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Book Reviews: POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, THIRD EDITION. Edited by Thomas I. Emerson, David Haber, and Norman Dorsen and CRIMINAL INTERROGATION AND CONFESSIONS, SECOND EDITION. By Fred E. Inbau and John E. Reid.

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BOOK REVIEWS

POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, THIRD EDITION.
Edited by *Thomas I. Emerson*,† *David Haber*,†† and *Norman Dorsen*.††† Boston: Little, Brown and Co., 1967. Two Volumes.
Pp. 2274. \$45.00.

When the first edition of this work appeared in 1952 it was hard to visualize a collection of legal and related materials in the field of political and civil rights as a necessary part of the practitioner's reference shelf. 1952 was the era of *American Communications Association v. Douds*¹ and *Feiner v. New York*.² It was the time of the narrow victories of *Sweatt v. Painter*³ and *United States v. Rumely*.⁴

Yet to come were the far-reaching opinions that touched most citizens directly and have led to voluminous litigation: the development of the Equal Protection Clause in *Brown v. Board of Education*⁵ and *Baker v. Carr*,⁶ new substantive rights of conscience and speech;⁷ new developments in areas covered primarily by legislation, such as welfare; and in

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1. 339 U.S. 382 (1950), upholding the Taft-Hartley provision denying the services of the NLRB to any union who had an officer who had not sworn he did not believe in the violent overthrow of the government.

2. 340 U.S. 315 (1951), upholding a conviction for disorderly conduct where the speaker refused a police order to move on because the crowd was getting excited.

3. 339 U.S. 629 (1950), wherein a Negro won admission to the University of Texas Law School because the Negro school established in response to an earlier suit was in fact unequal.

4. 345 U.S. 41 (1953), reversing a contempt of Congress conviction because the particular inquiry was not authorized by the resolution setting up the investigation.

5. 347 U.S. 483 (1954), forbidding race as a valid classification. Despite the emphasis on the school context in *Brown*, the results in the later cases were reached in court per curiam orders simply citing *Brown*. See, e.g., *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *New Orleans City Park Ass'n. v. Detiege*, 358 U.S. 54 (1958) (parks).

6. 369 U.S. 186 (1962), making malapportionment a judicial question under the Equal Protection Clause.

7. 374 U.S. 398 (1963), holding that a Seventh-Day Adventist who would not work on Saturday was entitled to state unemployment compensation since a rational relationship to some state interest is not enough to sustain otherwise valid state legislation where such legislation could be drawn in another way which would interfere less with First Amendment rights; 370 U.S. 421 (1962), prohibiting the recitation of a state-drafted, non-sectarian prayer in the public schools; 384 U.S. 11 (1966), striking down a loyalty oath for teachers which covered membership in an association unaccompanied by a specific intent to further its unlawful aim; 376 U.S. 254 (1964), reversing a defamatory recovery under state law by a public official where actual malice was not proved; 379 U.S. 536 (1965) and 379 U.S. 559 (1965), invalidating broad prohibitions against demonstrations in certain public places; cf. 385 U.S. 39 (1966), affirming a trespass conviction based on a demonstration at the jail grounds.

areas not covered in the present work, such as the establishment of more definite due process standards for the conduct of criminal proceedings,⁸ and their applicability to other proceedings,⁹ and the establishment of procedures for insuring their effectiveness.¹⁰

Then too, Congress, albeit belatedly, recognized its primary responsibility under the 13th, 14th and 15th Amendments to secure for all citizens those rights of individuals threatened or ignored by the growth of government on all levels¹¹ and the increasing interdependence of "private" social ordering.

The speed and scope of these developments is prodigious. The practitioner may no longer assume that the law of political and civil rights is something he will have to deal with never or only infrequently. The issues are vital no longer to just those on the fringes of society with whom an occasional lawyer had contact only after disaster struck. The issues now are of vital concern to a larger portion of society, that portion having increasing and primary resort to legal services. The growth of the neighborhood law offices may be both a cause and effect.

The origin and growth of the materials edited by Professors Emerson, Haber and Dorsen on political and civil rights is self-evident, and it gives rise to the strong and valuable features of this edition of their work. It began as a collection of classroom materials, hence the benefit for the practitioner of its orientation in terms of problems and, more important, its inclusion of not just cases, but statutes, regulations, and associated non-legal materials. Whereas collections of Constitutional Law materials have traditionally comprised only Supreme Court cases to be used primarily as a vehicle for analysis, the departure here is necessary and welcome. Today, statutes and regulations as well as opinions of lower courts, where the primary responsibility of effectuating the substantive

8. 372 U.S. 335 (1963), requiring that indigents be supplied with counsel in felony cases; 367 U.S. 643 (1961), applying the exclusionary rule to unlawfully seized evidence in state prosecutions; 378 U.S. 368 (1964), forbidding the jury from determining the voluntariness of a confession at the same time it is passing on guilt; 384 U.S. 436 (1966), excluding a confession that is the product of custodial interrogation unaccompanied by warnings of the right to refuse to answer, of the right to counsel, of the right to have counsel supplied, and that the interrogation shall cease, if requested, until counsel arrives.

9. 387 U.S. 1 (1967), juvenile court and implicitly raising questions on all "civil" commitments.

10. 372 U.S. 391 (1963), federal habeas corpus jurisdiction to test state confinement unless there was an intelligent and understanding waiver in the state courts.

11. The 1964 Civil Rights Act, 42 U.S.C. § 2000a (1964), desegregating all restaurants and places of public accommodation (except Mrs. Murphy's Boarding House) within the Commerce Power; the 1965 Voting Rights Act, 42 U.S.C §§ 1973 (Supp I, 1965), suspending voter qualification tests in certain areas; the 1968 Civil Rights Act, Pub. L. No. 90-284 (April 11, 1968), providing for open housing and providing for sanctions against private interference with the exercise of federally-created rights.

guarantees of the 14th Amendment has devolved, are giving content to new abstract rights of the citizen found in the Supreme Court's opinions.

The two volumes are divided into three parts and Volume One contains two of them. Part One is captioned "Freedom of Expression." The first chapter contains essentially non-legal materials on the basic theory of free speech, going back to Milton's *Areopagitica* and including excerpts from Learned Hand's *The Bill of Rights*¹² concerning the role of the courts. The second chapter reprints excerpts from materials on the historic development of free speech in this country. This departure from the problem approach, when coupled with the extensive notes and references in each following chapter and section, serves as a brief but almost complete background and context for the problems covered individually later. The following chapters on such problems as "Obscenity," "Defamation," "Internal Order," including "Permit Systems," and "Other Interests," such as the "Administration of Justice," are brief and comparatively straightforward when compared with the chapter on "National Security." Most of the 450 pages of this chapter are devoted to federal legislation on subversive activities. The section on the post-World War II period itself has a 2-½ page bibliography. While the inclusion of such seemingly diverse problems as the denial of social security benefits to persons deported for certain reasons, and state legislative investigations, might seem to make such a chapter unwieldy, the utility of the undertaking is saved by a highly articulated organization and table of contents. There is a danger of confusion for the student here, since he notoriously does not notice chapter and section headings.

Part Two, "Academic Freedom, Freedom of Religion and other Individual Rights," makes clear demonstration of the value of this entire edition. A highly detailed table of contents and exhaustive notes and references makes these two volumes *the* place to begin legal research.

It is to Part Three, all of Volume Two, that I wish to address some comments and observations. This Part, the most significant and distinctive, is titled simply "Discrimination." Here the advantages of including material not usually included in casebooks, and the highly articulated organization, coalesce to distinguish sharply this work from anything that has gone before. For instance, the materials in the chapter on "Discrimination in Education: South" progress from an excerpt from Wechsler's *Neutral Principles*¹³ directly to enforcement of equity decrees and problems of tokenism. Included not only is the United States Commission on Civil Rights Survey and Title IV of the 1964 Civil Rights Act, but the Statement of Policies under Title VI from the Department of Health,

12. L. HAND, *THE BILL OF RIGHTS* (1958).

13. H. WECHSLER, *TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW IN PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* (1961).

Education and Welfare. So long in coming and so rare are such federal regulations, and so unlikely are they to change from month to month or even year to year, they deserve this convenient place between hard covers. Included, quite naturally next, is the chapter on "Discrimination in Education: North and West" with lower court cases and other materials on *de facto* segregation. The extensive notes and references are invaluable by virtue of their completeness and, currently, lack of other materials for the practitioner. Also in this Part are the allied problems of employment and housing, the latter including among other things "blockbusting," federal involvement and problems of the benign quota. It is difficult to conceive of making do without these volumes.

My only comments or observations of a critical nature about this work do nothing to impair its great value. It seems to me the only sin the editors have committed is a slight one of omission but not of oversight. Some issues involving "legal doctrine" rather than "problems" run throughout several chapters and explicitly are not treated separately let alone equally. One of them is the problem of "state action." I believe recent developments indicate that both the student and the practitioner would benefit from a specific, albeit limited treatment of it. It is becoming a problem of some immediacy and general importance to most men on the street, rather than merely a problem of abstract or academic doctrine.

I wish to make it plain that by my comments in this regard I wish in no way to associate myself with the recent criticism of Constitutional Law casebooks for their lack of "theory."¹⁴ In the first place, I am not sure that such criticism is directed towards this sort of an undertaking in that this is not a Constitutional Law casebook for use by students in a traditional Constitutional Law course. It covers only one aspect of the traditional course and then in too great a detail for class coverage. Likewise an advanced or specialized course or seminar could not hope to cover the over 2200 pages. Further, its price tends to suggest that its place in the Law School is on the reference room shelf, although there is for this third edition a less expensively priced "Student Edition." The lack of theory in a reference book is no handicap, and certainly not in this case. In general, however, I do not agree with the recent criticism that present Constitutional Law casebook categorizations subordinate the ". . . *concepts* which have been most dominant in structuring the Court's deliberative processes, or which will raise the questions that best enable us to evaluate the Court's functioning."¹⁵ There is more than one way to skin a cat, more than one way to look at any court's opinion let alone the opinions of the Supreme Court of the United States. It seems

14. Stone, *Towards a Theory of Constitutional Law Casebooks*, 41 S. CAL. L. REV. 1 (1967).

15. *Id.* at 4.

to me the basic Constitutional Law course is a fine time to study substantive concepts. Later on, other courses, such as Legal Process or Jurisprudence, might focus more productively on *how* a court decides and the role of contemporaneous history in the formulation of doctrines. The criticism continues:

[T]here is a root level at which the controversies producing all these decisions—whether ultimately cast in the “advisory opinion” mold or the “political question” mold—share a common syntax: the Court’s desire to conserve its fund of good will; an idea of the just state as one preserving for its citizens “rule by law”; calculations as to the probability that petitioners denied review will manage to get redress in some other manner; desire to spread the base of power. I agree that any teacher worth his salt will lead his class to these and other factors tugging the Court at the deeper levels where the really dispositive issues are formulated. But such a response neglects one of the prime purposes a casebook can serve: to direct our attentions in such fashion as to expose and bring into dialogue unexpected relationships from which one may produce a cloth of meaning from otherwise loose strands.¹⁶

Try as I may I cannot convince myself that the root level of decisions cast in the “advisory opinion” mold was not Article III. The fact that the “case and controversy” requirement makes very good sense should not be surprising and should not mandate a structuring of a casebook to bring into dialogue “unexpected relationships” at the expense of the substantive relationships as yet undiscovered by the student. One should not confuse the prime function of a casebook with one of the hallmarks of a good classroom teacher.

I am not suggesting the editors substitute a systematic examination of “state action” for their treatment of the cases under more substantive headings because it somehow might produce a “cloth of meaning” otherwise missing on the operations of the court. A study of the way in which *Burton v. Wilmington Parking Authority*¹⁷ and *Evans v. Newton*¹⁸ were decided and what application beyond their own facts they might have, especially in the technique of solving future cases, strikes me as still of uncertain utility. What does concern me, and what I do suggest a brief look at, is the guaranty of “new” substantive rights under the equal protection clause by a finding of “state action” where none had heretofore been found.

16. *Id.*

17. 365 U.S. 715 (1961), government-owned property leased to private restaurateur required to be desegregated under the circumstances.

18. 382 U.S. 296 (1966), private park in the hands of private trustees but formerly held by public trustees required to be desegregated under the circumstances.

The concept of "state action" was viewed originally as a limitation on the federal power in the *Civil Rights Cases*.¹⁹ It has since been expanded or weakened to include minimal and unauthorized participation of state officers.²⁰ More recently *Reitman v. Mulkey*²¹ has set off a fresh round of discussion on whether "state action" is any longer a viable concept.²²

Whatever the current vitality of "state action" as a label, there is a concept presently at work that deserves to be looked at. Plainly the concept presently is being used expansively and not restrictively of the federal power to insure minimal guarantees to each citizen against interference from almost any source.

The concept has been described variously:

. . . [E]qual protection of the laws is denied by the state whenever the legal regime of the state, which numbers amongst its ordinary police powers the power to protect the Negro against discrimination based on his race, elects not to do so—choosing instead to envelop and surround the discrimination with the protection and aids of law and with the assistances of communal life.²³

Of course, it is easier to fault "state action" than to suggest a flawless alternative standard. However, an approximation of the coming standard might suggest that *equal protection requires the state to proscribe racial discrimination in the public life*.²⁴

Heretofore, I had preferred the "State Function" formulation to justify the reach of the 14th Amendment into areas where the involvement of the state had not been manifest. It had seemed to me much more useful in a world of legal realism. It had, for me, vague overtones of an almost moral content, both expansive and restrictive, and yet a flexibility which the Court could use in accommodating the Constitution to the changing political realities of American life and the legitimate expectations of its participants. Recently, however, I have become enamored of the phrase "substantive equal protection."

19. 109 U.S. 3 (1883).

20. *United States v. Guest*, 383 U.S. 745 (1966).

21. 387 U.S. 369 (1967), invalidating the "Proposition 14" Amendment to California's Constitution.

22. See Black, *Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Note, *Uncle Tom's Multi-Cabin Subdivision—Constitutional Restrictions on Racial Discrimination by Developers*, 53 CORNELL L. REV. 314 (1968).

23. Black, *supra* note 20, at 108.

24. Silard, *A Constitutional Forecast: Demise of the State Action Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 870 (1966) (emphasis original).

The body of law we have so inelegantly labeled substantive equal protection straddles the orthodox lines between equal-protection issues and state-action issues. Indeed it threatens to obliterate the line altogether. It is a result of the "egalitarian revolution" to which the Warren Court has given crucial support.²⁵

In a publication that is otherwise so complete and exhaustive, it is this absence of a systematic look by the editors at "state action," "state function," "substantive equal protection," or whatever it is to be called, on the basis that it is somehow a matter of legal theory rather than a concrete problem of substantive rights that gives me pause. That this equal protection concept has a substantive content is seen most plainly in the criminal procedure cases, quite understandably not included in the present work, especially *Griffin v. Illinois*²⁶ and *Douglas v. California*.²⁷ The notion in the *Douglas* case seems to be to give the indigent what the rich man can have, and not just what is necessary for a fair trial. Involved is not equalization of access to appellate review but equalization of quality.²⁸ These cases have significance beyond the question of furnishing transcripts or counsel on appeal. They suggest myriad other rights of indigent defendants to the practitioner. So too the "egalitarian revolution" or "substantive equal protection" cases in the political and civil rights area covered in this work by Professors Emerson, Haber and Dorsen. Whereas *Munn v. Illinois*²⁹ told us what private areas *may* be regulated consistent with substantive due process because these areas were affected with a public interest, the recent cases indicate what "private" areas affected with a public interest *must* be regulated by the state to afford equality under substantive equal protection. The editors have no reference to *Munn* nor to this concept as a *source* of rights.

I do not urge a lengthy examination of these cases which already appear elsewhere in the book under more familiar headings, such as "Housing," "Voting" or "Education." A systematic treatment in great detail also would raise inevitably the doctrinal and theoretical difficulties raised by others. Rights arising in cases concerned with white primaries³⁰ or restrictive covenants³¹ or separate-but-equal school facilities³² already have been examined at length and charged with violating

25. Karst and Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 57 (P. Kurland ed.).

26. 351 U.S. 12 (1956).

27. 372 U.S. 353 (1963).

28. See Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections between Law and Political Science*, 20 STAN. L. REV. 169, 225 (1968).

29. 94 U.S. 113 (1877).

30. *Smith v. Allwright*, 321 U.S. 649 (1944).

31. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

32. *Brown v. Bd. of Education*, *supra* note 5.

"neutral principles."³³ To those cases may now be added *Harper v. Virginia Board of Elections*³⁴ and *Reitman v. Mulkey*.³⁵ It might be suggested by some that the Court has given up its function of legitimating legislative action for one of anticipating it. Whether or not that is a good idea, the fact remains that new rights have been springing full-grown like Minerva from the Jovian head of this concept found lurking in the Supreme Court's opinions. In *Reitman*, for instance, the court said that there was more than just a repeal of the fair housing act involved, but just what more isn't made clear. If the "more" is the effect on the seller or lessor by Proposition 14 so that the state has encouraged his discrimination, it is hard to see why a failure to pass a fair housing act in the first place, or a simple repeal, would not have the same effect and would not equally constitute "state action."

All these cases intimate broader substantive rights than those ultimately granted to the parties in each individual case, so I think something is lost by treating them only as disparate cases. They may stand for the proposition that the 14th Amendment serves to estop the denial of the promise of America by either state action or individual actions. What that promise is, and the quality of public life the citizen has a right to expect, are worth a generalized, brief look. Both the practitioner with his whole new class of clients and a whole new spectrum of rights, and the student with a seemingly new social consciousness, would derive a practical, as well as a theoretical benefit, from a short systematic treatment of these cases.

Lest I be taken for the man who faults the Rolls Royce for its noisy clock, let me emphasize the editors have made an invaluable contribution. This work is plainly the starting place for the researcher, be he lawyer or student, and no lawyer's shelf or reference room can be without it.

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33. H. WECHSLER, *supra* note 13.

34. 383 U.S. 663 (1966), holding poll tax unconstitutional.

35. *Supra* note 19.

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CRIMINAL INTERROGATION AND CONFESSIONS, SECOND EDITION. By *Fred E. Inbau*† and *John E. Reid*.†† Baltimore: The Williams & Wilkins Co., 1967. Pp. xiii, 224. \$8.00.

It is perhaps not surprising that the second edition of this book is substantially the same as the first. One might have expected the revised edition to embrace, or at least recognize, some of the Supreme Court's understanding of the privilege against self-incrimination that is articulated in *Miranda v. Arizona*.¹ But enlightenment, apparently, was expecting too much, particularly in view of the Court's indirect criticism of the first edition. As a result, the authors have ignored virtually all of the reasoning contained in the *Miranda* opinion and have only accepted, albeit grudgingly, its specific holding.

The second edition of *Criminal Interrogation and Confessions* says, in effect, that once the police have complied with the *Miranda* requirements and have elicited a waiver of the right to remain silent and the right to have counsel present, it is business as usual at the station house. This means that all of the trickery, cajolery, and outright lying that was described by the Chief Justice with such dismay is resurrected—so long as the arrestee consents to talk in the absence of counsel (as most will and do).

Lest there be any doubt, the various forms of "conning" are explicitly set forth: for example, the interrogator's air of confidence in guilt, expressions of sympathy, minimizing the offense and devising acceptable motives for it, condemning the victim, and the like. How any of these tactics can be squared with the Court's emphatic statement that the initial waiver does not mean a complete abandonment of the fifth amendment privilege² is not explained. Because the initial waiver is merely a relinquishment of the right to silence so that the availability of the privilege continues throughout the interrogation, the Court's condemnation of deceit is especially instructive: "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."³ Even where the initial waiver is properly obtained, it is clear that the Court did not intend to permit impairment of the continuing privilege by subsequent trickery.

It is noteworthy that the authors, in the latter half of the book which

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1. 384 U.S. 436 (1966). That expectation is temporarily heightened by the opening statement of the preface, where the authors acknowledge that the new edition was made necessary by the decision.

2. *Id.* at 474.

3. *Id.* at 476.

purports to deal with the law governing admissibility of confessions, devote but a few pages to the cases involving deceit or trickery.⁴ The leading case⁵ is not even mentioned, and another important case is described under a different heading in terms that omit the central element of deceit by the accused's "pretended friend."⁶

Messrs. Inbau and Reid take the position that without trickery custodial interrogation would be futile. One wonders why. If the objective is to obtain voluntary confessions from those sufficiently guilt-ridden to waive their privilege against self-incrimination in order to unburden themselves, then the straightforward asking of questions should suffice. Surely if counsel for the arrestee were present, "the friendly-unfriendly act" could not occur nor could any of the other forms of loaded questions, cajolery, and lies. By recommending all the non-violent forms of inquisitorial technique that no defendant's lawyer worth his salt would countenance, the authors (and the law enforcement groups for whom they presumably speak) are merely inviting the Court to insist that counsel invariably be present during any interrogation. This was precisely the position advanced by one of the amici in *Miranda*,⁷ and various members of the Court on oral argument evinced considerable interest in whether counsel had to be present to insure adequacy of the waiver.⁸ More important, fairness of the procedures invoked during the aftermath of the waiver is repeatedly stressed in the Court's opinion itself.

Finally, the second edition is interspersed with unlawyer-like comments about "five to four" decisions, "a one man majority," and how the President can effectively overturn the *Miranda* decision by judicious replacement of one or more of the sitting Justices. Mention should also be made of the authors' oft-recurring refrain that their techniques are designed to obtain confessions and admissions from the guilty rather than the innocent. Passing the philosophical question whether police officials should be judges in our society as well as the practical question relating to degrees of guilt,⁹ the short answer to their thesis lies in the privilege against self-incrimination. The availability of that procedural right has never been limited to the innocent; indeed, by the protection it affords,

4. Their principal objective in the law section appears to be to discredit *McNabb v. United States*, 318 U.S. 332 (1943), on the theory that the Court's misapprehension as to delay in arraignment in that case was caused by an inadequate record.

5. *Leyra v. Denno*, 347 U.S. 556 (1954).

6. *Spano v. New York*, 360 U.S. 315 (1959).

7. Brief for the American Civil Liberties Union as Amicus Curiae at 22-27, *Miranda v. Arizona*, *supra* note 1.

8. *See, e.g.*, L. HALL & Y. KAMISAR, *MODERN CRIMINAL PROCEDURE* 410-411 (2d ed. 1966).

9. In *Spano v. New York*, *supra* note 6, the defendant was deceived into confessing to a premeditated killing whereas, in fact, his dazed behavior following a severe beating had probably amounted to either manslaughter or second-degree murder.

the privilege appears to have been designed primarily for those guilty of some offense to some extent or another.

In addition to overturning *Miranda*, *Escobedo v. Illinois*,¹⁰ and *Malloy v. Hogan*,¹¹ the authors apparently would like to undo the fifth and sixth amendments and a few hundred years of British constitutional history as well.¹² Some of us hope they will be unsuccessful.

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10. 378 U.S. 478 (1964).

11. 378 U.S. 1 (1964).

12. Congress has recently added to the clamor. Pub. L. No. 90-351, tit. II (June 19, 1968).

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