

The Brandeis Déjà vu: Looking at the Then and Now of Media Privacy¹

Eric Paik*

INTRODUCTION

The accelerated development of cyber technology stands in distinction in a world that has, in the past few decades, witnessed strong dynamicity all throughout. It is easy to put the developmental rapidity of cyber technology into perspective, if one were to take the example of current U.S privacy laws and recognize them as being made antique by growing cyber-technology; a monumental reaction of the American legal system concerning the federal collection of personal information in computer databases was the Privacy Act of 1974, a framework that has been preserved to this day on how the U.S government “gathers, shares, and protects Americans’ personal information.”²

Needless to say, forty years of technological development has long rendered the Privacy Act insufficient, resulting in a problematic amount of concerns and a concerning amount of problems related to data privacy and the American Government.³ Expectedly, Government collection and utilization of digital data has received an abundance of media attention in the past few years, but we must appropriately remind ourselves that the urgent matter of privacy protection is one that encompasses much more, for example, the vast market of electronic commerce; new technology is everywhere to be found, and so are privacy concerns that come with it. After all, we live in a world where five exabytes (the equivalent amount of information, if hypothetically digitalized, accumulated throughout human history of texts and images until 2003) of information is produced in a matter of minutes.⁴ There is enough information on everyone’s plates. Simply put, there is an abundance of highly portable information, technological ways to access the said information, entities that are interested in utilizing the information, and a shortage of ways to stop the daunting consequence of the whole situation: privacy invasion.

If, by any chance, the given situation (which is seemingly unique to our modern digital age) triggers a déjà vu, that is because we have dealt with this issue before, more than a hundred years ago. Former Supreme Court Justice Louis D. Brandeis and Samuel D. Warren in their landmark article, *The Right to Privacy*, dealt with the legal conceptualization of privacy and the possible solutions of privacy intrusion in a time that witnessed the increasing usage of photographic technology by the media.⁵ With *The Rights to Privacy* being a foundational article of legal philosophy in American privacy law, it is an appropriate piece of literature that we could refer back to for the acquisition of guidance in thinking about privacy and its legal guardian

* Undergraduate at Brandeis University, Class of 2017

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² State of Federal Privacy and Data Security Law: Lagging Behind the Times?: 1

³ The Teaching Company/The Great Courses. “Privacy for the Cyber Age.” *Kanopy* video, 33:00. 2013. <https://brandeis.kanopystreaming.com/video/privacy-cyber-age>

⁴ State of Federal Privacy and Data Security Law: Lagging Behind the Times?: 3

⁵ Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy”, *Harvard Law Review*. (1890): 195

today. So, therefore, it is in the following sections of this essay where we observe *The Rights to Privacy* in its legal philosophy and then attempt at determining its applicability in today's cyber-dominated world. In doing so, we specifically explore the birth of the privacy tort through the publication of *The Right to Privacy*, and then look towards the changing definition of privacy tort factors in today's social media that necessitates a re-evaluation of Brandeis and Warren's legal genius.

THE RIGHT TO PRIVACY (1890)—BIRTH OF THE PRIVACY TORT

From the perspective of tort law at the time, Warren and Brandeis's argument that tort law should remedy psychological and emotional harm was fairly radical. Their arguments about its evolutionary potential notwithstanding, the common law had traditionally rejected claims of emotional injury and had required plaintiffs to prove physical or property injuries to recover damages.⁶

The Right to Privacy still maintains its identity as a monumental article on the subject of legal protection of privacy. Written by Louis D. Brandeis and Samuel D. Warren, and Published in the *Harvard Law Review* in 1890, *The Right to Privacy* famously referred to Justice Thomas M. Cooley's definition of privacy as the "right to be let alone," and detailed the emergent concern of the violation of privacy due to technological inventions, specifically the technology utilized by the press.⁷ The increasing focus of print media on private affairs, aided by the newly implemented use of photography, had essentially created a market of information entailing rumors and personal details, one that was "pursued with industry as well as effrontery."⁸ This situation had given rise to two concerns for the co-authors of *The Right to Privacy*, one of which was the fallen integrity and standards of print media, and another which carried more weight of legal significance was the lack of protection that privacy received.⁹ Privacy in the interactions among private parties, though a growing concern, was not sufficiently protected by congressional statutes, and neither was it protected sufficiently through common law. In fact, the legal concept of privacy in the wake of growing technology was one without concrete identity. The initiating section of the article *The Right to Privacy*, therefore, spoke of the chronological appropriateness of a new legal recognition of rights:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights.¹⁰

Brandeis and Warren explained that the "right to be let alone," a product of the evolving interpretation of our basic right to life, faced a new chapter of threatening business trend in yellow journalism; even seemingly benign gossip could be utilized with evil intent, if the gossip accompanied large public presence, to jeopardize the emotional well-being of an individual.¹¹ However, at the time of the article's publication, emotional injury was not recognized by courts

⁶ Neil M. Richards, "Puzzle of Brandeis, Privacy, and Speech." *Vanderbilt Law Review* 63.5 (2010): 1303

⁷ Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890): 195

⁸ *Ibid.*, 196

⁹ *Ibid.*, 196

¹⁰ Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890): 193

¹¹ *Ibid.*, 196

as a legal injury. Therefore, a part of Brandeis and Warren's argument was that emotional injury was deserving of a legal recognition and remedy. Their philosophical basis in pushing this unconventional idea could be found towards the beginning of the article, which reads: "The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things."¹² Brandeis and Warren respected the intangible value in honoring the "inviolable personality" of people, and so felt the need for the legal recognition of emotional harm as a legitimate injury.¹³

Following the development of their logic, what Brandeis and Warren ultimately advocated was tort remedy for the emotional damage caused by privacy invasion. However, even in the case of the legal recognition of emotional harm as a legal injury, the existing tort law would not have protected privacy as described by Brandeis and Warren. What was laid out in *The Right to Privacy*, therefore, was the push for the creation of a new category of tort law that specifically protected privacy. In communicating this, Brandeis and Warren showcased their excellence in portraying the standalone uniqueness of the subject of privacy, one that demonstrated the lack of protection privacy received from already existing parts of the common law; privacy was embedded with characteristic details which separated it from the seemingly related legal concepts of property as well as defamation, and so privacy could not sufficiently be accommodated for through the principles of either. In clarifying this uniqueness of privacy in its qualities as a subject of tort, the co-authors first compared the nature of defamation (slander and libel) to that of privacy, highlighting the value of emotional and spiritual well-being that is unique to privacy and absent in defamation:

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel...The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellowmen, -- the effect of the publication upon his estimate of himself and upon his own feelings nor forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual.¹⁴

Furthermore, the co-authors stated that though the category of property in tort law secured "to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others,"¹⁵ it did so in a problematic fashion that only concerned published material. Property law did not, in its narrowness, deal with instances in which the issue at stake had nothing to do with obtaining profit through publication but rather the

¹² Ibid., 195

¹³ Ibid., 205

¹⁴ Warren and Brandeis, "The Right to Privacy," *Harvard Law Review* 4.5 (1890): 197

¹⁵ Ibid., 198

“relief afforded by the ability to prevent any publication at all.”¹⁶ In other words, property law came fairly close to protecting the essence of privacy, but its legal boundaries only included either published information or information which the rightful owner had the intention of publishing. What Brandeis and Warren stated was that the fundamental value of protecting the extent to which an individual shares her/his information should not be about the value of the intellectual information as a publishable or published material.¹⁷

A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence.¹⁸

In both examples of the extension of tort law the emotional suffering of an individual in the public disclosure of unpublished private facts, which was the emergent concern, was unprotected. Therefore, Brandeis and Warren propounded it necessary that the common law made fitting adjustments for the demanding and urgent situation, by first viewing emotional harm as a legal injury and then formulating a new tort recognition of privacy as a unique subject.¹⁹

Even to this day *The Right to Privacy* is very deserving of its fame; it recognized the philosophical essence of the American common law dealing with one’s right “to be let alone” which was more or less lost in legal translation and only protected in a limited sense. In other words, Louis D. Brandeis and Samuel D. Warren had addressed the serious issue of emotional damage in the case of unauthorized and undesired circulation of unpublished information, one that slipped past the protection of property and against defamation, and together philosophized the legal category of privacy tort in reaction. While recognizing the significant value of what Brandeis and Warren advocated a century ago, the following section highlights a few factors that have changed and require further attention in how we view privacy tort today.

IMPORTANT FACTORS IN MODERN APPLICATION

A more modern and specific interpretation of privacy tort was constructed by William Lloyd Prosser some seventy years after the article “The Right to Privacy” was published.²⁰ Prosser’s take on privacy tort in itself has merit as well as compatibility issues in its application to today’s world, with complex legal examples being notably stated by scholars such as Professor Danielle Keats Citron.²¹ However, this essay solely observes the broad original ideas of Louis D.

¹⁶ Warren and Brandeis, “The Right to Privacy,” *Harvard Law Review* 4.5 (1890): 200

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 201

¹⁹ *Ibid.*

²⁰ Danielle Keats Citron. “Mainstreaming Privacy Torts.” *California Law Review* 98.6 (2010): 1805

²¹ *Ibid.*

Brandeis and Samuel D. Warren in their application to today's world without considering William Lloyd Prosser's more specific interpretation of privacy tort.

The simplified essence of *The Right to Privacy* would be best described as a discussion about the much needed tort remedy for emotional injury arising from the undesired disclosure of unpublished private facts. In an attempt to translate that philosophy into today's world, we must consider that modern societal complexity has changed the types and depth of the injury at risk as well as the perception of terms such as "unpublished" and "private facts." Though the essence of the article *The Right to Privacy* remains more important than ever, privacy tort should, and already does, deal with a much more complex reality. This section of the essay, therefore, attempts to observe two of many factors relating to the modern application of the philosophy of *The Right to Privacy* by specifically considering the example of social media. In sub-section one, the discussion focuses on the difficulty in maintaining the definition of privacy as exactly articulated in *The Right to Privacy* due to the changing definition and relevancy of consent and private space. In sub-section two, the increasing emotional harm as well as the emergence of new types of harm in social media are highlighted.

SECTION 1: GRAY AREAS OF PRIVATE SPACE AND CONSENT-WHOSE DATE IS IT ANYWAY?

Given the current usage of social media, it is easy to argue that society generally has a lower expectation of privacy when it comes to sharing personal information online. That is, until their privacy is intruded upon.²²

There are a few fundamental questions that require consideration when it comes to discussing the ideas of "The Right to Privacy" in its applicability to today's cyberspace. To initiate the discussion, we start with the nature of social media in being representative of both private and public elements.

The expectation of privacy in the arena of social media, if derived from the essence of *The Right to Privacy*, is confusing due to the following statement: "the right to privacy ceases if an individual, or someone by consent of the individual makes public the information themselves."²³ Sharing information on social media is conventionally understood as a voluntary act which, if we were to refer to the statement above, could eliminate legal expectations of privacy. This is not a surprising development of logic because the common understanding of the intended function of social media is that "people post because they want others to read the information."²⁴ However, the added complexity of social media originates from the existence of adjustable privacy settings. Taking the social media giant Facebook as an example, it is apparent that, first of all, there are three modes of privacy settings at large: sharing information with your

²² Renee Prunty and Amanda Swartzendruber, "Social Media and the Fourth Amendment Privacy Protections." In *Privacy in the Digital Age: 21st -century Challenges to the Fourth Amendment*, ed. Nancy S. Lind and Erik Rankin (Santa Barbara, California: Praeger, 2015), 402-403

²³ Katherine Leigh, "Developments on the Fourth Amendment and Privacy to the 21st Century." In *Privacy in the Digital Age: 21st-century Challenges to the Fourth Amendment*, ed. Nancy S. Lind and Erik Rankin (Santa Barbara, California: Praeger, 2015), 14

²⁴ Meghan E. Leonard, "The Changing Expectations of Privacy in the Digital Age." In *Privacy in the Digital Age: 21st -century Challenges to the Fourth Amendment*, ed. Nancy S. Lind and Erik Rankin (Santa Barbara, California: Praeger, 2015), 317

approved “friends”, sharing information with the public that uses Facebook services, and sharing information with the specific list of users selected. Due to the existence of different privacy settings and some 1.23 billion active monthly users,²⁵ it cannot be stated that every individual participates in social media with the same expectation of privacy; some people have Facebook accounts with the expectation of sharing information with a limited group of people and they have the privacy setting details to help reinforce that will. What is implied through all of this is that social media participation does not necessarily constitute information being made public in the black and white sense. Instead, selective publicity seems to better describe the general expectation of user experience when it comes to Facebook. Put another way, limited privacy is what the typical user might want or expect from using Facebook.²⁶ This gray area of situationally defining and expecting privacy is a source of trouble for privacy tort.

Considering the fact that different privacy settings generate varying user experiences with different execution of privacy protection, it is then crucial to understand that privacy settings are often complicated: “Knowing exactly which settings to choose and how to best protect your privacy on Facebook is difficult for even the most adept of users. . . . In addition, the privacy setting options change frequently, as does the Facebook interface.”²⁷ Social media users, in this case Facebook account holders, may by mistake make information “more public” than what they had intended. A hypothetical college student under the legal drinking age might share a photograph depicting the consumption of alcohol with the intention of privately sharing his/her enjoyment of youthful energy with friends (not in reference to the Facebook idea of “friends”) and unexpectedly face consequences of public viewership due to a mistake of a click or corporate-induced changes in privacy settings. The student in this given scenario faces privacy concerns, concerns that could very possibly bring with them emotional suffering, that the student did not anticipate or want at the time of sharing the information. However, in logical terms, this hypothetical student has indeed given her/his consent to Facebook regarding privacy details as proven by the preferences selected online. Here, we notice the difference between the issue of privacy back in the time of intruding print media and now: back in the day of yellow journalism it was easy to see that in the case of unauthorized and unwanted picture publication that very clearly there was no consent or the desire for disclosure, whereas in the case of Facebook it is difficult to assume the same. After all, “Facebook and other social-networking sites remind users of the privacy risks when creating an account.”²⁸ The responsibility could be argued to belong solely with any user that mistakenly induces more publicity into the shared information.

In analyzing the above situation, it might be helpful to turn to a relic of another side of the American legal system dealing with privacy, the fourth amendment case of *Katz v. United States*.²⁹ The portion of our concern is the court recognition of privacy rights in instances where intentionally private acts take place in public settings, and the contrary denial of privacy protection in situations where public disclosure of information is made in an expectedly private space.³⁰ So going back to Facebook, are we to understand the general utilization of social media

²⁵ Lisa M. Austin, “Enough About Me: Why Privacy Is About Power, Not Consent (or Harm),” in *A World Without Privacy: What Law Can and Should Do?*, ed. Austin Sarat (New York: Cambridge University Press, 2015), 147

²⁶ Austin, “Why Privacy is About Power, not Consent (or Harm),” 149-150

²⁷ Leonard, “The Changing Expectations of Privacy in the Digital Age”, 316

²⁸ Ibid.

²⁹ *Katz v. United States*, 389 U.S. 347 (1967)

³⁰ Prunty and Swartzendruber, “Social Media and the Fourth Amendment Privacy Protections.” 402-403

as an act with private intent in a public area, or are we to understand it as public disclosure of information in an area that could be private? On one side we may be justified in expecting privacy, and on the flip side we may not, or it really may be situational.

The discussion about consent and the varied expectation of privacy and user experience was initiated above, and is continued here. The factor of consent in the example of Facebook is made even more confusing because of what is recognized by Professor Lisa M. Austin, in the chapter “Why Privacy is About Power, not Consent (or harm)” which is published in the book *A World Without Privacy*, as “implied consent.”³¹ The legal acceptance of implied consent means that privacy recognition could happen at a broad level of general user expectation without considering the privacy affinity of each individual user:

General expectation of users, formed through the active architectural choices of Facebook, can even undercut individual consent entirely. For example, CIPPC complained that Facebook does not provide users with the ability to opt-out of profile memorialization. Although the Assistant Commissioner originally found this to contravene the consent requirements, she changed her view due to “reasonable expectations” with respect to content... Because of this, the Assistant Commissioner found that Facebook could rely upon implied consent. However, this implied consent is based on what “typical” users would want, and indeed what “users generally” would want in relation to another individual... Reasonable expectations of the “Facebook experience” trump individual consent.³²

Facebook’s often changing privacy settings and policies, in other words, just have to conform to what would be legally recognized as acceptable general user standards and expectations. The fact that Facebook “has no obligation to change its infrastructure so as to better enable individual choice”³³ raises the possibility that accommodation for the varying privacy needs of social media users is unlikely to materialize. However, the emotional damage (the amplified nature of which is discussed in the next section) is very plausible to arise from genuine mistakes or unexpected changes in privacy settings, and could be then viewed as unintended sharing of private information. The application of the philosophy of *The Right to Privacy* is challenging when considering such an aspect of today’s privacy.

This section is concluded with the peculiar example of a Facebook function called “tagging.” Facebook account holders often reveal information about others in photographs and texts through “tagging,” or name labeling, other people. “Tagging” could involve other Facebook users but could also involve those that have no participatory will when it comes to Facebook. Not only would it be a problem for individuals that are “tagged” to be unaware of their information being shared online, but there are only two offered solutions for a concerned and aware individual in that situation, and both of them are revealing of private information.³⁴ The first solution is to make a Facebook account and “untag” herself/himself, and the other solution is a method that still involves Facebook obtaining the non-user’s email information.³⁵ Though

³¹ Austin, “Why Privacy is About Power, not Consent (or Harm),” 151

³² Ibid., 147

³³ Austin, “Why Privacy is About Power, not Consent (or Harm),” 152

³⁴ Ibid.

³⁵ Ibid., 153

the legal responsibility in the given scenario might lie primarily with the user of Facebook that shared the information without consent, Facebook still gains profitable private information from the “tagged” individual in the process of problem-shooting, so the issue of legal responsibility is made confusing.³⁶

SECTION 2: AMPLIFIED INJURIES MEAN PRIVACY TORT IS INCREASINGLY IMPORTANT

Renee Prunty and Amanda Swartzendruber, in their co-authored section of the book *Privacy in the Digital Age* titled *Social Media and the Fourth Amendment Privacy Protections*, identified the broad range of potential harm related to social media: “There are many possible negative consequences attached to the use of social media sites. These new forums create a place for gossip, rumors, unwanted contact, stalking, the use of data by third parties, hacking, and even identity theft.”³⁷ Though Prunty and Swartzendruber’s work analyzes the aspect of government surveillance and its constitutionality, many of the harms that they have listed are injuries that remind us of what Brandeis and Warren wanted to establish a tort remedy for; malicious gossip and rumors were specifically stated by Brandeis and Warren to cause emotional harm that was toxic to the human pursuit of happiness in life. However, what cannot go unnoticed in observing the list of harms above is that in it are things such as stalking and unwanted contact, actions that could consequently entail direct physical harm or robbery. Another thing to keep in mind is the permanent nature of data and its availability which amplifies the emotional and reputational harm that was similarly discussed a century ago by Brandeis and Warren.³⁸ This sub-section observes the expanded width and depth of injuries related to privacy that seek tort remedy, which allows us to see the increased value in privacy tort. Again, the specific example we will observe is social media.

As stated above, private information in the modern world is stored digitally. Unlike a century ago when the private information of concern was circulated by print media and most likely withered away with time, private information on the web is permanent and searchable.³⁹ The horror of digital data permanency for those suffering emotional harm from unwanted disclosure of information is perfectly described by Professor Danielle Keats Citron as “evoking a Nietzschean image of persistent memory.”⁴⁰ Combine the permanent nature of digital data with the fact that data is now easily searchable and globally accessible, and we have at our hands the groundwork for the timeless preservation and return of emotional suffering for some individuals.⁴¹ Besides, anybody with the intent to do so could publish private information of others with more ease and potential for publicity than any press we could have imagined a century back. Private information on the web is at a constant risk of being shared by anyone, with the potential to spread globally like wildfire and to be preserved in its most accessible state for the time to come. If that was not enough to induce fear, the increased damage of privacy invasion is discussed next.

³⁶ Ibid.

³⁷ Prunty and Swartzendruber, “Social Media and the Fourth Amendment Privacy Protections.” 408

³⁸ Citron, “Mainstreaming Privacy Torts.” 1808

³⁹ Ibid.

⁴⁰ Citron, “Mainstreaming Privacy Torts.” 1813

⁴¹ Ibid.

“In the past, physical injuries associated with privacy invasions typically involved a person's physical manifestations of emotional distress. For instance, individuals often suffered sleeplessness in the face of privacy invasions.”⁴² In today's world of social media, the abundance of easily accessible personal data is allowing the occurrence of life threatening situations. Participants of social media that have access to personal information of others could easily initiate unwanted disclosure of private facts anonymously, or even by pretending to be the very subject of the disclosed information. Take for example the case referred to by Professor Dianne Cintron: “in 2009, a Long Island, New York, mother allegedly posted an advertisement on Craigslist seeking sex and directing men to the mother of her nine-year-old daughter's rival.”⁴³ With malicious intent and enough personal information, imitating identity online to initiate danger for another individual could be achieved by anyone. To really reveal the alarming danger that is privacy invasion on social media, we end the section with another disturbing example referred to by Professor Dianne Citron, one that serves as a powerful reminder of why the idea of privacy protection as suggested by Brandeis and Warren are more important than ever:

In an early case of online impersonation, a security guard pretended to be a woman in a chat room, claiming that the woman wanted to be assaulted. The chat room posting asserted: "I want you to break down my door and rape me." It also provided the woman's name, address, and instructions about how to get past her building's security system. Over the next few weeks, nine men showed up at her door, often in the middle of the night.⁴⁴

CONCLUSION

Louis D. Brandeis and Samuel D. Warren understood a very important aspect of our legal system: the law evolves, and justifiably so due to the betterment of our recognition of values and needs over time:

Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect.⁴⁵

Therefore, in the history of the evolution of American law, *The Right to Privacy* has its own special place for its awareness of a need for change. However, as important as it is that we take the principles of Brandeis and Warren to heart, it is now time for the Brandeis or Warren of our generation to step up to the plate. The cyber world that we inhabit is one that Brandeis and Warren could not have imagined more than a century ago, and quite frankly had no responsibility to do so. This new era of cyber development and its byproduct could only be interpreted by those that are responsible for it, namely us. The process of defining our newly adjusted “right to privacy” is to be anticipated in the days to come.

⁴² Ibid., 1817

⁴³ Ibid., 1818

⁴⁴ Citron, “Mainstreaming Privacy Torts.” 1818

⁴⁵ Warren and Brandeis, “The Right to Privacy,” *Harvard Law Review* 4.5 (1890): 193

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