

William and Mary Law Review

Alumni Newsletter

Volume 51

2009-2010



The William & Mary School of Law is the oldest law school in the United States. Established in 1779, upon the appointment of George Wythe as the first professor of Law and Police, the Law School operated continuously until the beginning of the Civil War in 1861. During that time, William & Mary Law School educated some of the more prominent names in American history, such as Thomas Jefferson, John Marshall, James Monroe, and Henry Clay.

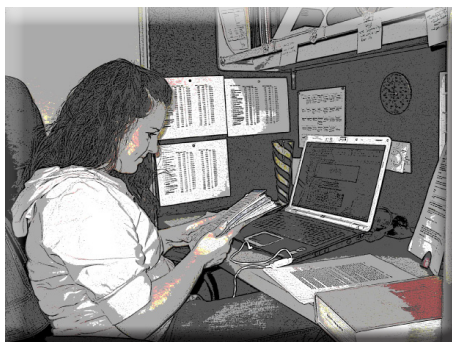
After remaining closed for some sixty years, the Law School re-opened in 1921, and has since become one of the top-ranked law schools in the United States.

The *William and Mary Law Review* is one of five law journals published by the students of William & Mary Law School. Each year, its members produce six issues of quality legal scholarship.

The Year in Review:

Volume 51 Editor-in-Chief Krysta Edwards

Volume 51 has officially wrapped up, and what a year it has been. The editors and staff of the *William and Mary Law Review* have worked tirelessly to produce a volume that we believe will make a lasting impact on the legal community. Consisting of over 2,300 pages of scholarship, including 42 articles and notes and a symposium on the “Boundaries of Intellectual Property,” multiple pieces in the volume have already received recognition for the contributions they have made to the legal landscape.



Krysta Edwards in the Law Review Office

Continuing our efforts to make the *Review* more accessible to a broader audience, we launched our new website in the fall: <http://wmlawreview.org/>. The new site features pieces from this

volume as well as previous years, and new content will continued to be added. Additionally, we are excited to announce that the *Review* is joining the Legal Workshop! An online consortium composed of many of the top-ranked law journals in the country, the Legal Workshop features modified versions of the articles appearing in the print editions of the member journals, allowing readers to easily digest an article’s argument while directing back to the full article for more nuanced discussion. The *Review*’s first contribution to the Workshop will be posted this spring, and two more articles from Volume 51 will appear in the coming months.

It has been an extremely successful year for the *Review*, and I would like to personally thank all those who contributed their time and energy into shaping our volume. The efforts of each of the staff, editors, and our exceptional administrative assistants, Beckie Pasipanki and Andrea Raines, made this year truly outstanding. I look forward to all of the accomplishments that are yet to come in Volume 52 – I know that the *Review* is in good hands.

Executive Board Members Krysta Edwards, Scott Upright, Christina Payne-Tsoupros, Sean Marotta, and Leah Holt at the 2010 Law Review Banquet.



Greetings Alumni!



Matt Kapuscinski

My name is Matt Kapuscinski, and I am honored to be the Editor-in-Chief of Volume 52 of the *William and Mary Law Review*. Raised in Northern Virginia, I graduated from Mary Washington College in 2004 with a Bachelor of Science in Economics. Before attending law school, I worked for four years as an Analyst at the Congressional Budget Office in Washington, DC, and part-time for the Washington Nationals baseball team as a Racing President mascot. While I've enjoyed my time at William & Mary thus far, I'm really looking forward to the year ahead.

The publication of Volume 52 has already begun, and I hope that each of you will have the opportunity to read the scholarly Articles and student Notes that we will publish this year. Also, in February, I encourage you to attend our Symposium, "Constitutional Transformations: The State, the Citizen, and the Changing Role of

Government," which will gather leading constitutional scholars to discuss whether current economic, political, and social conditions represent a transformative constitutional moment.

To the staff of Volume 51 – thank you for your commitment to the *Law Review*. We sincerely appreciate your friendship, guidance, and encouragement during the past year. You have been particularly supportive throughout the transition process and we wish you all the best in your future endeavors.

The staff of Volume 52 understands that the bright future of the *William and Mary Law Review* is grounded in the solid foundation that our alumni have built. Through the years, your hard work and dedication have made the *Law Review* a renowned and respected journal of legal scholarship. We are committed to preserving that legacy.

Alumni Profile: *Jane Fahey*

Former Supreme Court Justice Sandra Day O'Connor will deliver the commencement address at this year's Law School graduation ceremony. Justice O'Connor, who is the current Chancellor of the College of William & Mary, has published in the William and Mary Law Review, and also cited the Review in a 1994 concurring opinion. The Reverend Jane 'Vehko' Fahey (JD '81), interviewed below, was one of Justice O'Connor's first law clerks on the Supreme Court.

By Hannah Carrigg

William & Mary grounds its philosophy of legal education in the concept of the citizen lawyer – a person possessing high legal expertise who plies his trade in the service of his community. Reverend Jane 'Vehko' Fahey, the Editor-in-Chief of Volume 22 of the *William and Mary Law Review* and a 1981 graduate of the Law School, exemplifies in a unique way the ideal of the citizen lawyer.

Fahey enrolled at William & Mary after studying Religion at Rhodes College in Memphis, Tennessee. She remembers that the Law School, then housed next to the Wren Building, was active with debate and the pressing questions of the day. At William & Mary, Fahey further solidified her belief that lawyers have an obligation to contribute to their communities and maintain an active voice.

Fahey has fond memories of her experience on the *Review*, recalling her "fabulous" staff. A symposium on the topic of State Courts and Federalism, organized by Jim Crockett, stands out as a particularly interesting experience. There, a little-known state appellate court judge from Arizona named Sandra Day O'Connor was in attendance. Fahey escorted Judge O'Connor around the Law School during her visit, and the Judge delivered some remarks on federalism that were published in the symposium issue of Volume 22.

This encounter in Williamsburg turned out to be important for both women. The next summer, O'Connor was appointed by Reagan to be the first woman Justice on the Supreme Court. Her commentary in the *William and Mary Law Review* was one of the few published remarks Justice O'Connor had made to that point, and were mentioned during the confirmation hearings. Reverend Fahey, who had kept in contact with Justice O'Connor (and in fact does to this day), attended the confirmation hearings and was later among Justice O'Connor's first personal clerkship hires for the October 1982 term.

After several years of practice at Bondurant Mixson & Elmore in Atlanta, where she was a partner in the firm's commercial litigation practice and active in pro bono work, Fahey felt that her life's work might be outside the traditional practice of law. Wondering if



Reverend Jane Fahey

she was able to serve her community in a different way, Fahey enrolled in the Columbia Theological Seminary. She is now entering her tenth year as a minister in the Presbyterian Church.

Reverend Fahey sees many parallels between ministry and the law. "The lawyer-minister combination is more common than you'd think," she says. "The skill of persuading a jury or judge or a panel of judges has overlap with the skill of preaching or trying to bring a Biblical text to life for a congregation." She sees her ministry as another way to uphold the citizen lawyer ethic. On her unconventional post-law school path, Fahey uses her talents to serve and empower her community, carrying on William & Mary's proud tradition of citizen lawyering.

A Message from our Faculty Advisor

TO ALL LAW REVIEW ALUMS YOUNG AND OLD

I write to you for the first and last time as advisor to the *Law Review*. I am serving in an interim capacity. Next fall, Professor Tim Zick, recently arrived from St. Johns Law School, will become the permanent advisor. The *Law Review* has had another stellar year, either regardless of or in spite of my presence. In terms of citation counts, the opinions of authors, and the quality of articles, the *Law Review* continues to punch above its weight.

Dean Douglas is proving to be everything that we hoped for in a dean, and then some. In tandem with Appointments Chair Professor Meese, he spearheaded a very successful hiring spree: three new faculty members will join us in the fall. Alli Larsen comes to us after clerking for Justice Souter, practicing at O'Melveny & Myers, and teaching as a visiting professor at Catholic University Law School. She will be teaching Administrative Law and Constitutional Law. Nancy Leong clerked for the Honorable Kermit Lipez, First Circuit Court of Appeals, served as a fellow at Georgetown Law School

for a year, and is presently teaching at American University Law School. Nancy will be teaching Criminal Procedure and Evidence. Finally, Jason Solomon will be joining us from the University of Georgia Law School, where he has taught since 2005. Jason is a rising star in the theory of tort law. In addition to Torts, he will be teaching Administrative Law and Employment Law.

That we were able to hire three new faculty members in the face of a one-third reduction in state support over the last three years is a testament to the prudence, planning, and vision of former Dean Reveley and Interim Dean Butler. I know that Dean Douglas has great confidence that despite continued reductions in state support, the Law School will continue its upward trajectory. This rosy outlook, of course, is premised on your continued support. I offer our sincere thanks for everything that you have done, and all that you are able to do in the coming years.

I hope all is well with you and your families.

Sincerely,
Eric Kades

The William and Mary Law Review continues to be well regarded by the legal academy and the judiciary. One recent law review ranking (compiled by Washington and Lee) places our Law Review at No. 19 (based on the number of citations to the Review in the legal literature and in judicial opinions).

THE NATION'S TOP LAW JOURNALS (available at <http://lawlib.wlu.edu/LJ/index.aspx>)

- | | |
|--|--|
| 1. Harvard Law Review | 11. Cornell Law Review |
| 2. The Yale Law Journal | 12. The Georgetown Law Journal |
| 3. Columbia Law Review | 13. Michigan Law Review |
| 4. Stanford Law Review | 14. UCLA Law Review |
| 5. New York University Law Review | 15. Northwestern University Law Review |
| 6. California Law Review | 16. Minnesota Law Review |
| 7. University of Pennsylvania Law Review | 17. Fordham Law Review |
| 8. Texas Law Review | 18. Vanderbilt Law Review |
| 9. Virginia Law Review | 19. <i>William and Mary Law Review</i> |
| 10. The University of Chicago Law Review | 20. Notre Dame Law Review |

Student Accomplishments of Note

At the 9th Annual Regent National Constitutional Law Moot Court Competition, Chris Healy was a member of the first place team and won Best Oralist. Brandon Boxler, Stephen Barry, and Sean Marotta came in second overall and won Best Brief. Sean Marotta won third Best Oralist.

Brandon Boxler won the 2010 Academy of Trial Lawyers for Allegheny County Mock Trial Competition.

Hunter Allen was named third Best Oralist in the opening rounds of the University of North Carolina's Moot Court Competition.

Shanda King received a CALI Award for the Best Paper in Professor Christie Warren's fall 2009 seminar

course on Comparative Constitutional Systems. Professor Warren published the paper, *The Role of Political Parties in Democratization: the Cases of Turkey and South Africa*, on the website for the William & Mary Center for Comparative Legal Studies and Post-Conflict Justice at <http://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/studentinternationalpapers/index.php>

Christina Payne-Tsoupros's Note, *No Child Left Behind: Disincentives To Focus Instruction on Students Above the Passing Threshold*, will be published in the Journal of Law and Education in August 2010.

Class Notes

Law Review Volume 51 3L Destinations

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Hartford, CT

Ashely Crenshaw

Clerking for Judge James Spencer
Eastern District of VA

Krysta Edwards

Baker Botts
Dallas, TX

Christopher Emden

Honors Program
Department of Justice
Civil Division

Katherine Gray

CowanGates
Richmond, VA

Leah Kaufman

Jones Day
Cleveland, OH

Noah Kuschel

Gibson, Dunn & Crutcher
Washington, D.C.

Colleen Loughran

Clerking for the NY Supreme Court
Appellate Division

Sean Marotta

Clerking for Judge Jane Grall
NJ Superior Court Appellate Division

Colin McCarthy

Hancock, Daniel, Johnson & Nagle
Richmond, VA

Steven Popps

Clerking for Judge Henry E. Hudson
Eastern District of VA

Steve van Stempvoort

Clerking for Judge Glen Conrad
Western District of VA

Edward Turnbull

Williams Mullen
Richmond, VA

Christina Payne-Tsoupros

Clerking for Judge Gregory A. Presnell
Middle District of FL

Christopher Versfelt

Sullivan & Worcester
Boston, MA

Christopher Wilson

Honors Program
Department of Justice
Civil Division
Commercial Litigation Branch



Law Review Board Members and Administrative Assistants (from left to right): Chris Wilson, Scott Upright, Sean Marotta, Leah Holt, Andrea Raines, Beckie Pasipanki, Krysta Edwards, Chris Emden, Christina Payne-Tsoupros, Steven Popps, Leah Kaufman

William and Mary Law Review Joins The Legal Workshop

The *William and Mary Law Review* has joined The Legal Workshop, an online forum which features condensed versions of the legal scholarship featured in the print editions of member journals.

Beginning with the upcoming Volume 52, The Legal Workshop will publish six “miniature” articles from the *William and Mary Law Review* each year. Three articles from Volume 51 will also be published. The *Review*’s first submission, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, by Professor Wayne A. Logan of The Florida State University College of Law, will be featured this spring. Other pieces to be presented from Volume 51 include Professor Robert J. Rhee’s *Bonding Limited Liability*, and *Playing by the Rules: Combating Al Qaeda Within the Law of War*, by Professor David Glazier.

Editor-in-Chief Krysta Edwards expects The Legal Workshop to increase the visibility of the scholarship published in the *Review*. “The *William and Mary Law Review* is very excited to join the Legal Workshop. This forum provides an excellent opportunity for a broader audience to gain exposure to our authors’ pieces and consider the legal issues that are being discussed today. The *Review* is looking forward to working with the other members of the consortium to continue to generate accessible legal scholarship in this Internet Age.”

The *Review* is to be the eighth member of The Legal Workshop, joining the flagship journals of Cornell, Duke, Georgetown, New York University, Northwestern, Stanford, and the University of Chicago. Find out more at <http://legalworkshop.org/>.



The Articles of Volume 51

ISSUE 1 (OCTOBER 2009)

Articles

Adam M. Samaha, *Randomization in Adjudication*

Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*

Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*

Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the Rational Actor*

Notes

Anna C. Leist, *Voting with Their Feet and Dollars: The Role of Investors and the Influence of the Mutual Fund Market in Regulating Fees*

Scott J. Upright, *Suspicionless Border Seizures of Electronic Files: The Overextension of the Border Search Exception to the Fourth Amendment*

ISSUE 2 (NOVEMBER 2009)

Symposium: Boundaries of Intellectual Property

Articles

Trotter Hardy, *Introduction*

Dan L. Burk & Brett H. McDonnell, *Trademarks and the Boundaries of the Firm*

Jason Mazzone, *Administering Fair Use*

Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*

Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*

Jane Winn & Nicolas Jondet, *A New Deal for End Users? Lessons From a French Innovation in the Regulation of Interoperability*

Margo A. Bagley, *The New Invention Creation Activity Boundary in Patent Law*

John F. Duffy, *Rules and Standards on the Forefront of Patentability*

Mark A. Lemley, *Distinguishing Lost Profits from Reasonable Royalties*

Michael J. Meurer, *Patent Examination Priorities*

Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*

Brett Frischmann, *Spillovers Theory and Its Conceptual Boundaries*

Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*

Mark P. McKenna, *An Alternate Approach to Channeling?*

ISSUE 3 (DECEMBER 2009)

Articles

Alan Devlin & Neel Sukhatme, *Self-Realizing Inventions and the Utilitarian Foundation of Patent Law*

David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*

Anita S. Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*

Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*

Notes

Andrew T. Erwin, *Avoiding Another Eldorado: Balancing Parental Liberty and the Risk of Error with Governmental Interest in the Well-Being of Children in Complex Cases of Child Removal*

Christopher G. Wilson, *Embedded Federal Questions, Exclusive Jurisdiction, and Patent-Based Malpractice Claims*

ISSUE 4 (MARCH 2010)

Articles

Fabio Arcila, *The End of Suspicion*

Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*

Robert J. Rhee, *Bonding Limited Liability*

Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*

Notes

Krysta R. Edwards, *The Vote from Beyond the Grave*

Noah A. Kuschel, *Exempting Police from 18 U.S.C. § 924(c)*

ISSUE 5 (APRIL 2010)

Articles

David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*

Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*

Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*

W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*

Note

Jessica R. Coulter, *A Sea Change To Change the Sea: Stopping the Spread of the Pacific Garbage Patch with Small-Scale Environmental Legislation*

ISSUE 6 (MAY 2010)

Articles

Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*

Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*

Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*

David S. Rubenstein, *"Relative Checks": A New Paradigm for Controlling Administrative Power*

Notes

Colin P. McCarthy, *Paging Dr. Google: Personal Health Records and Patient Privacy*

Andrew M. Szlagyi, *Blowing Its Cover: How the Intelligence Identities Protection Act Has Masqueraded as an Effective Law and Why It Must Be Amended*

The Articles of Volume 51

Submission numbers were up yet again this year, keeping the Articles Selection Committee busier than ever. After receiving over 2,400 submissions for Volume 51 (up from 2,200 last year), the Law Review published 20 articles in regular issues and 13 articles in a symposium issue on intellectual property. The articles of Volume 51 cover a plethora of topics, including incentives for inventors that operate outside the patent system, applying behavioral and happiness research to economic questions, development impact fees and the Takings Clause, and classifying education as a federal right. Following is a sampling of Volume 51's diverse collection of articles.

In his introduction to our Symposium issue, Professor Trotter Hardy writes "You have in your hands thirteen papers on intellectual property, written by some of the most outstanding and widely recognized scholars working in the area today. What a collection of probing analyses, on topics ranging from the morality of patents, to the "Goldilocks hypothesis," to the relationship of TOFU to fair use, to the secret gay love affair between Captain Kirk and Dr. Spock! Don't believe me? Read on ..."

In *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, Florida State University law professor Wayne A. Logan writes about variation of federal constitutional norms in local jurisdictions across the nation. Variation in local criminal procedure rights highlights the detriments and benefits of constitutional contingency, and casts new light on the effects of the incorporation doctrine and America's sense of shared commitment to the Constitution.

In *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, St. John's University law professor Anita S. Krishnakumar unpacks and holds up to the light an often ignored segment of the Supreme Court's decision in *Church of the Holy*

Trinity v. United States. There the Court used a detailed narrative about America's historically Christian roots to explain why a statute could not be construed against a church, calling America a "Christian nation." Krishnakumar finds a distinct interpretive canon in the methodology of the Court's Christian nation analysis, which she labels the "unique national institution" canon. This canon has reared its head in several decisions since the Court's Holy Trinity decision.

In *Bonding Limited Liability*, University of Maryland law professor Robert J. Rhee describes a polarized debate about corporations' right to limited liability, then points to a middle path for reform. Rhee's middle path calls for limited liability against creditors and mandatory bonding to create an aggregate compensation fund. Business enterprise as a whole would thus bear risks more fully, while individual firms would have a minimal burden. According to Rhee, this system would be practically administrable, politically feasible, equitable, and just.

In *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, Washington University in St. Louis law professor David S. Law and Wharton School of Business legal studies professor David Zaring present an empirical analysis of the tendency of Supreme Court justices to use legislative history to determine the purpose and meaning of a statute. After analyzing every Supreme Court opinion on statutory interpretation between 1953 and 2006, Law and Zaring collected data on the characteristics of the statutes the justices were interpreting, including the statutes' ages, lengths, complexity, obscurity, and amendments. Combining these factors with information on the Justices' ideological tilt, case outcomes, and enacting legislators, Law and Zaring use a logit regression analysis to assess the relative impact of each variable on a Justice's tendency to cite legislative history.



Lead Notes Editor Laura Hartnett reviewing an article.

Volume 51 and 52 Student Notes

Our students have submitted many excellent notes for consideration by our Notes Committees in the past two years. We are only able to publish a small selection each year, and are very excited about the quality of the scholarship our current slate of notes reflects. Below are the titles and authors of the notes for Volumes 51 and 52. You can find links to the full text of each published note on the *William & Mary Law Review* website (<http://wmlawreview.org/toc>).



Volume 52 Articles Selection Committee at the 2010 Law Review Banquet

Congratulations to the following authors whose Notes were published in Volume 51 of the *William and Mary Law Review*:

Jessie Coulter, *A Sea Change to Change the Sea: Stopping the Spread of the Pacific Garbage Patch with Small-Scale Environmental Legislation*

Krysta Edwards, *The Vote from Beyond the Grave*

Andrew Erwin, *Providing Protection and Preventing Abduction: Properly Balancing Parental Liberty and the Risk of Error with Government Interest in the Well-Being of Children in Complex Cases of Child Removal*

Noah Kuschel, *Exempting Police from 18 U.S.C. § 924(c)*

Anna Leist, *Voting with Their Feet and Dollars: The Role of Investors and the Influence of the Mutual Fund Market in Regulating Fees*

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Scott Upright, *Suspicionless Border Seizures of Electronic Files: The Overextension of the Border Search Exception to the Fourth Amendment*

Chris Wilson, *Embedded Federal Questions, Exclusive Jurisdiction, and Patent-Based Malpractice Claims*

Congratulations to the following authors whose Notes will be published in Volume 52 of the *William and Mary Law Review*:

John Annand, *Controlling Growth in Northern Virginia Through the Coordination of Land Use and Transportation Policies*

Brandon Boxler, *What to Do with Daubert: How to Bring Standards of Reliable Scientific Evidence to the National Vaccine Injury Compensation Program*

Kevin Crennan, *The Viability of Certification in Federal Appellate Procedure*

Stephanie Forbes, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*

Alison Graab, *Smart Grid Requires Smart Incentives*

Matt Kapuscinski, *Confronting the Impact of Melendez-Diaz on the Prosecution of DUI Cases in Virginia*

Bill Leinen, *Preserving Republican Governance: An Essential Government Functions Exception to Direct Democratic Measures*

Brandon Murrill, *The Business of Suing: Determining When a Professional Plaintiff Should Have Standing To Bring a Private Enforcement Action*

Katherine O'Keefe, *Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws*

Justin Sorrell, *Rehabilitative Employees and the National Labor Relations Act*

Garrett Urban, *None of the Above: Examining the Limitations of Current Judicial Interpretations of Employee Authorization Under the Computer Fraud and Abuse Act*

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William and Mary Law Review

Volume 51

2010

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