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‘A PROBLEM SHARED...?’ SOME REFLECTIONS ON PROBLEM SOLVING COURTS AND COURT INNOVATION IN AUSTRALIA

Harry Blagg¹

Abstract:

There has been growing interest in recent years in developing ‘non-adversarial’ forms of court based justice, and exploring the potential for courts to take a lead role in resolving the underlying issues that ensure repeated contact with the justice system for particular groups. Problem Oriented Courts, such as community courts, drug courts, family violence courts and the like, originated in the USA but have taken root in societies across the globe. This article emerges primarily out of research and policy development work intended to inform an initiative in Victoria Australia called the Next Generation Courts initiative, which sought mainstream the problem oriented approach by adopting the non-adversarial paradigm as the basis for all future court development in Victoria.

Key Words: Problem Oriented Courts, therapeutic jurisprudence, restorative justice, neighbourhood court, CISP, Victoria/Australia.

Introduction

There has been growing interest internationally in recent years in developing what King *et al* (2009) call ‘non-adversarial’ forms of court based justice, and exploring the potential for courts to take a lead role in resolving the underlying issues that ensure repeated contact with the justice system for particular groups. The influential Centre for Court Innovation (CCI) in New York has provided a vibrant focal point for research and policy debate focused on what it perceives to be the twin pillars of current court reform: the practices of Problem Solving Courts (PSCs) and the philosophy of therapeutic jurisprudence (TJ), and has been actively promoting the ideas internationally.² Non-adversarialism presents a radical challenge to the ways we imagine the routine dispensation of justice in many instances: away from a bruising gladiatorial struggle to establish guilt or innocence, towards a collaborative enterprise concerned with healing harms and reintegrating offenders.

Community or neighbourhood courts (with their origins in run down neighbourhoods of New York) and a host of single issue ‘specialist’ courts (initially drug courts, now also family and domestic violence courts, mental health courts, re-entry courts, etc)

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² See, <http://www.courtinnovation.org/>

are familiar features on the modern judicial landscape, leading to claims that they represent a global reform movement (Berman and Feinblatt, 2005; Nolan 2003). These courts have created a demand for innovative forms of multi-disciplinary work, 'triage' processes, diversionary interventions, new forms of clinical and social assessment, and new linkages between the court and an array of agencies. They have significantly extended the density and complexity of court based processes through 'problem solving' meetings at various points of the judicial process, and positioning the 'front door' into treatment agencies within the courtroom itself. These developments are particularly intriguing given the predictions of that other (self-styled) 'social movement' - restorative justice (RJ) - that courts were an obsolete hang over from a bygone era, and that the future lay with a range of non-judicial, community directed alternatives.

1 Next Generation Courts

This article emerges out of research and policy development work intended to inform an initiative in Victoria, Australia called the Next Generation Courts (NGC) project, which sought to adopt a non-adversarial paradigm as the basis for all future court development in Victoria (Blagg and Bluett-Boyd, 2010), and some work in Western Australia as part of a review of court innovation by the Law Reform Commission of Western Australia (Blagg, 2008). The aim of the NGC research project was to make suggestions on how the key 'learnings' from a number of existing flagship PSC style initiatives in Victoria might be packaged into a transportable 'model' for all courts of the future – not just specialist courts. A worthy enough aim, but could it work in practice? Before attempting to answer that question, it is necessary to define some core terminology.

1.1 Court Authority + Therapeutic Agency = Problem Solving Justice

The Problem Solving Court, according to Berman and Feinblatt (2002), 'employs the authority of the courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities' (Berman and Feinblatt 2002; see also 2003). Winnik (1997, 23) describes therapeutic jurisprudence as drawing on 'the knowledge, theories, and insights of the mental health and related disciplines' on the premise that 'the law itself can be seen to function as a kind of therapists or therapeutic agent'. In a similar vein, Kay Pranis (2007) maintains that TJ 'is not a specific program or set of programs, it is an innovative response to the problem of crime, a set of values that guides decisions on

policy, programs and practice' (Pranis 2007, 14). Here, Pranis suggests that TJ involves change in attitudes and values, rather than simply new programs. For example, a more nuanced and considered approach to the needs of victims of crime involved in the criminal justice process, not now a priority, is one of a number of areas where a TJ approach could be said to offer significant benefits (Erez, Kilchlin and Wemmers, 2011).

1.2 Law and Therapy, Law as Therapy

Ari Freiberg (2004) sees the emergence of problem-oriented courts as a response to a changing social and judicial environment, exerting a range of new pressures on traditional courts. Legal proceedings, he suggest, should be less concerned with 'adjudicating past facts and legal issues to changing future behaviour of litigants and ensuring the future well-being of communities'. The PSC intends to balance therapeutic and legal outcomes, promote a collaborative rather than an adversarial approach within the court system, is people rather than case oriented, less formal in style, with the judge becoming a 'mentor' rather than an 'arbiter'. The PSC signals a significant shift in the way we perceive the space of the court, from a place that diverts or sentences someone *into treatment*, to a place where treatment *is administered* (see Moore, 2007).

In essence, the problem-oriented approach exploits the 'crisis' created by an arrest and court appearance to motivate offenders into facing up to problems underpinning offending behaviour, such as drug and alcohol addiction, entrenched homelessness, unemployment, social exclusion and family violence. Contact with the criminal justice system can of course 'concentrate the mind' - providing an opportunity for service providers to persuade difficult to reach individuals (and families) appropriate services (King *et al* 2009). One court worker in Melbourne we interviewed called this moment of opportunity the 'golden hour': a brief window for intervention that is soon closed up again when the offender returns to his/her damaged life style and/or environment.

1.3 What's the Problem?

From the perspective of the bench, the 'problem' often lies not just in the life-styles of offenders but in the dismal lack of coordination between agencies, their tendency to work within 'silos', and to see work as a zero sum conflict over scarce resources. The attraction of the PSC, from the point of view of judges and magistrates, lies in the leverage it gives them to persuade, coerce, cajole, entice and/or shame relevant agencies into working together, share information and pool resources, as well as be

immediately accountable for their actions and inactions. Our research confirmed that many judicial officers despair at the lack of a genuine commitment to joined-up service delivery by many agencies (beyond the rhetoric) and see judicial monitoring as a means of disciplining recalcitrant agencies as much as disciplining wayward offenders (see also King *et al* 2009; Porter, Rempel and Mansky 2010).

1.4 From Omniscient Truth Tellers to Enablers

The role of the judicial officer shifts considerably in the PCS. Judges 'move from being magical 'tellers of the truth' to becoming more process-oriented listeners, translators, educators and, if possible, facilitators (De Rosiers, 2000). The judicial officer spends time engaging directly with offenders, rather than relying on legal counsel, statute and precedence, and weighs up the written and verbal input of specialists (in mental health, addiction and treatment, cultural matters, victim advocacy, etc) before making an informed assessment and ensuring, through judicial review, that any undertakings are completed. On the other hand, while the problem-oriented approach is assumed to enhance the role of the judicial officer through judicial monitoring of cases, it implicitly recognises the limits of legal expertise in the resolution of complex problems. Ideally at least, the court becomes the site for collegiate styles of working, combining the expertise of a diversity of experts, legal practitioners, court support services and/or community agencies.

2 TJ v RJ: the Battle of the Acronyms

Like restorative justice (RJ) in its hey-day, the PSC/TJ assemblage attracts a devoted following, even stimulating a degree of semi-messianic fervour. It is being marketed globally as a panacea not just for crime problems but for 'broken' social systems and 'chronic social, human and legal problems' (Blagg, 2008). There are certain similarities in terms of style of presentation. For example, both RJ and POC/TJ advocates are enthusiastic binarists; counter-posing their fresh approach – generally portrayed as a 'paradigm shift' - with the (roundly discredited) old system. The later is presented as retributive, statist, backwards-looking, obsessed with adjudication and blame, bureaucratic and offender focused, while TJ or RJ are presented as forward looking, communitarian in outlook, balanced, victim centred and focused on harms not laws broken. King (2008, 3) suggests they both 'highlight the importance of empowering parties, of actively involving them in dispute resolution processes and of using processes that comprehensively address underlying issues'.

2.1 *TJ and RJ: Bedfellows or Opponents?*

There are, however, also key differences between RJ and TJ. RJ adopts an essentially subversive stance in relation to extant justice institutions and seeks to dethrone judicial sovereignty: privileging, instead, the communal ownership of conflict 'stolen' by the state, in Christie's (1977) well-travelled phrase. Restorative justice has, therefore, tended to favour non-judicial forums, including shaming and reintegration ceremonies, family conferences, and the like, to achieve its aims, and has been particularly influential in the development of diversionary options that deliberately seek to minimize – where they cannot bypass altogether – court involvement. Therapeutic jurisprudence, on the other hand, remains unrepentantly wedded to the structures and institutions of the court and to notions of judicial authority and leadership. RJ advocate, John Braithwaite (1999, 2004), sees restorative institutions increasingly doing the heavy lifting of the justice system, with the court taking a back seat. However, TJ advocates envisage a leading role for courts in driving a diversity of community based practices around neighbourhood renewal, disputes, restorative justice, conflict reduction, and school based mediation.

2.2 *Dystopian visions?*

The PSC/TJ assemblage raises obvious concerns for critical theorists. The innovation may refine and intensify, rather than reduce, the culture of control, in line with Stanley Cohen's dystopian vision (Cohen 1985). The poor, the addicted, the homeless, the marginalised, will receive social support only when they forgo some fundamental legal safeguards and accede to intensive levels of surveillance. Moore (2007) engages with the question of whether Drug Courts, for example, represent a continuation or a break with traditional notions of punishment. Moore maintains that, while there may be genuine benefits in terms of assistance in overcoming debilitating conditions, they 'maintain the same old practices of justice and punishment, only now they are known by different names' (Moore 2007). However, in recent (2011) work, Moore adopts a more nuanced stance, suggesting that the approach could mark a definitive shift in the structure of late modern judicial systems, moving beyond the punishment/treatment binary by providing 'surveillance justified for benevolent reasons' (Moore, 2011).

3 *Victoria: the Place to be for Justice Reform*

Like many jurisdictions in Australia, and internationally, Victoria embraced the PSC/TJ assemblage in the early 2000s. By 2009, Victoria had established twenty

PSCs dealing with issues such as diverse as drug addictions, family and domestic violence, mental health and homelessness, as well as a highly regarded Neighbourhood Court in Collingwood, City of Yarra, Melbourne. It had also developed a number of innovative court support services, such as the Court Integrated Service Program (CISP), intended to provide immediate intervention for clients with multiple needs in three Melbourne magistrates' courts. CISP focussed on offenders with a number of interacting problems, such as a mental health issue, an addiction, homelessness, an acquitted brain injury (found to be around 33% of all accused persons assessed by the CISP intake team) and/or be a victim of domestic violence. They also had a Koori (Aboriginal) worker who could liaise with the Koori community and minimize the tendency for Koori offenders (and families) to experience institutional racism when in contact with the system – a particularly welcome venture given the over-representation of Koori people in the justice system. These were often people who had repeated contact with the justice system and whose problems needed to be addressed holistically rather than in a piecemeal fashion. Victoria had a sound track record where victims issues were concerned; having introduced a number of important reforms, including the creation of specialist family violence lists, and the creation of Respondent and Applicants worker positions in a number of courts, and the creation of a designated Child Witness Service.

3.1 *Justice on Speed (not to Mention on the Cheap): Comparisons with the UK*

Nolan (2009) notes that despite some surface similarities, there are enormous local variations in the characteristics of PSCs internationally, as each is shaped to fit the specific contours of local justice practice and reflect local judicial sentiment – drolly observing, for example, the reticence of British judges to adopt the American practice of hugging successful drug court participants, we could add to the list handing out diplomas or calling offenders 'alumni'. Comparison with the situation in the UK reveals some other interesting contrasts in rational and approach. Evaluations of a number of community courts (Brown and Payne 2007; McKenna 2007; Mair and Milling 2007) which were ostensibly fashioned on TJ principles, reveal that despite investment in multi-agency cooperation, co-location of services and other problem solving initiatives (such as problem solving meetings), the UK schemes are replicating some of the very features of 'Macjustice' (Freiburg 2004), or production line justice, that POCs were originally designed to eliminate. Even co-location is presented as a production line process intent on increasing the speed of dispositions in line with central government requirements (Home Office, 2006), rather than

improving the quality of local justice. There may be features of the English court model (a lay magistracy, a tradition of judicial aloofness, lack of judicial continuity in courts) that militate against the development of problem solving courts on either the Australian or American models.

4 Researching Courts Down Under

Our research in Melbourne was intended to assess the extent to which PSCs and TJ could be distributed across courts and court jurisdictions in Victoria. We were particularly interested in whether successful elements of CISP and the NJC (discussed below) could be transported to other courts, including those in rural areas. These elements included:

- ‘triage’ (meaning to rank in terms of importance or priority) at the first point of contact with the court to make an early assessment about suitability for problem solving justice;
- a ‘no wrong door’ approach to accessing services (this refers to an approach that assists people in need to connect with appropriate services regardless of the agency where they try to gain access);
- a multi-disciplinary approach and co-location of services where feasible (particularly co-located actually within the court building);
- a high level of community engagement, with the court acting as a focal point for community regeneration;
- speedy access to treatment services;
- the use of problem solving meetings (for example, adjourning matters to convene a round table including the offender, support workers and clinicians to identify and resolve barriers to problem solving outcomes);
- consistent judicial oversight and monitoring

4.1 The Research Process

The research process involved piggy-backing on a number of ‘stake-holder forums’ being run by the Courts and Courts Services Branch of the Ministry of Justice: these forums employed an outside facilitator and invited participants, including magistrates, court registrars, police, clinicians, justice workers, legal services, prosecution services, relevant NGOs and community groups and representatives from Indigenous services, to identify pathways for court reform. We also conducted our own semi-structured interviews with key personnel in the judiciary, justice agencies, clinicians, NGOs and the academy; the aim being to drill down into the structures underpinning

the delivery of court services. The process also involved some observations of those Magistrate Courts supported by a CISP team, attending sittings of the Magistrate's Court and the Collingwood Neighborhood Justice Centre. We also hosted our own consultative workshops with key stakeholders. The research also benefited from close contact with the principle author of two recent evaluations of the NJC and CISP (see Ross, 2009; Ross *et al* 2009).

4.2 *The Neighbourhood Justice Centre (NJC)*

The Neighbourhood Justice Centre in Melbourne follows the model established in New York in terms using a refurbished building, rather than a purpose built court. The centre is multi-functional, housing a Magistrate's Court with one magistrate, Magistrate David Fanning, who hears all matters except sexual offences. David Fanning is well known, and highly respected in the local community. It is impossible to overstate the importance of having a consistent judicial figure with ongoing knowledge of, and responsibility for, a particular offender and his/her circumstances. The fact that the court hears a diversity of serious criminal matters differentiates it from Red Hooks, Midtown and other American neighbourhood courts, established to halt neighbourhood decline in line with Wilson & Kelling's (1982) 'broken windows' thesis, and therefore focusing on 'quality of life' issues such as persistent street crimes, begging and prostitution. The Collingwood NJC was developed to create an integrated and accessible system of justice through engagement with local communities and addressing underlying causes of crime. The approach stresses the importance of community participation, offender accountability and enhancing the quality of the court experience for participants. There is a strong emphasis on interagency collaboration and direct communication between the judicial officer and the offender. The collocation of staff and service providers on-site maximises the benefits of court supervised rehabilitation programs (Law Reform Commission of Western Australia, 2009).

4.3 *The Client Services Team*

The NJC Client Services Team includes specialists in mental health, drug and alcohol, Koori (Aboriginal) justice, general counselling and case-work – they are not just a brokerage service but do hands on work with clients. The team is supported by service agencies related to housing, victim support, chaplaincy, youth justice, employment and finance. Clients referred from court, or self-referred, are assessed to identify the nature of issues, then assigned to a case manager drawn from an

appropriate service area. The team works closely with community corrections. Representatives from most of these agencies are physically located in the centre with the court paying the salaries for these positions from its own budget. Budget control has been important in enabling the NJC to respond directly to the needs of clients.

The Ross *et al* (2009) evaluation found evidence that the centre was fulfilling key objectives in terms of developing a profile in the community, improving offender accountability while plugging offenders in to appropriate services. It had achieved higher compliance rates with Community Based Orders than other courts, had reduced re-offending compared to other courts, and was making a significant contribution to communities through unpaid community work. Ross *et al* conclude that the NJC represents a template for broader court reform, particularly in relation to the quality of its community engagement practices and the intensive clinical engagement with clients.

In addition, Ross *et al* argue that many of the NJC's key features could be introduced into other courts, particularly '[t]he physical location of defendants in the court, the review of defendants on community based orders, stable staffing by prosecution and defence to foster relationships of trust and respect...' They conclude that having a single magistrate with multi-jurisdictional roles tracking specific offenders would allow for more continuity across court matters. But they warn that courts needed to have access to multi-disciplinary client support service and provide intensive clinical engagement with clients to ensure success.

4.4 *The Court Integrated Services Program*

The Court Integrated Services Program (CISP) was established in 2006 in response to the Victorian Attorney General's *Justice Statement* of 2004, with A\$17.1 million allocated for the development and implementation of the pilot program. The CISP pilot operates in 3 Magistrates Courts (Melbourne, Sunshine and Latrobe Valley) and aims to provide intensive, broad based short-term support for accused persons both pre-plea and pre-sentence. Access to the service does not require a guilty plea. CISP simply targets those at risk of re-offending without requiring an admission of guilt, but rather a willingness to address one or more underlying problems. The program grew out of other Victorian court intervention programs, including the Court Referral and Evaluation for Drug Treatment Program (CREDIT/Bail) a diversionary program that only addresses drug-related offending. Under CISP accused people who have been

charged and have some involvement with the Magistrates' Court can receive up to four months of case management depending on the risk assessment conducted at the initial screening and the level of offending alleged.

4.5 Multiple Referral Points: or no 'Wrong Door' for Eligibility

There are various referral points for CISP, including the defence, prosecution, police and magistrates. Participation in the CISP is voluntary and does not necessarily impact on the sentencing outcomes of the accused. Assessment for suitability for CISP occurs rapidly, often on the same day as a court appearance. In accordance with key principles of therapeutic jurisprudence (TJ) it capitalizes on the immediate 'crisis' created by involvement in the justice system to encourage entry into treatment. We witnessed several instances of offenders being referred in the morning by a magistrate, assessed for suitability, and back on court in the afternoon; with a report set out before the magistrate outlining the recommended support services for the accused. Brokerage funds are allocated for needs such as housing, material aids and pharmacotherapy. Progress reports are provided to magistrates' from the defendant's case manager. Memoranda of Understanding exist between relevant support agencies to facilitate information sharing.

4.6 Case Management

Case managers are positioned in each court location with experience in dealing with a wide range of issues, including: drug and alcohol abuse; mental health; welfare needs; acquired brain injury; housing and homelessness, and issues facing Indigenous people. In the Melbourne Magistrates' Court there are 14 case managers who work with offenders on the program including 'team leaders' who are also responsible for the day-to-day management of the program. The CISP case management model places emphasis on individually tailored programs for participants. Furthermore, in contrast with many traditional pre-trial programs, case managers become involved in direct, therapeutic work with clients. The co-location of different disciplines within the team ensures that clients are matched with the appropriate professional. There are three levels of service response (Intensive, Intermediate and Community Referral); the assessment process identifies the level of support required in a particular case.

An evaluation of CISP by Ross (2009) found that it had achieved, or exceeded, its targets for the engagement and retention of clients, was able to match the intensity of intervention to the risks and needs of clients, and had achieved a high rate of referral

of clients to treatment and support services. The evaluation also identified a 20% reduction in re-offending rates for CISP clients, for those who did re-offend there was also a 4% drop in offending frequency while some 50% of CISP participants incurred no further charges. The review found a significant increase in mental and physical wellbeing of participants post their involvement with CISP. CISP was also value for money, A\$1.9 million per annum avoided costs of imprisonment as a result of the CISP program 3 – at the 3 sites where the CISP is based, Ross calculated cost saving to the community is up to A\$5.90 for every dollar spent.

4.7 *The View from the Field*

Participants in our research included clinicians, registrars, court workers, Koori justice workers, magistrates (including the Chief Magistrate and the Judge of the Melbourne Children's Court), police officers, prosecution services, third sector workers, community volunteers, court services professionals and bureaucrats. They identified a number of factors that made CISP successful from a stakeholder perspective. These included: the emphasis on individualised case management afforded by the initiative and a therapeutic advocacy approach that ensured consistency of service for vulnerable clients; the co-location of vital services at the court level, and the commitment to a 'joined up' approach; the multi-disciplinary referral system into treatment, that matches clients needs with appropriately skilled workers; the flexibility afforded by three level case management – intensive, intermediate and community; Service Agreements and MOUs with agencies and treatment services. Consultations found wide respect for CISP's capacity to give immediate support once the accused person comes to court ('immediacy matters most'). This early intervention reduces the likelihood of further offences being committed on bail.

In relation to the NJC, respondents praised the comprehensive client assessment and management approach and the direct access it offered into services locally; the consistency in judicial oversight through having one magistrate; and, the emphasis on community engagement. As with CISP, co-location was seen as a crucial element in relation to offender rehabilitation. For example, local mental health services are said to be notoriously difficult to access even for mental health professionals when they are not physically located in a mental health agency. Having an external mental health worker on-site with strong links to the mental health agency has given the

centre service credibility and direct and speedy access to services. The mental health worker is, literally, the 'front door' into the service. There was, surprisingly perhaps, little concern expressed about the loss of rights for offenders where the defence recommended a quick guilty plea to ensure rapid access to services. A number said that they were giving clients a better opportunity by working with other agencies and the courts to deal with issues such as drug abuse and mental illness.

4.8 Short and Long Term Strategies

King *et al* (2009) see increased application of TJ principles requiring that greater thought and planning is given over to the physical layout of courts in ways that makes it easier for clients to access services and for these services to liaise with one another. There is a need for different points of entry for accused and victims, safe and child friendly waiting areas, as well as distinct meeting rooms where dispute resolution, assessments and brief interventions could take place and where on-site, community and outreach services to can be housed. Less radically perhaps, Farole *et al* (2004, 7) distinguish between two sets of strategies: those that judicial officers could adopt now, with minimal additional resources, and long-term solutions. Immediately realisable strategies included 'triage... and exerting courtroom leadership to encourage attorneys and other parties to change their practices'. Longer-term goals included 'making the resources of collaborative justice courts available to all and instituting court-wide screening, assessment, and case management systems'. These forwards-looking ideals however need to be set against an increasingly neo-liberal funding environment and a punitive turn in justice policies in societies such as Australia. A change in government in Victoria has seen diminished enthusiasm for court innovation and reduced funding for treatment services. In Queensland the drug courts and Aboriginal courts have recently had their funding taken away.

Conclusion: The Problem Solving Local Court

Returning to our initial research question: could key 'learnings' from PSC style initiatives in Victoria be turned into a transportable 'model' for all courts of the future, not just specialist courts? There was no simple answer here. Consistent judicial monitoring of cases, perhaps the cornerstone of the PSC, becomes difficult to achieve across busy courts where judicial officers, and offenders, are highly mobile. One option is to use information technology to ensure that, as far as is possible, hearings coincide with the availability of a particular judge or magistrate. We

recommended, in the Victorian research, a number of initiatives that could help in shifting the culture of the justice system towards therapeutic goals. These included:

- 'triage' to begin at the registry, the first point of contact with the system. Negotiations with co-located agencies could ensure speedy diversion away from the system, through cautioning, or consideration for problem solving justice;
- in rural areas, consider having mobile clinical and case management teams to service small courts and make local justice feasible;
- develop protocols for initiating problem solving meetings and pre-trial conferences to ensure that judicial officers have a full understanding of offenders with complex needs;
- nurture 'bottom up' court liaison groups – not simply 'court users' groups – to expand community engagement and ensure meaningful support options in the community;
- support and encourage courts, courts services and relevant agencies to creatively explore 'hybrid' arrangements, tapping into services offered locally by entities such as local government, and non-government sector;
- ensure that vulnerable group (e.g. victims of family violence, children) are at the head of the queue in terms of accommodation in court, and support services.

The success of the Collingwood NJC and innovations such as CISP, demonstrate that courts can play a leading role in generating new solutions to entrenched problems. These were, however, relatively well-resourced pilot schemes and unlikely to become the blueprint for all courts any time soon. They do, however, demonstrate that meaningful change is possible, and that courts can cease to be just part of the problem and become a key part of the solution.

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