

## STONE, TREES, AND STANDING

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### ABSTRACT

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In his seminal law review article and book of the same name, *Should Trees Have Standing?* Christopher Stone argues that we should give natural resources, such as lakes, streams, and wilderness areas the right to sue in court for wrongs against them. Nature would be represented by organizations, such as Greenpeace, that have its interests in mind. I believe, however, that Stone's system, if implemented, would run afoul of the American Bar Association's model rules of ethics regarding conflicts of interests. Such conflicts suggest that the environment, contrary to Stone's assertion, cannot have any "interests" as a whole. Finally, I contend that Stone is seeking to advance a legislative agenda that runs contrary to the purpose of the courts and that the current legal system provides sufficient remedies for Stone's concerns.

### INTRODUCTION

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*"I am the Lorax. I speak for the trees.  
I speak for the trees, for the trees have no tongues.  
And I'm asking you, sir, at the top of my lungs" –  
he was very upset as he shouted and puffed –  
"What's that THING you've made out of my Truffula tuft?"*

- Dr. Seuss, *The Lorax*<sup>1</sup>

When Christopher Stone wrote "Should Trees Have Standing?" for the *Southern California Law Review*,<sup>2</sup> perhaps he tapped into the same inspiration that Dr. Seuss had when he wrote *The Lorax* a year before. Ought there not be someone, thought Stone, who "spoke for the trees" in court against federal agencies that would sell them out and private developers that would rape and plunder them? The response to the article was both swift and split. Individuals filed suits in the name of a river, a marsh, a brook, a beach, a national monument, an individual tree, and even a whole species.<sup>3</sup> On the other side, one wag in the *American Bar Association Journal* expressed his doubts in a poem:

Our brooks will babble in the courts,  
Seeking damages for torts.  
How can I rest beneath a tree  
If it may soon be suing me?  
Or enjoy the playful porpoise  
While it's seeking habeas corpus?<sup>4</sup>

The article was more than part of a debate about environmental policy. Indeed, Stone was arguing for a change to the doctrine of standing, which requires a plaintiff to suffer an "injury in fact" to bring a suit. He argued that we should appoint "guardians" or "conservators" for natural resources, in the same way a court may appoint a guardian to manage the affairs of an incapacitated adult. This guardian would then be able to file lawsuits in the name of the natural resource, as its representative, and prosecute cases to stop development that would be

detrimental to, or recover damages for, harm done to the ecosystem. While Stone's theory was rejected in the case he was hoping to influence in the Supreme Court, *Sierra Club v. Morton*,<sup>5</sup> it is still worth exploring as a theory of how the legal system can ensure that all stakeholders are represented in a development project, or impose the true costs of environmental damage on polluters.

### **STANDING AND SIERRA CLUB**

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The Constitution is mostly quiet about the issue of standing. Article III simply accords federal courts the right to adjudicate, among others, "all Cases affecting Ambassadors, other public Ministers and Consuls...[and] to Controversies to which the United States shall be a Party."<sup>6</sup> The Supreme Court has seized upon this "case or controversy" language to establish a judicial doctrine of "standing," that is, whether a party to a case has a "personal stake in the outcome of the controversy,"<sup>7</sup> so that the matter will be presented effectively by each party claiming to have a stake in it. It would make no sense for me, for instance, to bring a suit to recover damages on behalf of my girlfriend if she gets into a car accident. She has to be the one to bring the suit – she has "standing" for the suit, and I do not, because she was the one whose car was wrecked, not mine. Courts say that she has suffered an "injury in fact" while I have not, because her property has been damaged and my interest, at most, is tangential to hers.<sup>8</sup>

This "injury in fact" requirement is what dogged the Supreme Court in Stone's iconic case, *Sierra Club v. Morton*. The Petitioner, Sierra Club, sued to block the development of a \$35 million ski resort by Walt Disney Resorts in the Mineral King Valley. The United States Forest Service had approved a prospectus permitting private companies to submit proposals in response to growing public demand for skiing facilities, and Disney was selected from six bidders.<sup>9</sup> Under Section 10 of the Administrative Procedure Act, the law which governs a federal agency's rule-making power, a "person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant action" is permitted to bring suit to block that action or seek redress.<sup>10</sup> The question, then, was whether the Sierra Club, which had asserted its interest in the case as an organization with "a special interest in the conservation and sound maintenance of the national parks...of the country" was a "person suffering legal wrong" under the Act that had standing to sue.<sup>11</sup> The Supreme Court had previously adopted the "injury in fact" standard to clarify the wrong one had to have suffered in order to have standing to challenge an administrative decision.<sup>12</sup>

The Court acknowledged that a loss of aesthetic beauty is a loss or wrong just as much as a wrecked car is, but the Sierra Club did not allege that "it or its members would be affected in any of their activities by the Disney development."<sup>13</sup> Thus, the Club did not meet the "injury in fact" requirement of the Administrative Procedures Act judicial review requirement, and the Court affirmed the Ninth Circuit's dismissal of the case. The Court worried that if Sierra Club could defend an area merely by showing concern about the area, anyone could bring suit on behalf of anything, so long as one could show a genuine interest. As Justice Stewart wrote for the majority,

But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.<sup>14</sup>

To overcome this hurdle and allow organizations that may not have the requisite injury in fact to adjudicate the interests of a wilderness area in court, a different conception of “standing” was needed. Stone offered an answer.

### **GUARDIANS FOR TREES**

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In his “Should Trees Have Standing?” Stone implores us to consider the “unthinkable” of expanding our conception of legal rights holders to the natural world. The trend, he says, is not unprecedented. We have given rights where none existed before to prisoners, illegal aliens, the insane, Blacks, Indians, even children. This, among other things, says Stone, shows just how far we have come in considering “not only the welfare, but the happiness of all...fellow men.”<sup>15</sup>

And those, argues Stone, are just the groups of human beings we have recognized as legal persons worthy of rights. We’ve gone further than that, and declared that the United States itself is an entity deserving of legal protection, along with municipalities, states, and corporations. It was, previous to this, says Stone “unthinkable” that a “legal fiction” such as a bank or a railroad would be allowed to sue in its own name.<sup>16</sup> Building on these precedents, Stone sees rights for non-human ecosystems, no matter how “unthinkable” today, as the next step.

In claiming that the natural environment has legal rights, Stone means to say three things. First, the rights-holding entity can sue in its own name and at its direction. Second, a court must take into account the injury to the entity when it grants legal relief. Third, the thing must be benefited by any legal relief granted. So, therefore, if a stream wins a suit for damages after an oil spill, the funds must be used for the stream’s benefit, if we are meaningfully to say that the stream possesses legal rights.<sup>17</sup>

Of course, streams cannot hire attorneys or decide when to go to court on their own. But neither can incompetents or children, and we accord them the status of legal rights holders. The former case is especially helpful in the case of natural objects, says Stone. In New Jersey, for example, when a party believes that an individual is incapacitated and requires a guardian to make legal decisions for him, he can apply to the Surrogate’s Court to appoint a guardian who would have the legal right to manage the incompetent’s affairs.<sup>18</sup> In the same way, Stone contends, an interest group that is concerned that a natural area may become or has been despoiled or damaged should be able to apply to a court to create a guardianship for that natural area. Like the guardian of a person, the area’s guardian would be able to bring suit to recover damages for harm done to the area, or sue for an injunction to stop the damage in the first place, all *on behalf of* the natural area. The stream would be the named party in the legal action, but would be represented by its guardian, the Sierra Club, or other environmental watchdog groups or local citizens’ coalitions that might assume the role of guardian.<sup>19</sup>

Such a system, says Stone, is preferable to relying on private property owners that may control the natural resource to sue to recover damages and impose the true cost of pollution on developers and industries. If, say, the individualized property damage to each property owner was small, but the aggregate cost of the damage to the natural resource was large, each property owner may not bother to sue and let the damage stand. Or, the polluter or developer may convince property owners to take an amount smaller than the actual damages to the natural ecosystem as a way to make a problem “go away.” Such a pay-off would eliminate the legal claim, but leave the natural resource damaged and not made whole.<sup>20</sup> Stone’s approach, by contrast, effectively pushes the externalities back onto those who cause environmental damage. Writes Stone of his guardian system, “We in effect make the natural object...a jural entity competent to gather up these fragmented and otherwise unrepresented damage claims and press them before the court even where...they are not going to be pressed by traditional class action plaintiffs.”<sup>21</sup>

For Stone’s system to work, we must find guardians capable of representing the interests of the ecosystem they claim to represent. Here, the system breaks down.

**CONFLICTS OF INTEREST AND ENVIRONMENTAL INTERESTS**

One of the most important rules in American legal representation is that an attorney represent his client with “reasonable diligence” or “zeal.”<sup>22</sup> To this end, he must avoid conflicts of interest that would prevent him from asserting his client’s rights in the best way possible. For example, if an attorney represented a corporation, he could not also represent an individual suing that corporation because of the reasonable fear that the attorney’s business relationship with the corporation would prevent him from aggressively pursuing his aggrieved plaintiff’s rights. As the ABA puts it, an attorney should not agree to represent a client if,

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>23</sup>

When considering, then, representation of a natural ecosystem, we should consider what interests an attorney-guardian seeks to advance. What we call the “Mineral King Valley” is really an ecosystem made up of the rocks, trees, fish, rabbits, deer, foxes, and whatever else resides within it. Therefore, an attorney-guardian represents the interests of the rocks, trees, fish, rabbits, deer, foxes, and everything else that resides within that named geographic area.

What, then, are the interests of these fish, rabbits and so forth? Darwin has taught us that the basic desire of every species is to thrive and reproduce. Species do this by eating, claiming territory, and finding suitable mates. In any ecosystem, however, the interests of one individual or species in a food chain are often directly opposed to the interests of another individual or species. The foxes, for example, in the Mineral Valley, want to eat the rabbits whereas the rabbits would just as soon prefer to be left alone. Sometimes the foxes eat the rabbits, sometimes they don’t. And so the population of rabbits becomes sustainable over time as the foxes serve as a predator to keep the rabbits, from, well, breeding like rabbits. This is a feature, not a flaw, of any stable ecosystem.

This presents two distinct ethical problems for attorneys who would claim to represent all of these different interests. First, some species may in fact be helped by development. Development often eliminates the natural predators in an area. This, in turn, leads to a population explosion among the species, such as deer, that used to be kept in check by those predators. If we are serious about attorney-guardians representing the interests of the animals as opposed to merely opposing any and all development, the deer should be filing *amicus* briefs in favor of development.

Second, joint representation of these opposing groups may sacrifice the interests of individuals or sub-groups for the good of the collective ecosystem. Take, for example, a Mafia crime family under indictment. Represented jointly, the whole family might do better by having a few members plead guilty and refuse to testify against the others. Yet, an attorney cannot possibly take representation of the whole family. Each person is entitled to representation that looks out for his interests first, not the interests of the collective he happens to belong to. The same is true of ecosystems. Each resource or groups of resources, is entitled to representation that looks out for its interests, rather than the ecosystem as a whole. An attorney-guardian cannot take collective representation for the entire ecosystem because preserving a balanced ecosystem, by definition, means that some of the members of the ecosystem have to be killed by other members of the ecosystem.

This is not an iron-clad argument. We could, perhaps, appoint one guardian for every subclass of entities in the ecosystem. For example, we might have People for Mineral Valley

Foxes, Inc. represent the foxes, whereas Rabbit Watch, Inc. would represent the rabbits. There might even be conflict among these subgroups, though. What if development would benefit one family of rabbits because it does not pave over its warren, while at the same time eliminating the warren of its chief rival for food and mates? Then it would seem that each of the two warrens needs its own representative. Maybe we can find a conflict-free way of representing each distinct interest. But what this all suggests is that finding attorney-guardians for ecosystems is more complicated than Stone would like us to believe.

But the larger issue is what we mean when we say that the ecosystem has interests. Stone addresses the objection that we cannot know the ecosystem's interests. He says that we can judge the needs of natural objects just as, say, a corporation's legal counsel can decide "the corporation" wants to appeal an adverse judgment. He argues, "We make decisions on behalf of...others every day; these 'others' are often creatures whose wants are far less verifiable...than the wants of rivers, trees, and land."<sup>24</sup> This argument is true enough, but Stone equates the wants of the individual items that make up the ecosystem (blades of grass want water) with the wants of the ecosystem as a whole. What's more, the corporation in Stone's example doesn't actually speak to the general counsel, even metaphorically. The corporation's wants will change as different people make up its leadership and management. Management's goals for the corporation will become the corporation's goals. It is not as if executives are slaves to some disembodied voice behind a curtain. They serve the corporation, in that they put the business's goals above their own individual ones (the well recognized "duty of loyalty" in employment law), true, but we expect the same of any employee in any organization.

Roger Paden questions this conception of an ecosystem's "interests." Ecosystems, Paden claims, *have* no interests; individual organisms within an ecosystem do. He writes,

The fact that ecosystems can maintain complex dynamic equilibriums does not...show that they are goal-directed. This is...because stability is not the 'goal' of ecosystems; it is instead a 'by-product' of the goal-directed behavior of their constituent organisms.<sup>25</sup>

He analogizes to "the market." Many people will say "the market rose today as a result of the President's announcement" or "the market felt the price was too high," but "the market" itself has no ultimate goal. Instead, the individual buyers and sellers *that make up* the market have goals and when they interact with one other, the system as a whole reaches equilibrium. But no one suggests we need to appoint a guardian to protect the soybean market's interests because the soybean market has no interests. In the same way, it is nonsensical to speak of defending an ecosystem's interests.<sup>26</sup>

This isn't to say the environment isn't worth protecting, or even that we do not have duties towards it. We can protect it both for its instrumental value to us, as well as its natural and aesthetic beauty, as Paden argues. But aesthetic beauty is a human value, not a natural one. The flowers and trees may be beautiful, but they do not appreciate their own beauty. As Paden aptly puts it, "The beauty is *for* us, but it is *in* nature."<sup>27</sup> But what it also tells us is that when we defend an ecosystem, we do it for our sake, not the ecosystem's. Thus, Stone's model of a "defenseless, but rights-holding" entity falls apart.

Stone does not claim only that the ecosystem has interests and rights; he challenges the very idea of standing as a prerequisite to bringing suit in the courts. I explore this "myth of standing" next.

### **THE "MYTH OF STANDING"?**

Steven Winters calls the doctrine of standing a "myth." Standing, he avers, is regarded as "*the* literal truth" and has misshaped our thinking about who has rights and who may assert them.

The doctrine of standing, he claims, conceives of individuals as individuals only, rather than as parts of groups and societies. According to Winters, “this perspective obscures the fact that individuals exist only as part of groups and larger communities of interest. And it obscures our ability to think about how best to protect and effectuate those interests in an interdependent world...There are no forests and no ecosystems.”<sup>28</sup> We should not, says Winters, be so focused on a model of a legal system that only adjudicates disputes between people or individual entities. We should be willing to stand up for the common social good and each other, says Winters, and our court system should remove the impediment of individual “standing” that prevents the representation of others.<sup>29</sup>

Stone, too, admits that his project was to remove what he considers the legalistic bar of standing, and allow courts to address the merits. As he writes, “[The *Trees* framework] seemed to be a more straightforward way to address the really motivating issue, which was not how all that gouging of roadbeds would affect the Club and its members, but what it would do to the valley.”<sup>30</sup> But the *Trees* framework and its rejection of the “myth of standing” asks courts to do what they are ill suited to do: sit as legislatures, beyond democratic accountability.

As the Supreme Court has explained, and since repeated, “We do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.”<sup>31</sup> If the regulation of public lands and land use in general is an appropriate legislative-regulatory function, then the power of the courts to review the decisions of our legislatures and regulatory bodies on these issues is (and should be) quite limited. The doctrine of standing limits parties from using the courts to challenge regulatory or legislative determinations for which they have no interest other than as lobbyists or interest groups. Only people who are actually harmed by actions may sue so that the courts retain their role as arbiters of disputes. If we abolish the bar of standing to get to “the really motivating issue,” we are asking courts to play legislator.

If the Sierra Club wants to object to development of federal lands, it has plenty of other ways to do so. The Administrative Procedures Act requires federal agencies to publish proposed rules or regulations ahead of time and allow any member of the public to comment on them before the rule becomes final.<sup>32</sup> In other cases, the Act compels public hearings so that public comment may be made in person before the regulatory agency.<sup>33</sup> Many states have acts similar to the federal APA.<sup>34</sup> The Bill of Rights, too, protects the public’s right “to petition the government for a redress of grievances.”<sup>35</sup> Environmental groups can lobby the House, Senate, and President for a change of environmental policy, or to block development of a particular area. In the end, however, it is Congress, State legislatures, and their appointed regulatory agencies, not the courts, that have the power to manage public lands.

In response, Stone argues that the regulatory agencies are, in fact, in conflict with the very ecosystems they are charged to regulate. They are, says Stone, “charged with several institutional goals...and [are] currently looked to for action by quite a variety of interest groups, only one of which is environmentalists.”<sup>36</sup> Even if Stone’s description of the regulatory process is accurate, it does not warrant elimination of the standing requirement. If there are institutional failings in regulatory agencies, that is a call to reform those agencies, not to create an entirely new role for the courts in land management. Moreover, Stone’s concerns can be adequately addressed under current legal doctrines.

### THE LAW OFFERS ADEQUATE REMEDIES

Recall, earlier, that when I rejected the idea of an environment's "interests," I identified two alternate reasons for protecting natural ecosystems: loss of resources for us and aesthetic beauty. Both interests can be adequately protected under the existing doctrine of standing.

When it comes to loss of resources, individuals may sue for damages for the resources that cannot benefit them anymore. Stone argues that some plaintiffs may not have claims worth pursuing, because they are so small individually, even though they are large in the aggregate. Class action law, however, addresses the problem neatly. It allows a representative plaintiff, whose claims adequately represent the entire class, to bring suit on behalf of the class, and in so doing aggregate small individual claims into one larger suit.<sup>37</sup> Thus, the externalities of environmental damage can be adequately imposed on the polluter without having to rely upon regulatory agencies or the legislature.

The second reason is not economic, but aesthetic. Ecosystems are beautiful, and we ought to attempt to keep them that way. But as the Supreme Court itself acknowledged in *Sierra Club*, even purely aesthetic damages are adequate to prove an "injury in fact." "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society."<sup>38</sup> The problem was not that the Sierra Club could not meet the standing requirement on purely aesthetic grounds. It was that the Club had not asserted any particular interest in the aesthetic beauty of Mineral King that would be injured, such as its members hiking, boating, or camping there. If it had, the case might have turned out differently. Stone's "problems" are problems only if we accept that ecosystems have interests.

### CONCLUSION

The Lorax may speak for the trees, but it is not clear the trees need anyone to speak for them at all. An ecosystem's value is derived from human values. As we have seen, an ecosystem has no goals and thus cannot have any interests that need speaking for. To say that the Sierra Club or any non-profit organization "speaks for the trees" is to say, at best, that it speaks for the love its members have for the majesty of trees and the beauty of unspoiled wilderness. While this is a noble and worthy cause, it offers no grounds to challenge the doctrine of standing, nor is it a reason to transform courts into legislative bodies.

Stone offers reasons to reform our administrative agencies and make them more responsive to aesthetic and ecological concerns. And we should urge truly aggrieved parties to bring suit when they are harmed by agency or private action. But Stone, however noble in intention, has failed to show that natural resources should be extended standing.<sup>39</sup>

<sup>1</sup> Geisel, Theodor. *The Lorax*. New York: Random House Books for Young Readers, 1971.

<sup>2</sup> In this paper, I cite Stone's *Should Trees Have Standing*, a book of the same name as the law review article. The article, according to Stone, was "brought out in book form utterly without re-edit -- essentially photocopied, in fact...." See Christopher Stone, "Should Trees Have Standing? Revisited: How Far Will Laws and Morals Reach?" 59 S. Cal. Law Rev. 1 (1985). (Hereafter *Trees Revisited*).

<sup>3</sup> Stone. *Trees Revisited*, 59 S. Cal Law Rev. at 4.

<sup>4</sup> Naff, *Reflections on the Dissent of Douglas, J.*, in *Sierra Club v. Morton*, 58 A.B.A.J. 820 (1972).

<sup>5</sup> 405 U.S. 727 (1972).

<sup>6</sup> U.S. Const. Art. III, Sec. 2, Clause 1.

<sup>7</sup> *Baker v. Carr*, 369 U.S. 186, 204.

<sup>8</sup> Legal Information Institute. "CRS/LLI Annotated Constitution Article III." 3 December 2005.

<[http://www.law.cornell.edu/anncon/html/art3frag17\\_user.html#fnb346](http://www.law.cornell.edu/anncon/html/art3frag17_user.html#fnb346)>.

<sup>9</sup> *Sierra Club*, 405 U.S. at 728.

<sup>10</sup> 5 U.S.C. 702.

<sup>11</sup> *Sierra Club*, 405 U.S. at 729.

<sup>12</sup> See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 157 (1970).

<sup>13</sup> *Sierra Club*, 405 U.S. at 735.

<sup>14</sup> Id. at 739-740.

<sup>15</sup> Christopher Stone. *Should Trees Have Standing? – Toward Legal Rights For Natural Objects*. Los Alitos: William Kaufman, Inc., 1974. p. 3-4. (Hereafter *Trees*).

<sup>16</sup> Id. p. 6.

<sup>17</sup> Id. p. 11.

<sup>18</sup> See New Jersey Court Rule 4:86-*et. seq.*

<sup>19</sup> Stone, *Trees*. p. 17-19.

<sup>20</sup> Id. p. 13-16.

<sup>21</sup> Id. p. 28.

<sup>22</sup> American Bar Association Model Rule of Professional Conduct (A.B.A. MPRC) 1.3. See also New Jersey R.P.C. 1.3.

<sup>23</sup> A.B.A. MRPC 1.7.

<sup>24</sup> Stone. *Trees*. p. 24.

<sup>25</sup> Roger Paden. “Two Kinds of Preservationist Ethics.” *Environmental Ethics: Readings in Theory and Application*. Ed. Louis Pojman. Belmont: Thompson Wadsworth, 2005. 182-188. p. 185

<sup>26</sup> Id.

<sup>27</sup> Id. p. 187.

<sup>28</sup> Steven L. Winters. “The Metaphor of Standing and the Problem of Self-Governance.” 40 *Stan. L. Rev.* 1371, 1387-1388 (1998).

<sup>29</sup> Id. at 1515.

<sup>30</sup> Stone. *Trees* Revisited, 59 *S. Cal. L. Rev.* at 2.

<sup>31</sup> *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 423 (1952). See also *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991) and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

<sup>32</sup> See 5 U.S.C. 553.

<sup>33</sup> See 5 U.S.C. 556 and 5 U.S.C. 557.

<sup>34</sup> See, e.g. N.J.S.A. 52:14B-1 et seq. (New Jersey Administrative Procedures Act).

<sup>35</sup> U.S. Const. 1<sup>st</sup> Amendment.

<sup>36</sup> Stone. *Trees*. p. 25.

<sup>37</sup> See Federal Rules of Civil Procedure R. 23.

<sup>38</sup> *Sierra Club*, 405 U.S. at 734.

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