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Censure Theory *Still* Best Accounts for Punishment of the Guilty: Reply to Montague

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Abstract In an article previously published in this journal, Phillip Montague critically surveys and rejects a handful of contemporary attempts to explain why state punishment is morally justified. Among those targeted is one of my defences of the censure theory of punishment, according to which state punishment is justified because the political community has a duty to express disapproval of those guilty of injustice. My defence of censure theory supposes, *per argumentum*, that there is always some defeasible moral reason for the state to proportionately punish the guilty, and then demonstrates that censure theory best entails and explains this intuition. Montague does not question the intuition, but instead argues that three rival theories of punishment, including his societal-defence view, account for it to no worse a degree than my censure theory. In this article I defend my initial argument, noting resources for its defence that Montague does not appreciate and that, I maintain, provide those who believe that there is always *pro tanto* injustice in the state failing to proportionately punish the guilty reason to adopt censure theory over all competitors, including Montague's societal-defence theory.

Keywords Punishment · Proportionality · Retributivism · Censure · Self-defence

Introduction

In an article previously published in this journal (Montague 2002), Phillip Montague critically surveys and rejects a handful of contemporary attempts to explain why state punishment is morally justified. Among those targeted is one of my defences of the censure theory of state punishment, the view that it is justified, roughly, because

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the political community has a duty to denounce those guilty of injustice, a duty that it can discharge only with punishment of them (Metz 2000).¹ I had defended censure theory by supposing, *per argumentum*, that there is always some defeasible moral reason for the state to proportionately punish the guilty, and then demonstrating that censure theory best entails and explains this intuition. In his critique, Montague does not question the intuition,² but instead grants it and argues that three rival theories, including his societal-defence view, account for it to no worse a degree than my censure theory. Indeed, Montague maintains that rival theories can easily account for the intuition, once they are granted argumentative resources that I grant to my own theory, drawing the conclusion that my rationale is methodologically flawed and unfair to my opponents.

In this article I bolster my initial argument, noting resources for its support that Montague does not appreciate and that, I maintain, provide those who believe there is always *pro tanto* injustice in the state failing to proportionately punish the guilty reason to adopt censure theory over all competitors, including Montague's societal-defence theory. This dispute between myself and Montague is worth considering, for two reasons. First, it concerns an issue central to the philosophy of punishment, namely, which theory best accounts for our considered judgments about when and how much the state has (defeasible) moral reason to punish the guilty. Second, it raises issues about appropriate methods to use when testing punishment theories against intuitions.

I begin by sketching my initial argument in favour censure theory, briefly spelling out the intuition that I submit is firmly held among most philosophers of punishment and the reason why I think only censure theory adequately captures it ("[Accounting for Intuitions about Punishment of the Guilty](#)"). Next, I devote a separate section to each of the three theories Montague claims is able to accommodate the intuition to an equal degree, namely, rule-utilitarianism ("[Rule-Utilitarianism and The Intuition](#)"), desert theory ("[Desert Theory and The Intuition](#)") and Montague's societal-defence theory ("[Societal-Defence Theory and The Intuition](#)"). In each case, I show that censure theory entails or explains the intuition better than its rivals, saying more than I did in my initial article to flesh this out. I conclude by indicating how to advance the debate between censure theory and its main rivals, supposing my argumentation is sound ("[Conclusion: Toward an Adequate Theory of State Punishment](#)").

Accounting for Intuitions about Punishment of the Guilty

Most punishment theorists believe that there is always some injustice when the state punishes the innocent, especially when it does so knowingly, even if there can be all things considered moral reason to do so. Similarly, most punishment theorists believe that there is always some injustice when the state acquits those guilty of

¹ For additional discussion and defence of censure theory from me, see Metz (2002, 2004, 2006).

² And, elsewhere in his work, he seems to endorse it explicitly, e.g., Montague (1995, 70). The strongest way to question the intuition, in my view, is to point to cases in which offenders are genuinely remorseful to the degree that they should be, on which see Rogers (2007). cf. Bennett (2008).

having broken a just law³ or gives the guilty punishment that is grossly disproportionate to the nature of the crime. Stock examples in the literature include the state failing to punish a person who has both raped and murdered or giving him a slap on the wrist, as well as executing those guilty of overtime parking. Even if there were somehow all things considered ethical justification for the state to perform these actions (most plausibly, double jeopardy when it comes to the very guilty), many firmly judge that there would still be *some* serious moral cost to doing so. Following Montague, for ease of reference I will call this “The Intuition.”

Plainly stated, The Intuition is that the state always has some defeasible moral reason to proportionately punish those guilty of injustice. Notice that The Intuition is about what the state or, more generally, political community ought to do, and is not about the duties of individuals or other private agents. Furthermore, when I say that the state “always has defeasible moral reason” to punish, I am saying that it invariably has a *pro tanto* duty to do so, i.e., that it never fails to have an obligation of *some* weight that may be overridden by other moral considerations. The Intuition, therefore, does not imply that the state is invariably all things considered bound, i.e., has conclusive or decisive moral reason, to proportionately punish the guilty; it rather implies the weaker claim that, whenever the state fails to proportionately punish the guilty, it has done something that is wrong to some degree (even though it might be the right thing to do on balance).

My argument is addressed to those who share The Intuition, for I aim to demonstrate that if you do share it, then you have reason to adopt the censure theory of state punishment in lieu of all other theories. Censure theory, of the sort that I defend, is the backward-looking view that the state is justified in punishing because only by proportionately punishing those guilty of injustice can it discharge a duty to express disapproval of them in proportion to their guilt. The greater the injustice, the stronger the denunciation that should be expressed, and hence the harsher the penalty that should be imposed, regardless of whether the penalty is expected to have any good results in the long run. Most censure theorists believe that the duty to express disapproval of the guilty rests upon further non-consequentialist rationales such as a need to treat offenders as responsible for their behaviour, victims as important or injustice as something to disavow. Such treatment, so the theory goes, is constituted by proportionately expressing disapproval of the guilty, which, in turn, is constituted by proportionately punishing them.

In the article of mine that Montague criticizes, I demur from providing a positive and systematic defence of censure theory’s controversial property identities and implied theses about the purposes of the state.⁴ Instead, I seek to defend censure theory by showing that its logic most easily accounts for the existence of some degree of injustice whenever the state fails to proportionately punish those guilty of having broken a just law. Censure theory, I argue, best accounts for The Intuition because all plausibly motivated theories other than it base the justification of punishment on some factors metaphysically distinct from the nature of the crime.

³ And perhaps those who have done something gravely wrong that patently should have been illegal, even if it was not at the time of the act.

⁴ The next few paragraphs borrow from Metz (2000).

This is pretty clear in the case of standard forward-looking theories, which make the justification of state punishment depend on whether the imposition of punishment will have desirable long-term consequences with regard to incapacitation, deterrence, education or reform. Basing the justification of punishment on such results, I point out, makes it very difficult for a forward-looking theory to account for The Intuition, since there will often be times when a disproportionate response to the nature of a past crime would have the best results.

I also argue that rival backward-looking theories, when not in *ad hoc* formulations, base the justification of punishment partially on something other than the crime itself, which makes them unable to best account for The Intuition. For instance, consider the influential fairness theory, according to which state punishment is justified because it equalizes the ratio of benefits and burdens between offenders and law-abiding citizens. When an offender commits a crime, he shirks a restriction of his will that others undertake in obeying the law, and he receives the non-excludable goods of peace and security that result when others do so. Punishment, for the fairness theorist, is justified insofar as the offender no longer obtains an unfair advantage, i.e., no longer gets the benefits of peace and security without having undergone his share of the burdens needed to produce these benefits. However, my point is that whether a crime gives an unfair advantage to a lawbreaker depends in part on the degree of benefits and burden the legal system has conferred on him in the past. For example, fairness theory grounds no moral reason to punish either a guilty person who is a foreigner who has not benefited in any respect from the sacrifice of law-abiding citizens, or a person guilty of crime *X* at time₂ who was incorrectly punished by the state at time₁ for having committed crime *X*.

In contrast, the logic of censure theory easily entails that, and provides a strong explanation of why, there is the invariable presence of some injustice that accompanies the guilty avoiding state penalties that fit the nature of their crimes. If the political community had an invariable, *pro tanto* duty to express disapproval of the unjust in proportion to their injustice, and if expressing proportionate disapproval of the unjust simply were a matter of the state doling out proportionate hard treatment of the sort inherent to punishment, then the state would have an invariable, *pro tanto* duty to punish the unjust in proportion to their injustice. There is nothing apart from state punishment that fits the crime that is necessary to realize the state's aim of censuring injustice, which makes censure theory uniquely able to accommodate The Intuition, or so I argue.

Of course, if it were patently obvious that expressing disapproval of the unjust did *not* require punishment, then censure theory's explanation of The Intuition would be weak. However, granting that the censure theorist must at some point provide a substantial defence of the claim that censure of the guilty requires (indeed, is constituted by) punishment of them, note that this claim is not absurd in the way it is for, say, a certain kind of consequentialist to imply that someone has a good reason to commit crime so as to promote the intrinsic value of his punishment. According to an idiosyncratic, scalar consequentialism, there is always some moral reason for the state to punish the guilty proportionately because it is good for its own sake to do so. Although this view entails that there is always some injustice when the state fails to give offenders fitting penalties, it cannot adequately explain the injustice; for the logic of this position is that people have a reason of *some* weight to commit crime

while police officers are watching so that the state can promote the final value of proportionately punishing them for it. I hope this contrast between censure theory and scalar consequentialism makes it clear how one can appeal to a theory's explanatory power or lack thereof, without providing a full-blown evaluation of the theory's central tenets. This point will be important for defending my argument for censure theory against some of Montague's criticisms below.

Rule-Utilitarianism and The Intuition

In the article of mine that Montague criticizes, I argue that rule-utilitarianism cannot entail The Intuition, and provide a putative counterexample to the claim that it can. Specifically, I imagine that a rule-utilitarian could find no reason for the state to punish someone guilty of having broken a just law forbidding harm to innocent, if he harmed members of a small and hated minority community and if the bigoted and hateful majority would be much happier seeing him acquitted or not even arrested in the first place (Metz 2000, 499–500). Montague maintains that this might be a counterexample to the claim that rule-utilitarianism generates only just laws, but is not a counterexample to the claim that rule-utilitarianism provides reason for the state to punish all those guilty of breaking just laws.

His reason for so thinking turns on the need to construe “justice” in a way that is fair to the rule-utilitarian. According to Montague, parity of reasoning requires me to let the rule-utilitarian construe just laws in rule-utilitarian terms. After all, he points out, I have assumed for the sake of argument that the state is obligated to denounce injustice and then tested the implications of that assumption. To be fair, Montague maintains, I must assume for the sake of argument that that the state is obligated to enforce just laws construed simply as those which would maximize utility if all conformed to them and if routinely enforced by the state. He says this:

Political communities will maximize intrinsic value only if they reduce the total harm done to their members; and they can accomplish this reduction only by establishing laws prohibiting certain sorts of actions and punishing those who break these laws. Political communities therefore have a pro tanto obligation to punish all those who break laws whose establishment and enforcement maximizes intrinsic value for their members (Montague 2002, 17–18).

I have two replies to Montague's suggestion. First, parity of reasoning does not require me to grant the rule-utilitarian a full-blown conception of just legislation. Notice that, when I articulate censure theory, I do not invoke any particular theory of what it is to be guilty of having broken just laws. In fact, I leave that open, indicating that censure theory requires the political community to express disapproval of those guilty of breaking just laws, however just laws might be specified (See Metz 2000, 493–494). The proper parallel in the case of rule-utilitarianism, therefore, would be to suppose for the sake of argument that state punishment is justified only to the extent that it would be permitted or required by a rule that would maximize utility if the state were to routinely conform to that rule, and then to see whether punishment meted out on these terms would invariably provide reason to punish those guilty of injustice. Of course, to carry out this evaluation implicitly requires *some* notion of

just laws (and of those culpable for violating them). However, instead of supposing a full-blown rule-utilitarian theory of justice, I may use widely shared, piecemeal convictions among professional ethicists about which laws are just and which are not. Nearly all in the debate assume if there is a law against assault, if someone knowingly breaks the law, and if the state refuses to punish that person because doing so in like cases would fail to maximize the community's happiness, then it is reasonable to conclude that a rule-utilitarian account of state punishment does not invariably provide reason to punish those guilty of breaking just laws.

My second reply to Montague is stronger and more interesting, for it grants the rule-utilitarian his favoured conception of justice. Even if we evaluate just laws in rule-utilitarian terms, it does not follow that a rule-utilitarian account of state punishment will provide reason to invariably punish those guilty of breaking those laws. There can be rule-utilitarian reasons for legislators to *adopt* or *maintain* a law, on the one hand, which reasons do not necessarily entail that judges and police ought invariably to *punish those who transgress* this law, on the other. Montague supposes that just laws for the rule-utilitarian will be identical to those that maximize utility when punishment is routinely meted out for breaking them, but that is false. Establishing laws is one thing, and punishing their violation is another, and any plausible rule-utilitarianism will acknowledge the difference. One can imagine that putting a law on the books against assault would maximize utility relative to not doing so, say, by educating the public and threatening potential aggressors, but that the enforcement of this law would maximize utility only when members of the majority are not punished for assaulting members of a despised minority. Hence, there would be a case in which rule-utilitarianism would not prescribe punishment of those guilty of breaking laws that are just in rule-utilitarian terms. I conclude that The Intuition remains beyond the reach of the rule-utilitarian.

Desert Theory and The Intuition

Another theory that Montague claims is able to capture The Intuition as easily as censure theory is what I call “desert theory.” Sometimes called “retributivism” in a narrow sense, this is the view that state punishment is justified because those who have been unjust deserve it. I need not spell out the concept of desert here, in order to enable the reader to appreciate the force of Montague's objection.

He points out that in my original article, I spell out a version of desert theory that is able to entail The Intuition, namely, this principle: legal punishment is justified because the guilty deserve to receive legal punishment consequent to their injustice that is proportionate to this injustice (Metz 2000, 507). Although I grant that this theory can entail The Intuition, I maintain that it fails to provide a *prima facie* plausible explanation of it. Now, Montague claims that, regardless of the reason I offer here, it is unfair of me to criticize this version of desert theory for providing an implausible explanation of The Intuition when I explicitly set aside the project of defending a given theory's central tenets. Since I assume the truth of censure theory in order to test its ability to account for The Intuition, I should do the same for this version of desert theory, so says Montague. “In light of his assumption about censure theory, Metz cannot fairly criticize any other theory on the ground that

it needs supporting arguments without similarly criticizing his own theory” (Montague 2002, 18).

In reply, note the difference between providing a positive and systematic justification for a theory’s essential claims, on the one hand, and noting that a particular theory is poorly motivated in light of claims held by those who would be most inclined to believe it, on the other. I do avoid the former, assertoric project in my article, saving it for other occasions, but I do not refrain from the latter, dialectical argument, which strikes me as a reasonable approach, at least given the space constraints of a journal article. I do not claim that the above version of desert theory is downright unjustified and indefensible relative to the arguments that exist for censure theory. Instead, I note that firm desert-based intuitions provide little, if any, reason to believe this version of desert theory, making it a poor desert-based explanation of The Intuition.

What makes the above instance of desert theory unattractive from a desert-based perspective is that intuitions about desert do not track the above principle’s specification about when and how much state punishment is apt. Literally hundreds of millions of movie-watchers each year think to themselves, “He got what he deserved,” upon a villain being harmed either by his own hand (e.g., the gun blowing up in his face), by punishment from a non-statal agent (such as the hero or the victim), or perhaps even by natural causes (say, being crushed by a boulder). Hollywood probably would not exist were these kinds of retributive judgments not deeply and widely held. If suffering or deprivation that comes prior to state punishment can give an offender what he deserves, then there is no reason to favour the above principle, which is the view that state punishment is alone deserved, regardless of what harm the offender has received from an extra-judicial source.

Now, the parallel argument to make against censure theory would be that firm censure-based intuitions provide no reason to believe the version of it that I expound (making it a poor explanation of The Intuition). But Montague does not make that argument in his critique of my article, and I do not believe that he plausibly could, when it comes to the relevance of extra-judicial punishment or harm. Here is why. When we reflect on the duty to censure, it is *agent-relative* in a way that the duty to give people what they deserve is not. That is, the duty to censure is binding on a particular agent in a way that the duty to fulfill desert claims seems not to be. As I have noted, if someone deserves something negative for his crime, he seems able to receive what he deserves from someone (and maybe even something) other than the state. Similar remarks apply to a wide array of other desert-based judgments. If a person has been morally good and deserves a kidney that is necessary for her to stay alive, and if one falls from the sky into her lap, it would be natural to say that she has received what she deserves. If someone has had his bicycle stolen and deserves another one, and one shows up on his doorstep from an anonymous do-gooder, then he has received what he deserves. If someone has substantially contributed to a firm or society by working long and hard at a job for which she was grossly underpaid and then wins the lottery, it is plausible to say that she finally received what she deserved.

In contrast, the duty to censure appears to be binding on particular agents, regardless of what other agents have done or nature has caused. This seems

particularly clear upon reflection of censure theory's underlying motivations. Recall that these are usually to treat offenders as responsible, to act as though victims are important and to disavow injustice. These are duties incumbent on an agent that cannot be discharged by some other agent. Even if someone else treated offenders as responsible, victims as important and injustice as something to distance oneself from, it would remain a duty on the state (supposing it were one, of course) to do these things as well. It would not do for the political community to say, "This vigilante has stood apart from injustice, stood up for victims and treated the guilty as accountable, and so there is no need for us to do it, too." The logic of censure theory requires a specific agent to carry out its fundamental obligations, which, in turn, is what renders it immune from the kind of objection I have made against desert theory, namely, that its own logic with regard to the bearer of a duty to punish does not support a version of it that entails the The Intuition.

Of course, it would be nice to have the space to examine more arguments for and against the essentials of the desert and censure theories. I have instead aimed for a more limited claim against desert theory's attempt to explain The Intuition, trying to provide a dialectical argument that desert theorists themselves should find compelling.

Societal-Defence Theory and The Intuition

The remaining theory that Montague claims is able to capture The Intuition is his own societal-defence theory (Montague 2002, 19). I respect Montague's theory and the way he has defended it over the years. It captures a lot of intuitions about punishment, particularly those about the injustice of punishing the innocent, and it does so in a way that coheres with thinking about other realms of justice. However, I continue to submit that it does much worse than censure theory at entailing that, and explaining why, there is always some moral reason for the state to proportionately punish those guilty of having broken a just law.

The fundamental reason why the societal-defence theory cannot entail The Intuition is that it is a forward-looking view, by which I mean that it makes the justification of punishment contingent upon the (likely) realization of a consequence metaphysically distinct from the imposition of a penalty fitting the crime. Montague's basic rationale for punishment is that the logic self-defence permits it, meaning that punishment of the guilty is justified on Montague's view as a way of serving the (probable) function of protecting innocents from unjustified harm in the future. Just as an innocent individual may use force against an aggressor to defend herself, so may the state do so against those who have aggressed in order to prevent more aggression. However, it is a platitude of self-defence theory that force is permissible only if *necessary* to fend off aggression. By extension, then, the state may use force against those who have aggressed only if necessary to deter or otherwise inhibit further aggression. And, now, what about a situation in which punishment is simply not (likely to be) necessary to accomplish this end? Or what about a case in which punishment of the guilty would in fact (be likely to) bring more harm to innocents than its absence, e.g., where Neo-Nazi skinheads would riot if their leader were proportionately punished for murder? In these cases, a demand to

protect the innocent will provide no degree of justification for the punishment of those who are guilty of aggression or otherwise breaking a just law.

It is also a platitude that, according to principles of self-defence, one must use the *least force* that is necessary to protect oneself, meaning that the logic of societal-defence cannot justify proportionate penalties, when lesser penalties would be sufficient to protect the innocent in the long run. Hence, Montague's theory would prescribe a disproportionately light punishment of the guilty, if it protected the innocent to an equal (or even potentially greater) degree as a proportionate penalty would.⁵ For the sake of simplicity, in the rest of my discussion, I downplay discussion of this troublesome feature of Montague's theory with regard to how much to punish, focusing on its inability to entail that there is always *pro tanto* moral reason for the state to punish aggressors to some degree or other.

As part of his reply, Montague claims that I am in "error" for deeming his theory to be forward-looking, thereby "ignoring" that his theory is fault-based (Montague 2002, 33n30). However, I do no such thing. By "forward-looking," I do not mean a utilitarian or consequentialist theory; I instead mean a theory implying that punishment is justified because (and *only if*) it is likely to bring about a certain desirable result in the future,⁶ something Montague's theory clearly does. I acknowledge that Montague's theory is fault-based, such that those not at fault may not be punished as a means to protect other innocents; this point does not address my criticism that his theory sometimes grounds no moral reason to (proportionately) punish those who are at fault, namely, when doing so will not protect innocents.

A more important part of Montague's reply points to the "two-level" aspect of his theory (Montague 2002, 26–27, 33n30; see also Montague 1995, 69–73). In the first instance, he justifies punishment as a practice, and then seeks to justify the punishment of a given individual in terms of its role in supporting the institution of punishment as an instrument of societal-defence. So, his idea is that supposing (as is plausible) that the institution of punishing those who have aggressed were justified as a means of protecting the innocent, judges and police officers would be justified in imposing punishment on particular individuals because doing so would be necessary to maintain such an institution. Obviously, one could not have an institution of using punishment against aggressors in order to protect the innocent if members of the institution never used punishment in this way.

It is true that I disregarded this feature of Montague's view in my article (Metz 2000, 502). However, I do not think it provides adequate reason to think that societal-defence can account well for The Intuition. The problem with this rationale is that, while it is true that to maintain an institution of punishment as societal-defence the members of that institution must *often* punish the guilty (proportionately), it is not true that to maintain this institution its members must *always* punish the

⁵ See Metz (2000, 502) for this point, to which Montague does not respond. An additional problem with Montague's theory is that it does not base how much force may be used against someone on the degree of her fault, e.g., it would invariably permit one to kill those who have merely negligently caused the prospect of death, if doing so would be necessary and sufficient to protect innocent life. Applied to state punishment, therefore, his theory would prescribe a disproportionately harsh penalty. This kind of point has been made in Wasserman (1987, 366–367).

⁶ See the definitions in Metz (2000, 498, 503, 510).

guilty (proportionately). It could well be the case that a given practice of punishment would have exactly the same consequences in terms of protection of the innocent if the guilty were (proportionately) punished 95% of the time instead of 100%. Indeed, in light of the Neo-Nazi case above, it could be that a punishment system would better protect the innocent if it refrained from punishing some of the guilty. In short, Montague cannot provide a principled reason for the state to (proportionately) punish all the guilty, and can appeal only to the contingent results of a given instance of such punishment or collection of such instances. Since the results of state punishment vary from context to context, the logic of the theory fails to entail that there is always some moral cost when the guilty avoid (fitting) penalties from the state.

Conclusion: Toward an Adequate Theory of State Punishment

If I have established that neither Montague's societal-defence theory nor any other theory is able to account for The Intuition as well as censure theory, how might the debate be taken forward? It is of course plausible to note that the inability to account for one considered judgment is hardly damning of a philosophical theory. Indeed, elsewhere I have argued that all theories of punishment face the problem of conflicting with some firm intuitions. I have pointed out that forward-looking theories do a good job of accommodating intuitions about why punishment is apt (viz., about the proper role of the state), but conflict with those about when and how much to punish, while backward-looking theories account well for intuitions about when and how much punishment is justified, but conflict with those about why it is (Metz 2004). As Montague notes, given the intentional infliction of harm inherent to punishment—and, one could add, given the financial and other costs to society of having a punishment system—protection of the innocent seems to be a better reason to set up and maintain a punishment system than is a need to express disapproval of injustice (Montague 2002, 19; see also Husak 1992).

So, to settle the dispute between societal-defence theory and censure theory, either the societal-defence theorist must find a way to do a better job of accommodating intuitions about when the state has moral reason to punish and how much (or convince us to abandon them), or the censure theorist needs to come up with a reason for thinking that the state's primary reason to punish is to express disapproval of injustice, even when doing so is not expected to protect or otherwise help anyone. I have undertaken the latter project in recent work, arguing that the liberal account of state purposes that often underwrites forward-looking theories of punishment in fact coheres with many backward-looking theories (Metz 2007), and I look forward to Montague and others continuing the former project as well.⁷

⁷ For helpful written comments on an earlier draft, I thank Stephen Kershner and an anonymous referee for *Philosophia*.

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