

FIDUCIARY – ASYMMETRICAL
POWER, ASYMMETRICAL
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Abstract

The legal concept of fiduciary plays a fundamental role in all financial and business organisations. It acts as a moral safeguard of the relationship between trustee and beneficiary, ensuring that the beneficiaries' best interests are met. It is often referred to as a duty of care. Originally formulated within familial law to protect property put into Trust, beneficiaries were women and children, allocated passive and subordinated roles. This paper investigates two aspects of the asymmetrical power relations central to the fiduciary. Firstly it reveals the gendered presuppositions regarding male and female agential capabilities on which the fiduciary is premised, drawing out the origins of the authority differential in the trustee-beneficiary relationship. Secondly, the paper engages with the ethical nature of the fiduciary relationship, arguing that Care Ethics offers a robust framework for explicating the history of the relationship, alongside delivering a morally-enhanced and future-fit fiduciary free of damaging gendered stereotypes.

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‘Studying juridical concepts in their historical context opens up new perspectives on institutional change and contributes to our understanding of social reality’¹

1. Introduction

The legal concept of fiduciary, from the Latin *fidūcia* meaning trust, plays a fundamental role in all financial and business organisations, as well as governing other professional relationships including medical care². It acts as a moral safeguard of the relationship between trustee and beneficiary, ensuring that the beneficiaries’ best interests are met. It is often referred to as a duty of care. Originally formulated within English common (familial) law to protect property put into Trust while the rightful (male) owner of the property was absent, for example fighting Crusades, beneficiaries were women and children, allocated passive and subordinated roles. As the lawyer Benjamin Richardson writes; ‘Historically, trusts arose in England primarily to protect family wealth and to provide for the wife and children, who were socially constructed as passive and dependent. Modern investment law transplanted these arrangements for the private trust into a very different context’ (Richardson, 2011, p. 6).

With this in mind, the fiduciary arrangement – referred to as both relationship or duty - could be said to have been devised as a substitute for a familial relationship, one supposedly underpinned by care, and taking place within the private sphere. In this way, the fiduciary, and its associated body of fiduciary law constituting part of tort law, is concerned with managing this substitute relationship in all its complexity, a point also made by Paul Miller who notes that; ‘Fiduciary law, more than any other field, undergirds the increasingly complex fabric of relationships of interdependence in and through which people come to rely on one another in the pursuit of valued interests’ (Miller, 2018, p.1)

However, what must be made clear alongside this acknowledgement of fiduciary and interdependence, is that the distribution of power within this relationship is not egalitarian. Indeed, the relationship is *premised* on an unequal distribution of power, of the trustee having power (and subsequent authority) over the beneficiary, with the trustee leading on decision making (economic or otherwise). So it can be safely concluded that this substitute caring relationship has a *prerequisite of a power mechanism*, of an assumed responsibility of the trustee, with the trustee leading the relationship.

It is crucial to draw attention to the rationale behind this power imbalance, to deduce why this power mechanism plays such an integral role in the fiduciary. This can arguably be done by fleshing out some of the presuppositions regarding the beneficiaries agential capabilities, presuppositions which underpin the social construction of passivity and dependency which Richardson draws attention to

– specifically that women (and children) were deemed to be without full reasoning capability, and so incapable of economic agency. Females (and children) were viewed as being without the necessary reasoning capabilities. They were allocated, as has been well-argued by feminist philosophers³, the role of being the ‘emotional gender’, whilst males were deemed capable of reason, and a result of this particularly dangerous and damaging gender divide has ultimately been the subservience highlighted by Richardson in the context of the fiduciary..

The assumed capabilities of this subservient role are now embedded in the fiduciary in the corporate context, and as Richardson writes; ‘Rather than treating beneficiaries as self-governing and responsible owners of assets, the trust provides a legal fiction whereby ownership and control become separated, with the owners (beneficiaries) assuming a subservient role while control is vested in trustees to act on their behalf (Watt, 2006). Trustees, unlike an agent who is subject to control of his or her principal, are not legally obliged to consult with beneficiaries. They only need to act in their ‘best interests’, yet they need not enquire what those best interests are.’ (Richardson, 2011, p.6), adding later that ‘the notion that investors are expected to be largely passive has become well entrenched as a matter of law and business practice’ (*Ibid.*)

2. Gender, essentialism, and power

The above brief introduction to the fiduciary, including its evolution as a juridical concept, along with the central role that power and care play in the relationship between trustee and beneficiary, highlights a number of central conceptual characteristics requiring further attention. Firstly, the foundations of the asymmetrical power at the core of the fiduciary, when read in light of this gendered relational dynamic, are revealed to be implicitly problematically sexist. Power differentials are open to abuse. Indeed, the assumed inequity of power between trustee and beneficiary is precisely why the fiduciary duty exists - it is there to safeguard against the trustee using their power to gain advantage - economic or otherwise - over the beneficiary.

Secondly, the (original familial) fiduciary also requires examination for the (essentialist) assumptions regarding the agency and capabilities of the beneficiary. In short, the fiduciary is premised on a fiction regarding the (ir)rationality and limited decision making capabilities of the (female) beneficiary. This is clearly a sexist and non-realist falsehood, steeped in assumptions about the supposed *nature* of females and their agency, assumptions referred to as essentialism. And what is more, another sexist non-realist falsehood also plays a part in the fiduciary, this time steeped in assumptions about (male) trustees as having rational and self-interested natures,

mirroring the fallacious claims made regarding rational economic man, also known as *homoeconomicus*, who is, by contrast to the supposedly selfless and emotional beneficiary, a self-interested rational agent. It is, supposedly, this self-interested nature which must be fettered via the fiduciary, to ensure against abuse of the position of trust the trustee is placed in. In short, the fiduciary is premised on a number of gendered non-realist falsehoods - relying on warped caricatures of the supposed natures of males and females which have since been shown to be erroneous and outright damaging - and neither males nor females emerge from the portrayals in a particularly pleasant or desirable light.

The space for this contribution is rather limited. Whilst there are a wider range of interesting angles to investigate regarding the fiduciary, the objective of the remainder of this paper, in keeping in line with the wider context of this collection, is as follows: i) to determine how fiduciaries are currently identified by judiciary and by doing so exploring the gendered asymmetrical power dynamic embedded in the fiduciary a little further, and ii) to offer some thoughts on what these investigations concerning exposed power structures, their non-realist provenance, and the lived experience of them can suggest about how the fiduciary relationship can be re-thought with realist underpinnings for future use.

2.1 Identifying the fiduciary and exploring the gender agenda

In his chapter focussing on how fiduciary relationships can be identified, Miller provides a helpful account of the multitude of ways in which fiduciary relationships are determined and recognised by judiciary. Miller's objective is to lay-out the process of identification; highlighting key characteristics that judiciary look for in determining if a fiduciary relationship existed. Noting the predominant use of two methods of identification - status-based and fact-based reasoning - Miller starts by outlining the 'default' position of status-based reasoning, drawing attention to the importance placed on social positions and occupations of trustees, occupations characterized by their underpinning by and predominant use of reason.

He writes:

'The prevalence of status reasoning is reflected in conventional wisdom about fiduciary law: one tends to think of fiduciary principles as attaching to persons by virtue of the legal or social role or position they occupy. Thus, we say that trustees, directors, agents, lawyers, and doctors are fiduciaries, and so too, by implication, we attach a fiduciary characterization to the relationships in which these persons perform their roles. We - and by 'we' I mean here to include lawmakers - usually say these things unreflectively. As we will see,

habitual reliance on status is encouraged by black letter law. Over time, fiduciary laws come to encompass an increasing number of kinds of relationship to which authoritative attributions of fiduciary status have been made. One searching for a principle of growth - i.e., clear public justification for the extension of status - will find it elusive' (Miller, 2018, pp. 7-8)

There is a lot to draw out of this statement, particularly if we use a lens of gender theory along with aspects of feminist philosophy to address and correct the lack of reflectivity (and thereby implicit presuppositions) which Miller so honestly and graciously highlights. What is crucial to note here, and to explicitly link back to the aforementioned allocations of the gendered emotional (f) and reasonable (m), is that until relatively recently, the identified professional roles - the roles of lawyers, doctors, Directors - were out of reach of females. And what is also crucial to note is that that these occupations afford participants the requisite *status* used by judiciary to identify fiduciary, with status implicitly imposing 'hierarchy', with those with status having power or benefits over those without.

It will be useful here to refer to a classic text which explores the emotion/reason hierarchy and its gendered history. Genevieve Lloyd's *The Man of Reason* (1984) was central in highlighting elements of this male bias and has since inspired generations of feminist theorists. In her book, Lloyd extensively reviews the way in which central figures in Western philosophy have set out the role of reason, of what it is, of how to achieve it, and what its purpose is. She examines how these central figures constructed reason within the context of gender, and how this maps onto wider social structure. By examining the work of Descartes, Rousseau, Kant, Hegel, Hume, Sartre and De Beauvoir, Lloyd demonstrates how reason has developed as an ideal, an ideal constructed *through the image of maleness*. An ideal which constitutes femininity as that from which transcendence, via rationality, can be obtained; the flight from the feminine and a *quest for separation*.

The result of the maleness through which this ideal has been constructed and the femaleness against which it has been contrasted, an ideal which can be said to have determined the course of philosophical and scientific method, is a philosophical history riddled with value-laden hierarchical dichotomies: of reason/emotion, male/female, rationality/nature, public/private. As Lloyd writes:

'What is valued - whether it be odd as against even numbers, 'aggressive' as against 'nurturing' skills and capacities, or Reason as against emotion - has been readily identified with maleness. Within

the context of this association of maleness with preferred traits, it is not just incidental to the feminine that female traits have been construed as inferior – or, more subtly, as ‘complementary’ – to male norms of human excellence. Rationality has been conceived as transcendence of the feminine; and the ‘feminine’ itself has been partly constituted by its occurrence within this structure.’ (Lloyd, 1993, p. 104)

The existence of such dichotomies is not however, as Lloyd is keen to point out, evidence of intentional construction, noting that ‘The exclusion of the feminine has not resulted from a conspiracy by male philosophers.’ (*Ibid.*, p. 109). However, exposing and identifying these dichotomies is crucial, for these are not harmless relics of the past. Such dichotomies are still very much active and effective in present day thinking. They underpin social structures and block progress. They continue to limit individual’s potential, and they narrow thinking:

‘Contemporary consciousness, male or female, reflects past philosophical ideals as well as past differences in the social organization of the lives of men and women. Such differences do not have to be taken as norms; and understanding them can be a source of richness and diversity in a human life whose full range of possibilities and experience is freely accessible to both men and women.’ (*Ibid.*, p. 107)

One need not look too far to identify how ‘past philosophical ideals’ regarding reason play out in gendered vocations listed by Miller. Indeed, I would argue that any search for ‘a principle of growth - i.e., clear public justification for the extension of status’ might do well to start with an examination of such philosophical ideals. And it is important to note the stickiness of such past philosophical ideals and the normative function they fulfil. Again, without having to expend too much energy in the search for examples, we see that those academic disciplines regarded as requiring advanced reasoning skills - including mathematics, philosophy, and law, and associated disciplines such as engineering and economics - are still widely dominated by male participants. It is then no coincidence that those careers which are dependent on the attainment and use of these disciplines, which are often seen as the pinnacle of reason, are also highly remunerated and afforded the high social status that ‘qualifies’ them to be identified as fiduciaries.

By contrast, examples abound of the low remuneration and poorer social status often afforded to those occupations on ‘the other side’ of the gendered dichotomy, such as caring roles including nursing and childcare, which whilst recognised for their crucial contribution to society, are caught in a

valued/devalued ‘care paradox’⁴, of being systematically morally elevated whilst being poorly remunerated.

But how does all of the above assist in exploring the gendered asymmetrical power dynamic embedded in the fiduciary? How does it draw out the *paradox of care* in the fiduciary, or help in explaining the *experience of asymmetry* in the relationship, both of which are important in the context of this collection? It is worth turning again to Miller’s helpful paper in this regard, and to the second most dominant method judiciary use to identify fiduciary *in the absence* of clear and evident ‘status-based’ reasoning; namely that of ‘fact-based’ reasoning, or the identification of ‘the necessary and sufficient properties of a fiduciary relationship’ (Miller, 2018, p. 11). It is here, in this second identificatory process, that perceived issues of vulnerability, of trust, and the role of power imbalance and associated issues of authority really come to the fore. In short, when the implicit role of power hidden in ‘socially accepted’ positions of status is removed, we get a clearer view of the experience of asymmetry in the fiduciary relationship. Noting that the identified range of necessary and sufficient properties is broad and often vague, Miller does however provide the following summary:

‘Fiduciary relationships are variably said to implicate: **the possession and exercise of legal authority and/or power by one person relative to another; an inequality in material position, power, strength or influence; the dependence and/or vulnerability of one person upon another;** a more specific susceptibility to harm, as where one’s assets or person is placed at risk of conversion or exploitation; the exchange of confidential or private information; a repose of trust and/or confidence; **the legal or actual incapacity of a party and/or a complete or situational inability to engage in monitoring, reporting, or other form of self-protection; the reliance of one person upon another;** or, one person’s expectation of goodwill, altruism, loyalty or competent or considered advice or judgment from another’

(*Ibid*, p. 12 - **emphasis added**)

It is in this list of characteristic properties, used by judiciary for fact-based identification of fiduciary, that the clear asymmetry of power embedded in the fiduciary relationship is starkly revealed. The disempowerment, legal and otherwise, of the beneficiary comes sharply into focus. By extension, it is also here that we see the degree of importance which the trustee - placed in such a position of power as ‘protector’ over the beneficiary (who, as we must recall, in the original familial context had limited choice regarding such dependency when

the legal doctrine of coverture is also taken into account, with married women legally obliged to sign-over all property to their husbands) - must consider this great moral responsibility and learn to *care well*. This moral responsibility being framed as one of caring is a point taken up by Goldstone, McLennan & Whitaker (2013) in their special report on fiduciary professions entitled 'The Moral Core of Trusteeship: How to develop fiduciary character'.

Situating their discussions squarely within the financial/Trusts context, and contemporising their example with the Trustee being female, they advise the following:

'But the trustee isn't pure minded. As Aristotle indicates, character shapes the passions. The equitable tradition (not to mention modern litigation) suggests that the first passion of this character is acquisitiveness. The trustee must develop a settled habit of choosing well with regard to taking and not taking for herself. Further, the tradition points to the importance of the passion of care. **The trustee has to develop a settled habit of caring well, both for the grantor (or her wishes) and for the beneficiary. Only by developing this active condition can a trustee hope to avoid the twofold pitfall of paternalism and infantilization**' (Goldstone, McLennan & Whitaker, 2013, p. 51, **emphasis added**)

So according to Goldstone et al the fiduciary relationship - or as they describe it 'good Trusteeship' (*Ibid.* p.50) requires the Trustee to develop 'a fiduciary character' (*Ibid.*), one which fundamentally involves learning how to *care-well*. But what does this entail? And how will it help avoid paternalism and infantilization (which can be interpreted as another articulation of over-caring and its associated issues of infringement of an individuals' autonomy).

Goldstone et al present a suggestion for how to develop the 'fiduciary character', and crucially -particularly within the context of ethics - they frame it in the language of 'the particular', as opposed to 'the universal', noting that, 'what's crucial to good trusteeship isn't primarily a set of rules, but the development of a type of character' (*Ibid.*), adding later that, 'Developing character involves shaping the vision of the good through attention to particular examples. We call this work exercising 'moral imagination' (*Ibid.* 51).

It is at this point that an introduction to the Ethics of Care, or Care Ethics, will be beneficial, in order to consider what 'caring-well' could look like, and to further unpack the suggestion of how fiduciary relates to care, or more specifically how fiduciary can be theorised using Care Ethics. Care Ethics is a contemporary body of ethical theory originating from the work of Carol

Gilligan, initially undertaken within the discipline of moral developmental psychology but later developed within philosophy and political science, and widely accepted to have stemmed from the publication of her book *In a Different Voice* (1982). Responding to the work of her supervisor Lawrence Kohlberg, who's Kantian influenced theory of moral development suggested that females appeared to 'stall' at the level of 'conventional morality' – characterised by Kohlberg as being hampered by a preoccupation with the maintenance of relationships and social order rather than considering and using universal principles and rights in the reasoning process - Gilligan instead identified a *different* moral orientation, expressed via a *different voice*. Summarising the process of moral reasoning she had identified, Gilligan notes:

‘In this conception, the moral problem arises from **conflicting responsibilities rather than from competing rights** and requires for its resolution a mode of thinking that is **contextual and narrative rather than formal and abstract**. This conception of morality as concerned with the activity of care centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules.’ (Gilligan, 2003, p. 19, **emphasis added**)

Gilligan's work was celebrated for its identification and validation of a moral perspective which has always been in existence but had become lost behind Western ethical theory that values individualist, rights and principle centred ethics (i.e. certain interpretations of Kant) - theory which had influenced Kohlberg's work. Returning to this paper's context, the importance of Care Ethics for theorising how the Trustee can develop a fiduciary character - including learning how to care-well - is two-fold. Firstly Care Ethics has a strong focus on the contextual/particular as opposed to universal rules, and secondly, and relatedly, the use of moral imagination, centring on responsibility towards an individual (beneficiary) and an understanding of their particular needs and best-interests, is paramount.

Taking Care Ethics into the realm of practice, by helpfully developing some normative guidance, Virginia Held builds on Gilligan's work in her 2014 paper, 'The Ethics of Care as Normative Guidance: Comment on Gilligan'. She writes:

'Practices of care call for sensitivity, empathy, trust and especially responsiveness to need. They cultivate the development of trust and mutual consideration. Care relies on the insights and motivations of the emotions as well as on reason. It values especially caring relations, not simply the dispositions of individual persons. In contrast with the model of the 'liberal individual' of the dominant moral and political theories, it conceptualizes persons as relational. It especially understands how the whole framework of self *versus* other, of egoism *versus* altruism, is misplaced for much of human life already, and how it could and should be reduced rather than expanded in applicability' (Held, 2014, p. 111)

But Held's work goes a step further in helping outline how Care Ethics can provide the requisite ethical framework needed by Goldstone et al for the development of their 'fiduciary character'. She directly confronts the issue that 'A common objection to the ethics of care is the supposition that it encourages paternalism. Instead of the rugged individual of contract theory, what is conjured up is the domineering mother. Not only is this a mistake, but on the contrary, the ethics of care may be unusually helpful in avoiding paternalism' (*Ibid.*). She continues by outlining an example of avoiding paternalism in development work, where there is a concern that caregivers can confuse their desires by projecting them onto the individuals they wish to help, resulting in a sort of unconscious paternalism. Held's conviction is that:

'Caregivers need to *learn* how to avoid doing so, need to *cultivate* the ability to distinguish their own needs and desires from those of the recipients of their care. The ethics of care directs them to do so and shows them how. It aims to enable people to provide and receive *good* care, not merely the minimal care required for life to continue, and to do so in morally admirable caring relations' (*Ibid*, p. 112)

This emphasis on needing to *learn* how to care-well - that caring-well is something that must be developed - clearly mirrors the suggestion of Goldstone et al, who, to recall, emphasise that 'Developing character involves shaping the vision of the good through attention to particular examples. We call this work exercising 'moral imagination', and who, to reiterate, are also keen to underscore that, 'The trustee has to **develop** a settled habit of caring well'. This is then a learning process indeed. And one which, as we may recall from the status-based reasoning used by the judiciary of earlier - which *still* unreflectively elevates

reason over emotion, and *still* sees reason as best detached from emotion - will potentially be resisted by 'fiduciary professions' who may view this form and subject of education as 'out of place', due to its confliction with still strongly imbued past-philosophical ideals.

2.2 A future-fit fiduciary, with realist underpinnings

I have of course promised to deliver on a second point; to reflect on how the above investigations - exposing implicit gendered power structures, their non-realist provenance, and the care paradox they present - can help in thinking through a future-fit fiduciary, one in which gendered caricatures no longer run riot through the underpinnings of an appropriated legal concept harbouring past philosophical ideals.

Where to begin? Thankfully, much work has been done in uncovering the damaging emotion/female and reason/male dichotomy on which some of the core tenets of Western philosophy were premised, and some of that work has already been highlighted (again, see Lloyd (1986) and Prokhovnik (2002), amongst many others). But the application of that work into feminist jurisprudence - or the philosophy of law - is still rather scant and requires focus. There has also been considerable work undertaken in exposing the caricature of rational economic man, or *homoeconomicus*, within the context of economic (and relatedly finance) theory (for recent contributions see Mussell (2018) and Nelson (2016)). However, the track-record of weakening *homoeconomicus*' hold on economic theory is not strong, despite robust, rigorous, and repeated arguments against. Why? Without laying out chapter and verse on the issue, I believe this has already been rather neatly summarised within the context of organisational and management studies - 'Culture eats strategy for breakfast'⁵ - and culture, which is performed and reinforced by people, acutely retains unconscious bias, protects vested interests, and may be highly resistant to change.

Out of theory and into practice, there is however arguable evidence of push-back against the fiduciary premise that trustee knows best, and therefore need not consult with beneficiaries regarding their best interests. One example is shareholder activism. This can take the role of increasing demands on investment managers to communicate investment decisions in the context of socially responsible investments. But shareholder activism also includes push-back against company Directors, not only questioning remuneration packages, but also demanding information on corporate social responsibility or sustainability strategies. The era of the silent shareholder, passive in their asset ownership, appears to be shifting towards a more vocal beneficiary, one who no longer accepts a purely subordinated position, but who instead demands details

of the rationale behind the trustees' decision making and calls into question their performance. A beneficiary who, it can be argued, demands a more balanced caring relationship, one in which practices of caring-well include 'sensitivity, empathy, trust and especially responsiveness to need' and one which 'cultivate[s] the development of trust and mutual consideration' (Held, as before).

3. Final thoughts

The Trustee - positioned as having power over the beneficiary - necessitates them being the leader in the fiduciary relationship, thus assuming a position of responsibility. The history of the fiduciary, including the premises regarding beneficiaries' agency and reasoning capabilities, are outdated and fallacious. They are founded in dubious gender politics upheld then by now outdated laws including *couverture*. Yet these presuppositions and the past philosophical ideals on which they are founded are still clearly evident in present day fiduciary relationships. So much so that judiciary unreflectively default to, and so perpetuate and reinforce, the supposed core characteristics by which a fiduciary can be determined. By emphasising and elevating reason in their reliance on status-based reasoning, and by seeking evidence of the characteristics of inequality, dependence, reliance and authority in fiduciary relationships, the inequity of power in the relationship is enforced as a key determinant.

The fiduciary relationship is at core a *moral* relationship. But the sort of ethical theory we can use to understand what *sort of moral nature* it is, need not be limited to only that of justice, rules and rights. Calls for a more sophisticated and nuanced appreciation of the fiduciary relationship, including that of the development of a 'fiduciary character', call for the Trustee to care-well, highlighting that 'good trusteeship isn't primarily a set of rules, but the development of a type of character'.

Care ethics can add something to the fiduciary conversation. With fiduciary and Trusts having their roots in familial law - in the domestic/private sphere where care has historically been relegated (although it must be noted that numerous care ethicists seek to contest and dissolve the public/private boundaries that confine caring to the private) - fiduciary has past dealings with care. Appropriated into corporate law as a way of placing assets into Trusts, and of keeping company Director's in check against acting in self-interest, the fiduciary relationship has morphed into more of a 'detached duty'. Indeed, that the language of deontological duty has become common place as fiduciary moves into the corporate/public realm from the familial/private may be of no coincidence. And on detached duty, it is worth highlighting that pension fund managers do not know who their investors are, and likewise investors have no

name or face to put to them. But there is increasing interest and concern about investment decision-making, with both institutional and individual investors demanding details of investment decisions, as well as demanding that fiduciaries ‘empathize with investors’ needs’ and ‘respond to the[ir] unique needs’⁶. The catalyst for change in development of ‘fiduciary character’, of leaders who care-well, could then be caused via agitation of their beneficiaries addressing the power asymmetry, or in other-speak, by increasing market demands.

Notes

1 Deakin, Simon. 2015. (p. 1)

2 Paul B. Miller. 2018. (p.1)

3 See Genevieve Lloyd *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (1986) and Raia Prokhovnik *Rational Woman: A Feminist Critique of Dichotomy* (2002) amongst many others.

4 See Vinca Bigo (2010)

5 Attributed to Peter Drucker (2006)

6 Black Rock 2017 Chairman's letter

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