ESTRATTO

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Fantasies of Equity

1. *What Is Equity?*

Equity, according to the *Oxford English Dictionary* (OED), is "The quality of being equal or fair; fairness, impartiality, even-handed dealing". The oldest meaning of "fair" is "beautiful to the eye". In other words, "fairness" – and hence equity – is inescapably subjective. In England, the King's Chancellor, known sometimes as the "king's conscience", administered "equity" in instances where common law, by its rigorous operation, might yield a perceived injustice, an unfair sentence. To practice conscientious review "even-handedly", the Chancery Court, named for the Chancellor's office, evolved a complex set of principles for issuing writs that could trump common law sentences if the Chancety Court chose to accept jurisdiction. What began as a system whereby "reasonable" exceptions were considered by the monarch, the putatively equitable and well-educated source of worldly power, in time became a convoluted parallel legal system that could produce results far less just than the common law and could easily reflect a regal caprice (Friedman 1985: 25-27). Ultimately, both in England and the United States, for the courts of first instance, most of this parallel system was dismantled although some of the flexibility of equity (for example, the allowance for judicial injunctions, once a matter of equity only)

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were written into statutory law, a principled effort to quash individual caprice while allowing for equity in individual cases to bring the operation of law closer to ideal justice.

2. *Why Is Equity a Fantasy?*

Under the best of circumstances, "law", "a rule of conduct imposed by authority" (OED), exists for the good of society. Law may not be "softened" lightly, even to work ideal justice in individual cases. Shipley derives the word *law* from the Indo-European *leg*, meaning "gather, set in order; consider, choose; then read, speak", cognate with the Greek *logos* (Shipley 1984: 209). "In the beginning was the Word, and the Word was with God, and the Word was God" (John 1:1). Law in the best sense attempts to administer on Earth a sacred "authority". All "authority" is the "power to enforce obedience" (OED) and initially belongs to the *author*, he who causes something to grow (from Latin *augere*; OED; cognate with "augment"). God is the author of life, and we, his children, but imperfect images of Him. To apply flexible, "creative" equity equitably, we must aspire to be like God. The aspiration, of course, is possible; the achievement, of course, a fantasy.

In critical discussions of equity in literature and law, the most cited text is Portia's speech in William Shakespeare's *The Merchant of Venice* urging the Duke to equitably set aside legal justice and Shylock to consider his own human, fallen state, and then soften the exercise of the bond that would grant Shylock a pound of Antonio's flesh. In this speech, Portia's language both explicitly and implicitly asks all to be god-like. "The quality of mercy is not strained", for example, means "is not constrained, is not bound", that is, like God's power – but like no man's, not even a king's – the quality of mercy is infinite. References to heaven, blessing, and salvation bring God constantly into Portia's plea, even above the "scept'red sway" of monarchs although god-like mercy, "enthroned in the hearts of [the best] kings, [...] is an attribute of God himself" (IV, i, 191, 192-193).

Justice, like mercy, is infinite and in a divine sense absolute. The word justice derives from the Indo-European *ieuos*, meaning first "sacred", then "binding", and then "the law" (Shipley 1984: 150). Law supersedes brute force. "The pen is mightier than the sword", as we say. But this phrase comes from the mouth of the Machiavellian Richelieu in Bulwer Lytton's play of that name, subtitled "The Conspiracy", and signals the Cardinal's recognition that although he is too aged to punish his enemies directly he can do so indirectly and implacably by controlling law. Although wicked, Richelieu has a cardinal's theological training. His whole phrase is "Beneath the rule of men entirely great / The pen is mightier than the sword" (Lytton 1875: 10, Act 2, sc. 2). In other words, "entirely great men", like a king with god's attributes enthroned in his heart, should be above the law, preventing unjust punishment, enacting equity; but it is a fantasy to believe we have such men. Indeed, those who control the law are quite as likely to serve themselves, like Richelieu. Only God can reliably reconcile the often conflicting demands of infinite mercy and infinite justice. Men must rely on law, which can be a cruel weapon indeed.

Little wonder then that fantasies of guided human improvement are rife. In science fiction Victor Frankenstein, called "the modern Prometheus", attempts to conquer death in Mary Shelley's novel (1818), an attempt he regrets with fatal consequences; Arthur C. Clarke's alien monoliths in *2001: A Space Odyssey* (1968) guide leaps of primate evolution toward the ultimately powerful "Star Child"; and in Robert J. Sawyer's *Calculating God* (2000), thanks to an advanced and empathetic alien, a terminally ill human of good faith can leave this life to join with God.

Where some fantasize about aliens improving humans, others fix on Nature.

> My heart leaps up when I behold
> A rainbow in the sky:
> So was it when my life began;
> So is it now I am a man;
> So be it when I shall grow old,
> Or let me die!

The Child is father of the Man;
I could wish my days to be
Bound each to each by natural piety.

Wordsworth offers an ostensibly natural image, his own exhilaration at seeing a rainbow; however, the rainbow traditionally signals the covenant of God's mercy (Genesis 9: 12-17) when he decides never again to punish humanity, no matter how much justice may require it, with annihilation like that of the Flood (Genesis 8: 21). The bow, going ftom Earth to Heaven and back again, binds – the root of "justice" – God to humanity and Wordsworth would have his days bound together, in "natural piety". This is possible if "the child is father of the man", that is, if we can retain our innocence and humility and, as Jesus instructed, be "as little children" (Matthew 18: 3).

One of the earliest legal disputes in world literature arises between "two harlots" who come before King Solomon each claiming the one living baby as their own. Solomon had asked God to "Give [...] thy servant an understanding heart to judge thy people" (1 Kings 3: 9). God's gift is tested immediately by these competing claims which Solomon famously settles by ordering the baby to be divided only to have one of the women cry out to give it whole to the other.

> Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof.
> And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment. (3: 27-28)

The people's instant response is not joy in having a "king's conscience" on which to rely but rather fear of being too well known. Godlike power may be administered properly by God, but surely it is fearsome in man.

Plato shared the conviction that "There is no man whose natural endowments will ensure that he shall both discern what is good for mankind as a community and invariably be both able and willing to put [that good] into practice" (Laws 875a). "Equity and indulgence

[...] are always infractions of the strict rule of absolute and perfect justice" (757e), so "[m]en must either give themselves a law and regulate their lives by it, or live no better than the wildest of wild beasts" (875a). Since no entirely great man can exist, "we have to choose the second best, ordinance and law" (875d). According to Thomas Hobbes, in a state of nature "the life of man [...] is solitary, poor, nasty, brutish, and short [...] [a] war of every man against every man" (338-339). Plato speaks of men as beasts, Hobbes of their synonym, brutes.

Law may be the best we can do, but it "is an expression not just of ethics but of power" (Cohen 2006: 28).

In H. G. Wells's *The Island of Dr. Moreau*, the title scientist has surgically and chemically molded living creatures into less brutish and more human forms. These Beast People live their unnatural lives in some pain and a few, natural predators made from bears and leopards, endanger the doctor who poses as their god. Moreau gives them a law which they must recite daily:

> "Not to go on all Fours; *that* is the Law. Are we not Men?"
> "Not to suck up Drink; *that* is the Law. Are we not Men?"
> "Not to eat Flesh nor Fish; *that* is the Law. Are we not Men?"

and so on. Actually, men do suck up drink when no vessel is handy and they do eat flesh and fish. Why then does Moreau, the self-styled god, impose this law?

> "Not to chase other Men; *that* is the Law. Are we not Men?" (59)

Moreau enforces this law for his own protection and to support his dominance on the island, of course. As Freud wrote, the "replacement of the power of the individual by the power of a community constitutes the decisive step of civilization" (Freud 1961: 47). Since we cannot survive in a state of nature, we must inhabit a civilization. Still, the "liberty of the individual is no gift of civilization" (*ibid.*). Like Wells's Beast People, we all, part animal as we are, to some extent live brutish lives. No wonder we long for equity, that softening of the law.

In the Grimm Brothers' version of "The Sleeping Beauty", only twelve of the kingdom's "wise women" were invited to the celebration of the birth of the monarchs' long-desired daughter because the king had only twelve golden dishes fit for such guests. Near the end of the feast, each attending wise woman offered the child some gift: virtue, beauty, and so on. After the eleventh, "the uninvited thirteenth, burning to revenge herself" burst in and declared that

> "In the fifteenth year of her age the princess shall prick herself with a spindle and shall fall down dead". [...] Every one was terrified [but then] the twelfth came forward, for she had not yet bestowed her gift, and though she could not do away with the evil prophecy, yet she could soften it, so she said, "The princess shall not die, but fall into a deep sleep for a hundred years". (Grimm 1963: 204-205)

For our purposes, note that the story asserts limits to the king's power. He has only twelve plates. And there are limits to the powers of the wise women, too. Why can't the last negate but only soften the revengeful prophecy? Because that is the way of the fairy tale world. And why do we readers accept that, why even – given the longevity of this tale – embrace it? Because in our world, all softening so often fails. Real Antonios lose their pounds of flesh. As George Orwell knew when he wrote about Big Brother in *1984*, the nation justly fears a monarch who can see into their hearts. In his utopian satire *Erewhon*, Samuel Butler's Erewhonians say "To be born is a felony – it is a capital crime, for which sentence may be executed at any moment after the commission of the offence" (Butler 1960: 145). And "natural piety" is much rarer than the competitive "war of every man against evety man". Even justice can be implacable. That is why we hold so dear the fantasy of equity.

3. *When is Equity a Social Issue?*

When society at large sees the plain truth of a situation requiring equity, say forgiveness for a crime committed unwillingly under extreme compulsion, equity remains only individual – unless, as in cases like that presented in Charles Dickens' *Bleak House*, failure to

reach an equitable decision questions the very machinery and beliefs of society (Bezrucka 2007). In every instance, say Antonio's, equity is an individual issue; however, it is also a social issue when the situation reflects social equivocation. In the notorious O.J. Simpson case, jury nullification was an exercise of equity (Ross 2007). Public reaction showed that white Americans largely felt higher justice had been denied the murder victims while black Americans largely felt higher justice had been accorded a victim of institutional racism. The controversy around that decision was only compounded by the exonerated defendant Simpson later losing a civil suit brought on the basis of the same facts. This chorus of competing voices, this social equivocation, has yet to find its dispositive Solomon.

While judicial equity has been subsumed by statute in the courts of first instance, it remains operative in a sense at the appellate levels. In England, "since the Judicature Act of 1873, [Chancery Court has become] a division of the High Court of Justice" (OED "Chancery"). In the United States, the concept of equity can obtain at the appellate level even when largely unnamed. A prime example is *Brown v. Board of Education of Topeka* (1954).

Writing for the Court, Chief Justice Earl Warren offers a history lesson. The XIVth Amendment to the U.S. Constitution indisputably guarantees to "any person within its jurisdiction the equal protection of the laws" (section 1). But what does the law protect? In *Plessy v. Ferguson* (1896), the Supreme Court upheld the 1890 Louisiana law requiring "separate but equal" seating for whites and nonwhites in railway trains. That doctrine came to justify all manner of racial segregation. Half a century later, however, the individual question was not railway accommodation but education. Warren points out that education was primarily a private matter in 1868 when the XIVth Amendment passed. But education had long since become a good provided by the state and for the state to all citizens, a function crucial for the development of good citizens and even for military service. In 1954,

> To separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and

> minds in a way unlikely ever to be undone. [...] The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of rhe negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, rherefore, has a tendency to [tetard] the educational and mental development of negto children and to deptive them of some of the benefits they would receive in a racial[ly] integrated school system.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected. Thus the Court struck "separate but equal", created the possibility of court-ordered school integration, and began decades of contention in American education and politics.

Clearly Warren implicitly invokes classic equity here, applying the "equal protection" clause as he believes it would have been intended had the legislators of the time contemplated the conditions of Warren's time and probing the psychological injustice of the law when applied rigidly to individual children. Although the word equity is used only once in the opinion, it confirms that the Court is "exercis[ing] its equity powers [to] permit an effective gradual adjustment" to end segregated schools. In short, laws that arose under one set of historical conditions and social practices may require equitable adjustment when other conditions and practices obtain. The conflict reached the Supreme Court because some clung to earlier views, others held newer ones. Society was equivocal.

When we see equity issues in literature, we can assume they reflect a situation of social equivocation.

In H. G. Wells's *The Food of the Gods,* scientists develop a food, which they call Herakleophorbia, that makes anyone who eats it bigger, smarter, stronger. In this social satire, most in powerful positions among the little people – that is, among us – refuse this food because it would undermine their authority by disrupting normal life. Laws are passed to prevent the spread of the food and to trammel those who have already consumed it. In an act both defensive and benevolent, the big people lob canisters of Herakleophorbia into

the towns of the little people. The cry goes out that the big people have violated the "rules of war" by shooting missiles full of "poisou". And how is Herakleophorbia poison? It destroys one's life, doesn't it? (Wells 1904: 796). Here the plea is that the framers of the rules of war certainly would have wanted to extend the prohibition against poison gas to miraculous food had they only contemplated its existence. Supplementing or correcting the law on that basis is, by definition, equity.

Science fiction and utopian fiction often present fantasies of society at moments of change, equivocal moments with voices on many sides. In such moments, questions of law engage fantasies of equity. George R. Stewart's *Earth Abides* follows the painful, post-apocalyptic degeneration and slow beginnings of regeneration of society over the course of one long human lifetime. A stranger comes into the tiny community that is our main concern in this barely populated future. He pays unusual attention to the burgeoning but mentally challenged young woman all have so far protected. Slowly the older communitarians, those born in the earlier times, recognize in the stranger symptoms of venereal disease. As pacific as they are, they realize they must ostracize the stranger or, since they have no effective mechanism to thwart his return, kill him.

> 'You can't punish a man for something he ain't done yet.,'
> '*Why not!*' said Em [a constant mother figure] sharply.
> [...]
> 'Why . . . [*sic*] you can't . . . [*sic*] of course you can't... He's got to do something and then there's . . . [*sic*] a joo-tie. It says so . . . [sic] the *law*.'
> '*What law?*' (Stewart 1949: 240)

The novel is not arguing for lawlessness but genuinely asking, in its shattered world, "what law?". In this instance, a meeting of respected communitarians considers the issue and, reluctantly, decide to kill the stranger, which they do. Stewart implies that the traditional classification of justice as "distributive" or "rectificatory" (Hondetich 1995: 433) is incomplete; undet some circumstances equity – a supplementation of the law we know – may tequite an-

ticipatory justice. This parallels the anticipatory injunctions classically issued by Chancery.

The question of anticipatory justice arises often in fantastic literature. Alfred Bester's *The Demolished Man* presents a world patrolled by telepathic detectives. Can one be punished for entertaining criminal thoughts? The same question arises in Philip K. Dick's "Minority Report", the basis for a 2002 movie. The problem of anticipatory justice grows today with every scientific and technological advance that makes it easier to predict who has a propensity for any unwanted behavior or condition.

But the Renaissance, too, was a period of social equivocation. Even Portia's classic trial scene straddles a clamorous historical cusp. Giuseppina Restivo has shown the very rules of economy and law were changing.

> The new economy was based on careful budgeting, expenditure control or parsimony, profit and investment, personal ability and work contracts, as opposed to inflated prestige expenditure, based on a combination of inheritance and a debt economy, social hierarchy exploitation and scatce attention to gain or budget". (Restivo 2007: 232)

Shylock, characterized by "thrift", speaks for the new economy; Portia, in defence of Antonio, for the old. The old seems to win in that Shylock does not receive his bond exactly, but thanks to equitable judgment and equitable hearts, Shylock will not be subject to the fatal Aliens Act, he will retain half his fortune, and the other half will ultimately pass through Anronio to Shylock's daughter. Equity, in Restivo's view, harmonizes the old and new social systems in court.

4. *What Can Equity Issues Teach Us About Society?*

Fantasies of equity, arising in moments of social equivocation, suggest the grounds for social fragmentation at the time of their writing. The rising middle class, with a power unbeholden to the established hierarchy, threatened the class structure of Shakespeare's

England. Surely some structure is necessary to prevent the war of every man against every man, an argument Hobbes offered at the inception of the English Civil Wars (*De Cive*, 1642) and at their end (*Leviathan*, 1651), a period which, unlike Shakespeare's a generation earlier, could not simply fantasize that a right-minded monarch would dispense equity. The king ruled by divine right, but by accepting the free gift of right from his subjects, the king becomes bound by the natural law of gratitude so that "'Now all the duties of the rulers are contained in this one sentence, the safety of the people is the supreme law [...]'" (quoted in Honderich 1995: 370). Hobbes offers a fantasy of infinite power equitably constrained.

In *The Moon Is a Harsh Mistress*, Robert A. Heinlein portrays an ad hoc trial in a nascent subsurface colony on the moon (Heinlein 1966: 124-129). A new arrival makes friendly advances to a local woman, actions that would have been innocuous on Earth. Local teenage boys, protecting as all lunar males do their scarce females, want to toss the stranger out onto the airless surface, as they know they may, but they want the cover of law. The assembly of a citizen willing to serve as judge; the explicit agreements of the witnesses, woman, and stranger to his jurisdiction; and the assignment of court costs and an imaginative but far from fatal sentence all suggest equity at play at this socially equivocal moment. The section ends with the erstwhile judge, having softened rough frontier justice, winning the boys' approval to take the stranger for some local indoctrination over a drink. This recalls Plato's suggestion that there exist three types of adjudicator, one who simply punishes miscreants, a second who induces miscreants to voluntarily subscribe to the law, and a third – the best – who achieves a reconciliation between miscreants and victims (Laws 627e-628a).

What then is the historical difference between these examples? Plato's hypothetical concerns a family the members of which fall out with each other. He clearly writes at a moment when the one-time fountain of social cohesion, the family, is being supplanted by that of the city. Heinlein, writing only six years after the explosive introduction of female oral contraception, attempts to reconcile female freedom – those scarce women are very powerful on the moon –

with the need to retain a sense of civility and prevent women from squandering themselves. In short, the equity problem highlights the social fracture that motivates the fantasy and speaks in its several voices.

5. *What Can Equity Issues Teach Us About the Implied Reader?*

In Franz Kafka's short, famous "parable" "Before the Law", a man from the country presents himself to the doorkeeper of the Law who puts him off repeatedly until eventually the man realizes that he will never gain admittance. This is how the parable ends:

> "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and, to let his failing senses catch the words, roars in his ear: "No one else conld ever be admitted here, since this gate was made only for you. I am now going to shut it". (Kafka 1971: 4)

Isolde Schiffermüller observes that "the philosophical interpretations of this parable put the stress on this open door which does not seem to hide and guard anything [...] The real paradox is this: the more the Law is inaccessible and void, the more it manifests its power" (Schiffermüller 2007: 328). While this critique of "the Law" as an institution surely obtains, earlier critics have omitted consideration of the doorkeeper. The word "chancellor", from which we get "chancery", the English equity court, comes from "L. *cancellarius* usher of a law court, whose station was *ad cancellos* at the bars or grating [the English word "chancel"] which separated the public from the judges" (OED). Although the countryman believes he has presented himself to the Law, he has in fact presented himself to equity. Kafka's critique is not that the law does not work; as an agent of a workman's compensation insurer, Kafka knew that it did. The question was, how did it work? The problem is not that all are denied access to the law but that the law shows no equity, recognizes social institutions perhaps but no individual. Written at the beginning of the First World War, that shocking, automated slaughter,

"Before the Law" implies a reader who recognizes his own terrible loss of identity and personal worth.

In the trial scene occupying the last two chapters of Lewis Carroll's *Alice's Adventures in Wonderland*, illogical evidence is offered to demonstrate that Alice has stolen some tarts. For example, an unsigned letter is taken to prove her culpable stealth as its writer. The court is composed of anthropomorphic playing cards. Finally frustrated at her attempts to secure a just acquittal in the face of relentless legal nonsense, Alice bursts out: "Who cares for *you?* [...] You're nothing but a pack of cards!" (Carroll: 161), at which point she becomes physically huge, sweeps the court away, and suddenly awakens on the river bank where she first saw the White Rabbit at the book's beginning.

We can hear equivocation here. One voice, that of logical consistency and institutional authority, calls for submission to our betters even if we can't understand them. The second voice screams out against false premises, no matter how logically pursued, and ultimately topples the system. That this book was published almost exactly mid-way between *Bleak House* and the Judicature Act reforming Chancery is perhaps no accident. But it is also a book that suggests the implied reader sympathize with the immature. In the face of the strictures of Victorian England, Alice offers us a child's power fantasy.

Fantasies of equity, of adjudicating creatively both authority and even law itself, reveal both social equivocation and personal need.

6. *What Can Fantasies of Equity Teach Us About Individuals in Our Time?*

It seems fit that Plato, who wrote *Laws*, also wrote the first great utopian work, *The Republic*, and that the very term utopia was coined by Sir Thomas More (OED), Henry VIII's famous conscience and Lord Chancellor. Utopias, even if set in a distant or imaginary time or place, always intend to speak to their contemporaries. The greatest utopia, in my view (Rabkin 1995), is Eugene

Zamiarin's *We*, a work that clearly influenced all its major successors.

Zamiatin gives us a critique of the Soviet state at its very beginning. Law is everywhere. People have numbers rather than names, the higher the number, the higher the social rank. S-4711 is a "guardian", an officer of the United State, while R-13 is a mere poet. All males have consonants and odd numbers; all females, like the rebellious and exciting I-330, have vowels and even numbers. All "numbers" (never "people") live according to a published "Table of Hours". All are subject to the "*Lex Sexualis*" intended to obliterate interpersonal commitments: "A Number may obtain a license to use any other Number as a sexual product" (Zamiatin 1952: 22). D-503, the protagonist, is the Chief Builder of the *Integral*, a spaceship intended to impose "mathematically faultless happiness" on alien planets that might resist the spread of the United State. In the novel's first line, D-503 already struggles between his desires for self-expression and patriotic conformity. "This is merely a copy, word for word, of what was published this morning in the State newspaper" (*ibid.*: 3). He tells himself he is not expressing individuality, yet copies for us a public encomium to the progress being made on the *Integral*. Ultimately, induced by I-330, he attempts to seize the *Integral* for rebels but is thwarted by his alert assistant. Throughout the novel, we have had reference to the United State's desire to perfect an operation for "the surgical removal of fancy" (*ibid.*: 77). In the penultimate chapter, D-503, caught, addresses us, his readers, as "you, my unknown and beloved" (*ibid.*: 216), echoing Baudelaire's romantic "mon semblable, mon frère". In a last, post-operative chapter, after "a splinter has been taken out of my head" (*ibid.*: 217), D-503 concludes that "Smiling is the normal state for a normal human being". He watches placidly as "that woman" (*ibid.*: 218), his erstwhile lover I-330, faces public trial by torture, contained within a bell jar from which the air is repeatedly evacuated. She expires, is revived, and is tortured again. Until she dies. The post-operative D-503 accepts that willingly because her death brings order. The last line of the novel, the last line D-503 can ever bring himself to write, is "Reason must prevail".

If *We* criticized merely the Soviet state, it would be dated. The sense of modernity it reflects, entrapment by social and technical systems that tend to automate and commodify us, remains. In fact, it presses more painfully now than ever. The law recognizes no individuals, it often seems, except when modern Richelieus wield it for their own benefit. But the particularity of I-330, which her torture trial sought to obliterate, is what fancy, imagination, literature itself revives. Authors make the laws of their fictional worlds: who will narrate, what kind of detail will be reported, how happy will be the ending. But with all well achieved literature, we readers feel that authorial – authority's – control serves a human end, serves us. In reading, we rehearse the experience of a world perfectly ordered for our individual benefit. Even tragedy is softened, the sting of death blunted, by the glory, excitement, consolation of art. Caught as we all are in the indusrrialization of our daily lives, we need that more than ever. In specific and in general, then, literature indulges – and creates – fantasies of equity.

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