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The United States Execution Drug Shortage: A Consequence of Our Values

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THE FOURTH DECADE IN THE modern history of the U.S. death penalty, which began when the Supreme Court reinstated the practice in 1976, will be remembered for the role that challenges to lethal injection played in slowing, and even halting altogether, the administration of capital punishment in a number of states.¹ Persistent legal challenges by attorneys for condemned prisoners have brought to light the flawed administration of execution protocols—protocols which, in some instances, were flawed themselves—leading courts to scrutinize, more extensively than ever before, states’ plans for conducting executions.² The focus on lethal injection executions has in turn shined a spotlight on the manufacturers of the drugs that are used to put prisoners to death.

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As more and more of these manufacturers—generally large, multinational pharmaceutical companies—determine how to ensure their products are not used in U.S. executions, states face a new and vexing obstacle to carrying out executions. Some states have resorted to illegally procuring drugs of unknown provenance, sometimes with disastrous consequences, such as Oklahoma’s botched execution of Michael Lee Wilson, who cried out, “I feel my whole body burning” as he was put to death.³ Other states, such as Ohio, have halted executions while courts sort out the legality of proposed drug combinations.⁴

The refusal of some pharmaceutical companies to provide drugs to U.S.

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prisons has significantly impeded the imposition of the death penalty in a number of states. Despite this, it is the anti-death penalty activists who tend to draw the attention of the media, state officials, and politicians charged with carrying out executions. The media focuses particular attention on advocates in Europe who have campaigned to pressure European drug companies to stop distribution of their products to U.S. prisons for use in executions. In the litigation pleadings and legislative proposals of state officials advocating for secretive execution procedures, a prevailing narrative has emerged: the clever, dogged, and effective activism of a small band of anti-death penalty ideologues has thwarted the lawful performance of death sentences in a number of states.

This paper challenges that narrative and posits instead that it is the drug companies that have long sought to avoid the use of their products in executions, for moral and financial reasons, as well as to comply with European law. Abolition of the death penalty is a prerequisite for entry into the European Union, and several regulations and policies codify this position. Chief among them is European Commission Regulation 1236/2005, commonly known as “the Torture Regulation,” which prohibits trade of “goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.”⁵ To be sure, European activists, highlighting violations of European Commission law, have drawn attention to the pharmaceutical industry’s position that its drugs should not be used in executions. But the activists’ interest only strengthened, and in some cases facilitated, the companies’ extant predisposition to avoid association with executions.

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A few dogged activists have not impeded the death penalty.⁶ Instead, the fact that the United States is so out of step with the rest of the Western world is the major contributing factor to U.S. states’ recent difficulty carrying out

The United States is the only Western industrialized nation that continues to administer capital punishment.

executions. The United States is the only Western industrialized nation that continues to administer capital punishment. It also continues to use a method of execution that depends on materials manufactured by multinational corporations. The bottom line of these companies, from which they derive moral and legal authority, is the sale of medicines to heal, alleviate suffering, and save lives, not to end them. Put simply, association with executions, which are seen by much of the world as a barbaric American practice, hurts their business.

A practice that threatens the financial, moral, and legal interests of the corporations upon which that practice relies may itself become unsustainable.

If so, this result is a consequence of U.S. values, not the activism of Europeans who oppose the death penalty.

BRIEF BACKGROUND

Much about the administration of lethal injections in the United States is shrouded in secrecy, but it is no secret that states have had a difficult time in recent years obtaining the drugs needed to put people to death.⁷ A brief primer on the way lethal injections are meant to be carried out will provide background for the discussion of the present state of affairs.

Virtually every state that employs the death penalty uses lethal injection as either the only or the primary method of execution.⁸ As the name implies, lethal injection requires the injection of a drug or drugs of sufficient toxicity and dosage to end the life of the person being injected. Not only must the drugs ultimately cause death, but consistent with states' obligations under the Eighth Amendment to the U.S. Constitution not to inflict "cruel and unusual punishments," the death must also be humane. Courts have interpreted this requirement to mandate that states not utilize execution techniques that pose a "substantial risk of serious harm."⁹

For many years, the vast majority of lethal injection executions in the United States employed a three-drug protocol: the first drug, to anesthetize the inmate; the second, to paralyze him; and the third, to stop his heart, killing him.¹⁰ From 1976 to 2014, over a thousand lethal injections were carried out using this method.¹¹ Despite several botched executions, challenges to legal injection did not pick up legal steam until the mid-2000s. At that time, lawyers for death-row inmates began to convince courts that the personnel administering lethal injections were not always competent enough to do so, and that when the drugs were not administered properly, the execution could cause excruciating pain to the condemned inmate in violation of the Eighth Amendment.¹²

As judges in numerous states became more skeptical of the competence of the prison personnel conducting executions, executions across the United States were postponed and then put on hold while the Supreme Court deliberated *Baze v. Rees* in 2008. The *Baze* case, which considered a challenge to Kentucky's lethal injection procedures, was expected by some to resolve challenges to lethal injection nationwide, because it upheld as constitutional the three-drug protocol that Kentucky and all other states with the death penalty used at the time.¹³ However, challenges to lethal injection continued to proliferate in the six years following the Court's decision, in part due to states' inability to secure legal

drugs for use in executions.¹⁴

Throughout much of this recent history, challenges to lethal injection were based on the premise that adequate personnel were not being employed to administer the execution. As noted above, these challenges delayed states' plans to execute prisoners.¹⁵ It was not until 2010 that states began having trouble obtaining the drugs needed to conduct executions.¹⁶ That year, Hospira—the sole U.S. manufacturer of thiopental, the drug used by most states to anesthetize prisoners before injecting them with the second and third drugs in the three-drug protocol—was forced to temporarily cease production of the drug due to manufacturing problems at one of its facilities.¹⁷ Thiopental became scarce, and in response to its limited availability, departments of corrections (DOCs) began to quietly buy the drug from Dream Pharma, a small wholesaler that operated out of the back room of a driving school on the outskirts of London. This imported thiopental was not approved by the U.S. Food and Drug Administration (FDA).¹⁸

On 29 October 2010, in response to a legal challenge calling for the UK (where capital punishment has been outlawed since 1965) to act in compliance with its own policy on the death penalty, the UK government passed an export control on thiopental.¹⁹ In 2011, the European Union replicated this export control for all member states.²⁰

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While Europe was taking steps to prevent export of execution drugs, Hospira permanently ceased manufacture and sale of thiopental to the United States. In January 2011, the company announced it would not return to the market with the product. Since then, there have been no FDA-approved or legally available forms of thiopental available in the United States.

The unavailability of thiopental set off a chain reaction. States scrambled to stockpile the remaining thiopental on the market, conduct executions before the thiopental on hand expired, illegally obtain non-FDA-approved thiopental from overseas, and, eventually, abandon the drug altogether and seek other methods of carrying out lethal injections. These methods themselves quickly became problematic.²¹

The period following Hospira's decision in 2011 to take thiopental off the market saw a series of attempts to obtain drugs from overseas, despite the lack of FDA regulation of such drugs.²² That avenue to buy execution drugs was effectively shut down by the courts when the U.S. Court of Appeals for the District of Columbia Circuit ruled that the importation of unapproved thiopental from overseas was illegal.²³

To replace thiopental, states first turned to pentobarbital, a drug manufac-

tered in the United States by the Danish pharmaceutical company, Lundbeck Inc. In July 2011, however, Lundbeck became the first company to announce that it was putting in place comprehensive distribution controls to prevent sales of its medicine to DOCs for use in executions.²⁴ After Lundbeck successfully implemented tight distribution controls, its product became unavailable for use in executions.²⁵ Since then, close to a dozen other companies (including Teva, West-Ward, Par Pharmaceuticals, Naari, Sandoz, Merck, Fresenius Kabi, Siegfried, Sun Pharma, and Tamarang) have voluntarily taken similar steps to prevent U.S. prisons from obtaining their medicines for use in executions. These distribution controls include drop-shipping products directly to a list of authorized end-users and restricting distribution to certain approved classes of trade: hospitals, clinics, and acute care facilities.²⁶ For example, Fresenius Kabi, the German manufacturer of propofol, publicly announced that it has “voluntarily put in place several distribution controls,” among them the requirement that “each distributor/wholesaler has signed a contractual commitment that they will not sell or distribute to correctional facilities.”²⁷ Similarly, Tamarang, a Spanish manufacturer, issued a statement that it will “take additional measures to ensure that the supply chain is transparent so that it is known with certainty where the product [has] been delivered, with the prohibition to supply to penitentiary hospitals in the USA.”²⁸

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The actions of the drug companies have left many states without access to the drugs needed to carry out executions.²⁹ Several states have now turned either to compounded pentobarbital or to experimental combinations of drugs.³⁰ Both approaches have invited public criticism, as well as an increased risk of botched executions.³¹

THE DOMINANT NARRATIVE

Over the course of this recent history, a narrative has emerged that casts the unavailability of drugs for use in executions as the direct result of European activists. It is true that, as some states announced their plans to use new drugs in lethal injection executions, opponents of the death penalty both abroad and in the United States put increasing public pressure on pharmaceutical companies not to have their products used in executions. As Barba Lochbihler, chairwoman of the European Parliament’s Subcommittee on Human Rights, stated, “Our political task is to push for an abolition of the death penalty, not facilitate its procedure.”³² It is important to note, however, that these efforts were not novel. As early as 2001, death penalty abolitionists seized on the strategy of pressuring

drug companies to address the use of their products in executions. A 2001 report in *Mother Jones* explained, “The hope, activists say, is that the companies and institutions which provide lethal injection drugs will be sufficiently influenced by negative publicity to drop the practice.”³³ These early efforts to convince drug companies not to provide execution drugs, however, did not bear fruit.

The popular narrative regarding the current difficulties that states face in conducting lawful executions is that zealous anti–death penalty activists, mostly in Europe, have managed to thwart the imposition of the death penalty here in the United States. Nathan Koppel, writing for the *Wall Street Journal*, attributed the move by Hospira to “months of pressure by activists through a new campaign

Mainstream media outlets have sensationalized the efforts and effects of the European activists.

aimed at pressuring pharmaceutical companies whose products are used in lethal injections.”³⁴ Mainstream media outlets have sensationalized the efforts and effects of the European activists

working on the issue. As one national news story put it, “The reason several states are running short [of drugs for use in executions] is a woman named Maya Foa. She works for a British group that campaigns against the death penalty.”³⁵ A November 2014 opinion piece in the *New York Times* asserted, “under pressure from European activists, pharmaceutical firms stopped selling [drugs] to death penalty states. The shortage has plunged the execution industry into disarray.”³⁶

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In addition, the narrative of anti–death penalty activists thwarting the lawful execution of death sentences has benefited officials in a number of states. The specter of harassment or worse by these activists is used to justify the imposition of extreme secrecy measures.³⁷ In Texas, for example, soon after Hospira removed thiopental from the market, an assistant Attorney General refused to turn over documents related to execution procedures. She claimed that anti–death penalty activists would use the information from the documents to harass, intimidate, and even physically harm the suppliers of execution drugs:

The ideological rift between proponents and opponents of the death penalty is deep and entrenched. . . . The most recent development in the competing agendas of anti–death penalty advocates and law enforcement is the nationwide shortage of sodium thiopental, the anesthetic agent used by the TDCJ [Texas Department of Criminal Justice] in the lethal injections administered to inmates condemned to execution. . . . The TDCJ has been lucky in that those gathered or picketing outside the Huntsville Unit [where executions occur] on a scheduled execution date have never fired weapons or even used knives; but, both of these events are very real possibilities and amount to more than a generalized and speculative fear of harassment or retribution.

If the [person seeking information about Texas executions] published how much sodium thiopental we currently have and when it expires, this would operate to inflame an already volatile situation.³⁸

Oklahoma's response to the April 2014 execution of Clayton Lockett, who, according to media accounts, "gaped and snorted for 26 minutes before he died," was to reduce the number of journalists allowed to witness future executions in the state.³⁹

It is easy to see why the media's prevailing narrative—the dogged activist grinding the machinery of death to a halt—is so attractive. However, it does not reveal the whole story as to why lethal injection executions have become so problematic.

THE ACTUAL HISTORY

Long before the recent efforts of death penalty opponents to convince drug companies to disallow their drugs from being used in executions, these companies expressed a desire to disassociate themselves from U.S. executions. Media reports as early as 2001 quoted representatives of pharmaceutical companies as strongly objecting to the use of their products in executions and communicating to prison officials their request that the drugs not be used to end the lives of condemned inmates.⁴⁰

Despite the narrative that Hospira was forced to give up the production of thiopental as a result of pressure from activists, in fact the company had long sought to avoid the use of thiopental in executions. The company was simply ineffective in ascertaining a method of ensuring that its product was not used in executions. In March 2010, Hospira sent a letter to prison officials in a number of states asking them not to use thiopental in executions: "Hospira provides these products because they improve or save lives and markets them solely for use as indicated on the product labeling. As such, we do not support the use of any of our products in capital punishment procedures."⁴¹ This letter acknowledged, however, that "your correctional facility is able to acquire most products through a variety of sources without ordering directly from Hospira."⁴² Eventually the company realized that the minimal profit it made on the drug was vastly outweighed by the bad publicity of assisting executions, and it decided to shut down production of the drug altogether.⁴³

Other drug manufacturers similarly sought to prevent use of their drugs in executions, but were initially unsuccessful. For example, in January 2011, the president of Lundbeck wrote a letter to the top prison official in Ohio, stating

that he was aware that the state planned to use Lundbeck's product, Nembutal, in its executions after Hospira's decision to stop producing thiopental. "Lundbeck is adamantly opposed to the use of Nembutal, or any product for that matter, for the purpose of capital punishment," he wrote. He continued:

We recognize that we cannot control how licensed health care professionals use this or any pharmaceutical product. Nevertheless, we urge you to discontinue the use of Nembutal in the execution of prisoners in your state because it contradicts everything we are in business to do—provide therapies that improve people's lives.⁴⁴

Similarly, in November 2011, the CEO of Naari, an Indian manufacturer of thiopental, wrote to the Chief Justice of the Nebraska Supreme Court that he was "shocked and appalled" that drugs manufactured by his company had been obtained by the Nebraska Department of Correctional Services. "Naari did not supply these drugs directly to [Nebraska prison officials] and is deeply opposed to the use of the drugs in executions."⁴⁵

34 If U.S. prison officials had any qualms about using drugs in executions against the will of the manufacturers of those drugs, they did not express them publicly. Indeed, Ohio was not deterred by Lundbeck's request to discontinue the use of Nembutal in executions and simply ignored it.⁴⁶ The drug companies' initial efforts to curb the use of their products in U.S. executions appeared to be entirely ineffectual. As reported in the *Guardian* at the time, "Anti-death penalty groups have pushed for Lundbeck to write clauses into contracts with pharmaceutical distributors to ban its use in executions; Lundbeck, which strongly opposes the use of its drug for capital punishment, says such clauses would be impractical because of the way drugs are distributed."⁴⁷

But the drug companies' inability to accomplish their goal diplomatically should not be mistaken for a lack of will to do so. These companies are large, multinational corporations with shareholders around the world. Many of their shareholders reside in countries that have long since abolished the death penalty and have strong moral opposition to its use. Moreover, while some shareholders and the corporate leadership may well have personal, moral opposition to the death penalty, the desire not to have their products used in executions is as much a concern for the bottom line as it is a desire not to be engaged in a practice they consider amoral. Hospira's stated corporate philosophy is "Advancing Wellness." As the company explains prominently on its website, "'Wellness' demonstrates a broad commitment to healthcare, supported by a wide variety of products that help improve the well being of patients around the world."⁴⁸ It is difficult to imagine more negative public relations for a drug company than publicity about

the fact that its products are used to kill people—especially given that whatever profit these companies made from selling execution drugs was infinitesimally small, literally in the hundreds of dollars, compared to their overall portfolio.⁴⁹ Presumably this is why even Naari, a pharmaceutical company based in India, a country that employs the death penalty, was firmly opposed to the use of its product in executions.

There is also the issue of compliance with European law. The primary obstacle for companies that objected to the use of their drugs in capital punishment was that they did not have control over how the drugs were used once they were exported to the United States.⁵⁰ In 2011, however, the European Commission amended EC Regulation 1236/2005 to add certain execution drugs to the language of the regulation. These included sodium thiopental, pentobarbital, and other “short-acting or intermediate barbiturates.”⁵¹ Under the amended regulation, pharmaceutical manufacturers may not export drugs used for executions to the United States unless they obtain an export authorization by demonstrating the steps they have taken to ensure the medicines will not be used in lethal injections.⁵² European law—not the activism of anti-death penalty crusaders—constrained the abilities of pharmaceutical companies, who already did not want their products used in executions, to export their drugs.

In the late 2000s, anti-death penalty activists did seek to work with drug companies to effectuate their desire to avoid the use of their products in U.S. executions.⁵³ Among other strategies, they attempted to exert public pressure on the drug companies, but the allegations of threats and intimidation are overblown.⁵⁴ As reported in the *Guardian US*, the Texas Department of Criminal Justice issued a 15-page brief to the Texas Attorney General’s office in 2012, stating that “[Reprive, a London-based anti-death penalty organization] crosses the line from social activists dedicated to their cause to authoritarian ideologues who menace and harass private citizens who decline to submit to Reprive’s opinion on the morality of capital punishment by lethal injection.”⁵⁵ The TDCJ further claimed that “Lundbeck acquiesced to Reprive’s unrestrained harassment and agreed to deny orders from prisons located in those states active in carrying out death penalty sentences.”⁵⁶ As the *Guardian* reported, however, Lundbeck responded, “We acted because we are a company that wants to help save people’s lives and we are against the misuse of our drugs in prisons. We took our stance long before

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we were contacted by Reprieve.”⁵⁷

THE DRUG SHORTAGE AS A REFLECTION OF AMERICAN VALUES

State officials have been far from resigned in response to the difficulties in obtaining drugs for executions. Instead, the reaction has been to retrench and to be more secretive and less transparent. In Ohio, for example, legislation is pending that would both shield from public scrutiny the source of drugs used in executions and prohibit companies from entering into contracts with states that contain controls on the distribution of drugs for use in executions.⁵⁸ Officials in some states, such as California, assert that they are working to come up with an execution protocol that uses legal, reliable drugs. Most states have dug in their heels and turned to compounding pharmacies, unreliable overseas drug distributors, or untested and experimental drug combinations to resolve the impasse created by the shortage of drugs traditionally used in executions. At times, as noted above, these efforts have resulted in horribly botched executions.⁵⁹ The responses of states spotlights in many ways the starkly contrasting values of, on one hand, the European nations that are home to some of the world’s biggest drug manufacturers and, on the other hand, U.S. states that carry out executions.

36 There have long been vocal opponents of the death penalty who make no secret of their desire to end executions in the United States, and European death penalty abolitionists are counted among their critical allies. But the efforts of these activists to aid multinational drug manufacturers in their desire to stop the use of their products in executions merely gave voice to the strongly held concerns of the business interests that—for financial and moral reasons—wanted no role in the U.S. system of capital punishment. On the financial front, a noteworthy example is the German firm DJE Kapital’s divestment of \$70 million from pharmaceutical company Mylan to protest the fact that Mylan provides rocuronium bromide to some states for lethal injections. DJE Kapital’s CEO explained the decision: “If clients find out we have shares in companies that supply that drug, we have problems with our clients.”⁶⁰

It is convenient for U.S. prison officials to claim that difficulties in obtaining execution drugs are the result of a merry band of unethical death penalty opponents. But they cannot claim to have been caught off guard—not when the drug companies have been protesting for more than a decade against their involvement in the institution of capital punishment. It is nevertheless helpful to U.S. states to blame death penalty abolitionists, because it allows states to both operate in secrecy and deny that there are any larger forces at work that

are opposed to the use of capital punishment in the United States.

When we look back on the fourth decade of the modern, post-1976 era of capital punishment in the United States, we may consider it the decade that marked the beginning of the end. If so, it will not be the result of a handful of activists successfully thwarting the administration of capital punishment. Rather, it will be the consequence of U.S. states imposing the death penalty in the context of a modern world that generally abhors the practice, using a method of execution that is very much dependent on major players in that world. If the problems associated with lethal injection eventually cause the enterprise of capital punishment to collapse, it will be because the United States finally has come to grips with the fact that it is on the wrong side of history, and out of step with the rest of the Western world. ❧

NOTES

1. I am grateful to Jennifer Moreno, Megan McCracken, Maya Foa, and Elisabeth Semel for feedback on drafts of this article, as well as to Zishan Lokhandwala for excellent research assistance.

2. Eric Berger, "Lethal Injection and the Problem of Constitutional Remedies," *Yale Law and Policy Review* 27 (2008): 286.

3. Associated Press, "I feel my whole body burning,' says Oklahoma death row inmate during execution," *Fox News*, January 10, 2014.

4. Associated Press, "Death penalty on hold in Ohio into 2015 as questions about execution drugs linger," *New York Daily News*, August 11, 2014. Executions in California, the state with the largest death row, have been on hold for almost a decade. As the media reported in 2014, "California has conducted no executions since January 2006 because of legal challenges to its three-drug system for lethal injections. After a lengthy appeals process, Gov. Jerry Brown announced last year that the state would be moving to a one-drug execution, but can still conduct no executions as it drafts policy for the shift," see: Cormac Corney, "Judge Rules California Death Penalty Unconstitutional," *The San Francisco Appeal*, July 16, 2014. At the time of writing, California prison officials have not announced a new draft policy.

5. "Ban on Trade in Instruments of Torture," European Union.

6. "Executions by Year Since 1976," Death Penalty Information Center (DPIC). There were 355 total executions in the United States from 2006 to 2013. In the eight-year span before that from 1999 to 2005, there were 504 executions in the United States.

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8. "Methods of Execution," Death Penalty Information Center (DPIC). Since 1976, only Alabama, Arkansas, Arizona, California, Florida, Kentucky, Missouri, Oklahoma, South Carolina, Tennessee, Utah, Virginia, and Wyoming have allowed executions by means other than lethal injection. Even in most of these states, lethal injection is the dominant form of execution.

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Decision Making,” *Boston University Law Review* 91 (2011).

15. Denno, “Lethal Injection Chaos Post-Baze.”

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28. *Ibid.*

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33. Justine Sharrock, “Undercutting Executions,” *Mother Jones*, December 28, 2001.

34. Koppel, “Drug Halt Hinders Executions in the U.S.”

35. Holly Williams, “Meet the Woman Behind a Shortage of Execution Drugs,” *CBS News*, April 30, 2014.

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38. Texas Assistant General Counsel Patricia Fleming to Texas Attorney General Greg Abbott, September 28, 2010, American Civil Liberties Union.

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40. Justine Sharrock, “Undercutting Executions,” *Mother Jones*, December 28, 2001.

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42. *Ibid.*

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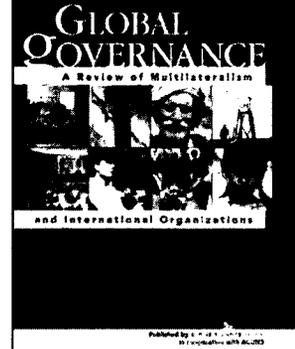
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