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Book Reviews

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MY PHILOSOPHY OF LAW. By Bingham, Cohen, Cook, Dewey, Dickinson, Fuller, Green, Kennedy, Kocourek, Llewellyn, Moore, Patterson, Pound, Powell Radin and Wigmore. Boston: Boston Book Company, 1941. Pp. xii, 321.

When the publishers announced that sixteen great American scholars had participated in a symposium on *My Philosophy of Law,* sponsored by the Rosenthal Foundation of Northwestern University, they were justified in calling that event "celebrated." Geographically, those scholars make up a finely representative group. There are Fuller, Powell and Pound from Harvard; Moore from Yale, Kennedy from Fordham, and Dickinson from Pennsylvania; Patterson, Llewellyn and Dewey from Columbia; Cook, Green, Kocourek and Wigmore from Northwestern; and finally, Cohen from Chicago, Bingham from Stanford, and Radin from California. The Editorial Committee graciously admits that these sixteen representatives do not exhaust the list of competent American legal thinkers. Two notable men are missing: Frank[1] of Freudian inclination, and Hutcheson[2] the intuitionist. In 1930, when Frank enumerated a minority group of brilliant critics of our legal system,[3] he listed among them seven of these eminent scholars. One-third of these participants have been closely identified with the so-called American realistic movement. Pound and Wigmore have played so significant a part in the progress of the law in their generation that Sociological Jurisprudence and Evidence seem almost to have become the symbols of their contributions to that progress. That the results of such a symposium would awaken an intense interest in the legal profession is too clear for comment. However, the prophecy of the publishers that these scholarly essays will "rock the legal world" will probably be considered mere sales talk.

"Is there *a* philosophy of law?" The publishers tell us that these sixteen scholars have answered this question. Is the answer "Yes"? Fortunately or unfortunately, it is "No". Not so long ago, Cook declared that "The so-called 'realists' do not constitute a 'school'; they differ too much with each other."[4] Fuller often refers to their activity as a "movement," which may imply that diversity of thought.[5] The facile pen of Powell tells the reader, with a touch of levity, that never before has he been charged with being possessed of a legal philosophy.

> "I have always had a disrelish for jurisprudence parading high in the air on stilts instead of working with shovels and test tubes on specific

1. FRANK, LAW AND THE MODERN MIND (1930).
2. HUTCHESON, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision* (1929) 14 CORN. L. Q. 274; HUTCHESON, JUDGMENT INTUITIVE (1938) c. 2.
3. *Supra,* note 2, 6n.
4. Cook, *Williston on Contracts* (Rev. Ed.) (1939) 33 ILL. L. REV. 497, n. 2.
5. FULLER, THE LAW IN QUEST OF ITSELF (1940) 61.

material embedded in legislation and adjudication. If there is a label to be applied to this attitude, I do not know what it is."[6]

Powell's distaste for jurisprudence on stilts has been fairly common among the legal profession. However, several centuries of legal thought should have given some distinctive label to Powell's approach to identify it. Then, perhaps, one might be able to think more discriminatingly upon the subject. If language halts behind intuition,[7] it ought not to halt too long. When language lags behind intuition, erroneous views are apt to result. Recently, in paying tribute to Wambaugh, Williston said[8] that "He had been for years a practicing lawyer and had no taste for excursions into the cloud land to which amateur theorizing without adequate basis in reality sometimes leads." Excursions into the cloud land without adequate basis in reality can scarcely be called amateur when Kant and Hegel indulged in that intellectual exercise. On the "high *priori*" road, Bryce says, "Some soar so high through the empyrean of metaphysics that it is hard to connect their speculations with any concrete system at all."[9] But Bryce saw clearly that the correlation of the abstract and the concrete is merely a matter of degree rather than of skill.[10]

James told us long ago that "every one of us has in truth an underlying philosophy, even those to whom the name and notions of philosophy are unknown and anathema."[11] Implicit in every decision is a philosophy of the purpose of law, however veiled from speculation it may be.[12] The preface advises the reader that

> "The contents (of this volume) will deal with views of American thinkers on the ultimate ideas of the origin, nature or ends of law. The label 'Philosophy of Law' is used in its wide sense. . . . There may be great variety of legal philosophies depending on the idea treated and the avenue of approach. The starting point may be a postulate of ontology, epistemology, psychology, logic, value, social fact."[13]

However broadly one may define 'Philosophy of Law', even though its variety may depend upon the idea selected and the avenue of the writer's approach, there still remains the question of the validity of the idea sponsored and the value of the approach.

When Patterson, the realist, makes the external relations of law his primary concern, he may assert that

> "With a good deal of stretching and squeezing, the important relations of the law can be brought under three categories: Its relations with government, society and justice."[14]

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6. MY PHILOSOPHY OF LAW (1941) 269.
7. WHITEHEAD, MODES OF THOUGHT (1938) 68. "But a meaning fixed by a linguistic sign is conserved for future use." DEWEY, HOW WE THINK (1933) 234.
8. (1941) 54 HARV. L. REV. 1, 3.
9. 2 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE (1901) 611.
10. *Id.* at 610.
11. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 12.
12. *Id.* at p. 11.
13. See note 7, *supra* at VII.
14. *Id.* at 231.

The critical reader may maintain that this classification of categories is highly defective. Certainly, if society is regarded as a group, or a collection of groups, the individual must be recognized in law as distinct from the social unit to which he belongs. Nearly every legal controversy implicitly necessitates it. The reader may well believe that Radin, the realist, is on firmer ground in asserting that

> "The irreducible element of the law—as indeed of all social sciences—is the individual, the unique human being who is a bodily human being and not a mere cluster of abstract legal rights, powers and obligations. And that this individual human being is an end in himself is one of the few completely acceptable and concrete results of idealistic philosophy—in this case, that of Immanuel Kant."[15]

Or the reader may prefer to approach the problem from Jhering's theory of interests, which was so superbly elaborated by the genius of Pound.[16] In that event the reader will agree with the great Webster that "Justice is the greatest interest of man." It is not the only interest. It is an interest of the individual as well as of society and of government.[17] As an end of law, justice belongs in a category more finely discriminatory than the one in which Patterson sought to jam it. In so classifying it, as a realist, one does not minimize the relational significance of law in its external aspects.[18]

In the first chapter, Bingham makes the reader vividly aware that he is "in the midst of the furious sound effects and confusion of thought which still prevail throughout the battlefield of this discussion."[19] The lull in the war of the legal sects which Aronson observed, after a decade of hostilities, seems to have passed.[20] When Bingham, the realist, announced that he was "not concerned primarily with the meaning of the term (law). This is a matter of language and not of government or law," he only added to the confusion—and he may also have stimulated the furor—by failing to resolve first the more basic of the two problems.[21] Language preceded both law and government; it is language which distinguishes man among animals. It is only through language that even a realist can communicate his ideas about law, even though "to try, in labored Hohfeldian fashion, to regiment

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15. *Id.* at 301. "Man ceases to be an individual, in the strictest sense, on the plane of life, for he cannot exist except in relation to his environment, and we cannot get a picture of his complete self, his personality, without taking into consideration that relationship." GORDON, PERSONALITY (1928) 43.

16. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (4th ed. 1928) 60; POUND, CONTEMPORARY JURISTIC THEORY (1940) 61-67.

17. "Justice is the set and constant purpose which gives to every man his due." JUSTINIAN, INSTITUTES (Moyle, 5th ed. 1913) i, I.

18. "Similarly, while it is true that order in society is achieved by delimiting the interests, desires and demands of its individual members, order is the primary, and interests and demands the secondary element. Order is the constant, and interests, desires and demands the variables. They are delimited to insure order; and by the achievement of order they are thereby made more secure." CAIRNS, THEORY OF LEGAL SCIENCE (1941) 3.

19. See note 7, *supra* at p. 8.

20. Aronson, *Tendencies in American Jurisprudence* (1941) 4 TORONTO L. J. 90.

21. See note 7, *supra* at p. 11.

the vocabulary of lawyers and jurists is almost as hopeless as to try to confine the blowing of the wind." Indeed, it is only by the mastery of language that realism can be achieved.[22]

Moore believes that the sterility of the philosophy of law is

> "caused by the classing together of behavior and artifacts which are not significantly similar, and the differentiation into separate classes of behavior and artifacts which are significantly alike. The theory which is outlined here is based on an analysis of the process of learning, through pain or reward, a response to a sign in a stimulus-response situation."[23]

In a rather perplexing fashion, Moore introduces the reader to his operational theory. His behavioristic approach of the parking problem enabled him to establish an operational hypothesis which "may be verified or disproved by a contrived experiment or by observation of a process."[24] His procedure by hypothesis and verification yielded a formula of behavior that would satisfy any one whose heart yearns for mathematical certainty. The reader is warned, however, that the formula is tentative and requires further experimentation to determine whether it has even a geographical value.[25] Fuller would probably say that Moore's behavioristic study merely exemplifies the vicious influence of a realistic view "largely indigenous to the soil of legal positivism."[26]

Nearly a decade ago, Fuller said that American legal realism revealed conspicuously the defects of its youth.[27] Among these defects was their distaste for philosophic discussion.[28] The significant question that Fuller posed for the American legal realists was: Do the proposals of the realistic school relate solely to method? The answer to Fuller then seemed to be:

> "I am not a philosopher. I have no interest in developing a scheme of ethical values. My only interest lies in seeing that the judicial process is accurately described, that it is recognized for what it actually is. My interest is, therefore, primarily methodological, though it is obvious that good method has a social value of its own."[29]

Six years later Fuller declared that American legal scholarship had remained unseasonably positivistic, due largely to the popularity of the "scientific method." The inhibitive effects of the positivistic philosophy according to him required the positivist to take a painful step forward in order to enlarge his conception of the legally relevant.[30] His indictment of positivism was (1) that in all its forms it had the common vice of being formal in its method and forgetting that the law

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22. "Now, the philosophy of the Middle Ages was the work of men who were ignorant of nature but learned in Latin grammar." HALDANE, FAITH AND FACT (1934) 73.
23. See note 7, *supra* at p. 204.
24. *Id.* at 222.
25. *Id.* at 225.
26. *Supra* note 6 at p. 55. *Cf.* Cohen, *post*, note 37, 233.
27. Fuller, *American Legal Realism* (1934) 82 U. OF PA. L. REV. 429, 430.
28. *Id.* at 444.
29. *Id.* at 448.
30. *Supra*, note 6 at pp. 117, 118, 132.

is a body of living material and (2) that its common objective was retaining the distinction between the law that is and the law that should be. In the light of Fuller's criticism, the dominant interest of the critical reader is likely to be in the pronouncements of some of the legal realists who appeared upon these Foundation lectures.

Cook contends that he has been misunderstood by his critics. In his own words, his position is that

> "the logical structure of scientific inquiry is the same whether one studies physics and chemistry or biology and the social sciences. It is at this point that legally-trained critics have gone wrong by assuming that the present writer is arguing that what we call 'mental' and 'social' phenomena can be dealt with adequately in physico-chemical terms. Nothing could be more erroneous. What has been argued is simply that the same logic of inquiry used in physics and chemistry will yield useful results if applied in all fields in which intelligent inquiry can be carried on. . . . No attempt has been made to argue that the subject matter of all fields of thought is the same, or that techniques adequate in one field will suffice in other fields: obviously, precisely the opposite is the case."[31]

In defending himself against his critics, Cook specifically addresses himself to the question which Fuller regarded as a basic weakness of the positivist.

> "This question is whether or not there really are grounds for believing that the scientist's logic of inquiry and procedures are indeed applicable in the socio-humanistic 'sciences.' . . . Those who believe the cleavage exists and must be recognized, accuse the present writer and those who agree with him of confusing the methods of the science of 'what is' (the 'fact sciences') with those that have to do with 'what ought to be' (the 'value sciences').[32]

Cook defines the position that he has taken as the one fully developed in the writings of Dewey: "an application of scientific method of inquiry to the field of 'values' (ethics and politics, including law) will make our choices of 'ends' 'more intelligent, better grounded, less subject to caprice'."[33] To those who believed Cook to be a "positivist," this confession may seem a bit belated. The scientist is apt to be the thinker who cares more for means than for ends. It is not an uncommon habit for one to seize upon a part and exalt it for the whole. That is the weakness of the positivist. To have been misunderstood so long, Cook may have been guilty of false emphasis. The dominant characteristic of positivism is that it is apt to be merely critical. The doctrine of ends may easily lie beyond the range of interest of the positivist even though his methodology may be most commendable.[34] Through a century from Jhering to Pound, the social philosophical schools have placed their emphasis on the end of law; that is what made them philosophical schools.

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31. See note 7, *supra* at p. 52.
32. *Id.* at 57. POUND, *supra* note 17, 36, 42, 45.
33. See note 7, *supra* at 59.
34. "The relation between scientific and value judgments that needs to be affirmed, when authoritarian philosophers and pseudo-scientists ask questions, is this: They support each other." BRYSON, THE NEW PROMETHEUS (1941) 74.

Cook's own words seem to have made him aware of the vulnerability of his position. He admits that there are some "who would deny the name of 'philosophy' to all that . . . which can be worked out by means of scientific inquiry."[35] Years ago Morris Cohen said that the kind of house one will build is quite as dependent upon one's material as it is upon the rules of architecture that one will use.[36]

When the devotees of American legal realism are defending it against the charge of positivism, they seldom are at their best. Their dialectic performance often illustrates the vainly critical mind. In *Jurisprudence on Parade,* Yntema ends his defense of the realist against positivism with an overzealous exhibition of an ancient fallacy as his conclusive argument:

> "After all, if the 'ought' is significant, it 'is' and as such is meat for the realist."[37]

If 'value' is a fact, then it is 'meat' for the positivist as well as for the realist, for the positivist too thrives on facts. So far as 'value' is concerned, the realist and the positivist must still be in the same category. Both Yntema's ire and his argument become pointless. For a realist to subsume in the category of fact 'what ought to be' with 'what is' by way of answer when indicted for positivistic short-sightedness does not illuminate their defense. As a subterfuge, it lacks subtlety.

When Cook says that he is "not primarily interested in labels,"[38] like Bingham, he treads in the field of fallacy. When labels identify reality, they give clarity to language. They are the symbols of knowledge. It is the abuse of language through the misuse of words that is now challenging the belated attention even of lawyers. Cardozo epitomizes the valid approach: "If we put aside deceptive labels . . . the tangle is unraveled."[39]

What is philosopsy? Let Kocourek's incisive words bear witness: "The province of science is ultimate description. The province of philosophy is ultimate explanation."[40] Dewey, the master, says:

> "The problems involved in the discussions about law that can be called philosophical seem to arise from the need for having some principles

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35. "Many years ago, . . . Albion W. Small, at the University of Chicago, used to say to his classes, 'Sociology, to deserve respect, must become not only a science, but an accredited section of general philosophy.' . . . Most of the worthwhile problems in human social evolution cannot be solved by narrow scientific methods. . . . The social sciences cannot possibly avoid questions that concern human values, because social values are the very subject matter with which they deal." ELLWOOD, SOCIAL PHILOSOPHY (1938) 556.

"The Philosophy of the Law is a branch of philosophy, which deals with man and his culture." KOHLER, PHILOSOPHY OF LAW (1921) 3.

36. Cohen, *Law and Scientific Methods* (1928) 6 AM. L. SCHOOL REV. 231, 237.

37. (1941) 39 MICH. L. REV. 1154, 1165.

38. See note 7, *supra* at p. 65.

39. Coombes v. Getz, 285 U. S. 434, 449 (1931). "Human behavior as we know it, became possible only with the establishment of relatively stable systems of relationships between things and events on the one hand and words on the other." HUXLEY, WORDS AND THEIR MEANING (1940) 14.

40. See note 7, *supra* at p. 167.

which can be employed to justify and/or criticize existing legal rules and practices."

"When the question of the nature of law is examined in the light of the doctrines of various schools and the controversies between them, it is found to break up into at least three distinct yet related questions. The three issues concern the *source* of law, its *end,* and its *application.* . . ."[41]

To these three questions, Pound has recurrently addressed himself.[42] It is a tribute to his fine vision that Dewey again redefines the issues which the wisdom of Pound has illuminated so steadfastly and so generously for his generation.

The reader is likely to close this volume, which incorporates the pronouncements of sixteen men on "My Credo About the Law," with a sense of disappointment. That disappointment may be due to the fact that the reader's interest in taking up the book may have been keyed unwarrantably high because of the prestige of the scholarly men who participated. It is not due to the limited compass placed upon their contributions.[43] All wrote under the same handicap; some wasted more space in discussing the limitation than others. If the reader were to select that contribution instinct with artistry, which is most refreshing, informing and satisfying, the contribution of Green would probably rank among the foremost.[44] Those contributions which induce a sense of distress and disappointment, the reader may select for himself. Who could possibly do it more perfectly to his satisfaction?

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HANDBOOK OF THE LAW OF TORTS. By William L. Prosser. St. Paul: West Publishing Company, 1941. Pp. xiii, 1309.

If only because each in turn was the latest and for at least a time the best of the textbooks on torts, it is inevitable that the *Handbook* of Professor Prosser should be judged by the standard set by Professor Harper's *Treatise* when it appeared in 1933. That this basis for comparison should be chosen seems to me to be, in a very real sense, a compliment to both books—a recognition, on the one hand, of the high performance achieved by Professor Harper, whose book I hailed with delight on publication and have used with profit ever since, and on the other an added accolade to Professor Prosser when it is possible to say that his is even better. The sources of this added excellence, aside from the perfectly obvious one of richness of citation to both case and secondary material, are not entirely easy for me to explain, except to say that Professor Prosser's approach to and treatment of their common sprawling subject seems more generally and genuinely appealing than that of Professor Harper, primarily perhaps because less moulded

41. *Id.* at 73.
42. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (2nd ed. 1914) 3.
43. See note 7, *supra,* Preface, p. X.
44. *Id.* at 129.

by and dependent upon the *Restatement of Torts.* In comparison to the *Handbook,* Professor Harper's treatment seems canalized by the *Restatement*—in many aspects at least a treatise in support of it. This may or may not be a disadvantage, depending upon individual prejudice, but to me, now that what one might call the honeymoon of the *Restatement* is over, it is increasingly difficult not to become at least mildly irritated by its somewhat specious air of certainty and dogmatic formalism, particularly striking in the absence of the supporting treatises which used to accompany the tentative drafts. This is not to say that Professor Prosser does not cite and has not profited greatly by the *Restatement*—not to have done so would be a mark of eccentricity at the least—but his treatment of his subject is free from any flavor of suspicion that he regards the *Restatement* and its makers in any sense the *alpha* and *omega* of thinking about torts.

The reader should not be misled into either condemnation or underestimation of the volume because of its publisher's choice of the hornbook form. In some circles, "hornbook" is as much an epithet as a noun, but I have not yet reached that stage of juridical sophistication which lets me with a clear conscience damn a work solely on the basis of its form and the excesses of the past. I am not persuaded of the utility of the black letter style of treatment, which at its worst is a deadly snare for the student and at its best scarcely helpful without a close reading of the accompanying text, but its use here, if it detracts at all from Professor Prosser's book, does so only because it takes precious space which might have been better employed. There is so much to torts, and so little to eleven hundred and twenty-seven pages! To compress adequately that immense field into such a compass demands special ability of a high order, and it seems to me that Professor Prosser has exhibited it to a superb degree. His style, clear and compact, is admirably adapted to the task; nowhere does he become windy or pontifical, and with an ease and certainty most of us despair of ever reaching he can turn a phrase, display a flash of insight, which illuminates equally the text and the mind of the reader.

For his subject matter, no author of what purports to be a standard text could very well do otherwise than accept the usual modern outline of the subject: the grand divisions of intentional harm, negligent harm, and strictly liability, the minor problems within each one, and so on through the rather dreadful catalogue of topics to a final chapter labelled "Miscellaneous" containing a discussion of the rights of privacy, immunities, joint torts, and election of remedies. The only unconventional item given to us here is a shift in order of presentation which separates the problems of owners and occupiers of land and suppliers of chattels from their usual juxtaposition with the negligence cases by interposing the topics of strict liability, vicarious liability, and nuisance. The utility of the change escapes me, since to my mind the owner, occupier, and supplier cases are linked both analytically and as a matter of practical presentation with those on negligence.

The task of compression, however brilliantly it may be done, has necessarily brought with it some disappointments to the reader and, I am sure, to the author as well, but these may be taken with good grace and with considerable astonishment that they are so few and so minor. Chief of these to me lies in Professor Prosser's

treatment of conversion, a topic which so far as writing is concerned seems to have fallen between the stools of property and torts, with the result that I have failed to find any adequate treatment of it either for my own enlightenment or that of my students. I regret to report that after a brief flurry of hope, my search still continues.

Other and more important matters are admirably handled by Professor Prosser, with a compactness which makes one realize how easily and frequently completeness is confused with mere bulk. The twin topics of negligence and proximate cause seem to me to be especially well done, and it is here that the catholicity of the author and the virtues of that trait in a text of this sort most plainly appear. A general text cannot, or at least should not, be a vehicle for advocacy, and however great the temptation, Professor Prosser manages largely to avoid it. As an example, although he follows in general Cardozo's analysis of duty as set forth in the *Palsgraf* case, he is unable to accept its solution of that highly controversial problem which he calls the question of the "unforeseeable plaintiff"; if the defendant is negligent toward *A* and so liable to him for all harm, however unanticipated, what of his liablty to *B*, outsde the zone of apparent danger and to whom no harm can be foreseen? Instead of plumping for a particular solution, Professor Prosser analyzes the problem thoughtfully, pointing out the advantages of the *Palsgraf* rule as a device for simplifying the problem and making for relative facility of administration, its consistency with the basis relational theory of negligence, and the obvious advantages of limiting liability by the reason for creating it—since the defendant's wrong is the creation of a risk, his liability should be bounded by that risk. With equal care, he states the opposing view: that if we hold the defendant for unforeseen consequences to *A*, it is inconsistent to deny his liability for unforeseen harm to *B*, that the fundamental question is one of how far the interests of the plaintiff are to be protected against harmful conduct of the defendant, that "duty" is merely a word in which we state our conclusion, and one which tends largely to beg the question—and then suggests that the real problem is one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization rather than the individual plaintiff, an issue not to be determined by any assumption of a conclusion in terms of "duty." The point I am making is not that one view is better than another—indeed, the choice for the individual may turn on something as basic as whether his approach to the problem is that of the legal technician or the social engineer—the point is that *all* views are presented, fairly summarized, and left to the reader with citations to cases and law review articles where exhaustive discussion may be found. The result may not be as exciting reading as the literature of controversy, but it is certainly more useful and perhaps safer for the inexperienced student, whose views tend too much to reflect those of the protagonist he has last read. Similarly in his treatment of the problems of proximate causation his position is rarely that of the advocate of any particular theory or any particular "approach"—he examines and appraises each of them, appends a depressingly long list of articles on the subject, and leaves the reader with the uneasy conviction that perhaps too much has been said about the matter already. I do not agree with a number of his appraisals, my personal solution to

some of the problems are not his, but that is neither here nor there; the fact remains that I consider his handling of these perplexities the best general treatment of them that has yet appeared.

That, indeed, may serve to summarize my opinion of the whole work. It will be invaluable to the student as an exposition and synthesis of a particularly baffling subject. It will be invaluable to the teacher as a compact summary of modern scholarship in the field, and as an unexcelled collection of the law review material which, as the author points out in his preface, "is of much more value than anything yet included within the pages of any text." And it should prove extremely useful to the practising attorney for the same reason, as well as for the choice collection of cases cited in the notes. In its publication, Professor Prosser has earned the gratitude and admiration of everyone now working in the field of torts.

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