

Can law become curricula's guidance counselor?

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Kimberly G. Goslin

ABSTRACT: This article asserts that curricula, a living text, ought to take into consideration the virtues of fairness, justice, and integrity as found in law, in order to judge controversial issues of curriculum. This assertion is argued through a comparison of jurisprudence and pedagogy, as well as law and curricula. Dworkin's (1986) contention of "law as integrity" is used to frame the discussion from the perspective of law. Utilizing Wiggins and McTighe's (1999) conception of "enduring understanding", tests of soundness regarding controversial curriculum are considered for examination to determine curriculum's integrity.

Keywords: Curriculum, Decision-making, Backward-design, Jurisprudence

Today, the corpus of curricula is a living text which ought to take into consideration fairness, justice, and integrity as it evolves to improve. This assertion is made after considering another living text, the law, and determining a number of similarities, both on the surface and beyond, regarding law and curricula in education. This essay will not attempt to establish or clarify the history of curricula in education. Nor will it cite numerous experts regarding curricular development today. This essay will not engage in a critical discussion about the progressive or neo-liberal agendas influencing curricula. Instead, I consider curricula guiding what is taught in schools and universities broadly, much like the concept of law. In doing so, I discuss eight points regarding why curricula has commonality with law as it guides our larger society. From this perspective I then consider how three virtuous conceptions innate with law, namely fairness, justice, and integrity, can support and guide curricula development particularly in the case of controversial curriculum issues.

Before embarking upon that discussion a limitation must be revealed and a point of confusion illuminated. First, a chronologized history of education is not easily attained; particularly with regard to a more coherent and philosophic perspective linking the social actions of teaching and learning from period to period. Certainly there are histories of education for nation states and the histories of educational innovation as often recorded in the journal, *The History of Education*. One might suggest that these histories are, as Ball (1997) described, histories of the dead for they describe the people and innovations of the past. Chronologies of education seem to examine the intentions of those who create curriculum and overlook the coherency and intentionality of the overarching principles. That is, unless we use curricula as evidence with that intention. Possibly curricula, like statues and laws are the evidence needed. If this be the case then curricula relates to pedagogy like law relates to jurisprudence. This raises two questions. If law can be distinguished as either common or statute (Black, 1979), can curricula be distinguished in any similar fashion to validate this simile? Secondly, how are jurisprudence and pedagogy similar? It seems appropriate to begin with the latter question since if there is no similarity, then the comparison fails completely.

Jurisprudence and Pedagogy

Jurisprudence is referred to as the "science of law, namely, that science which has for its function to ascertain the principles on which legal rules are based" (Black, 1979, p. 767). Further, this function goes beyond sorting and classifying rules of law but extends to "show the relation" (p. 767) in which laws stand with one another. Derived from the Greek word *paidegogos*, pedagogy refers to the science and art of teaching or the "study that deals with principles and methods in formal education" (Merriam-Webster Online, 2005). While there is a noun-verb grammatical incongruity between the two terms (law and teaching), the more important essence is that both focus upon a 'science' of performance and engagement. Both suggest a systematic approach to organizing and understanding disciplines of knowledge. Further, both appear to be guided by 'principles' and a methodology. For at least this discussion, it could be assumed that jurisprudence and pedagogy are similar enough to entertain the second question.

"With reference to its origins, 'law' is derived either from judicial precedents, from legislation, or from custom" (Black, 1979, p. 796). This description accounts for the distinguishing of statute law and common law. Law follows from legislation passed down by governing bodies or law established from customs within a culture. For the purpose of this discussion a curriculum might be defined as a "blueprint for learning that is derived from content and standards" (Wiggins & McTighe, 1999, p. 4). Curriculum suggests an end point, something beyond a syllabus, in which "they specify what the learner will do, not just the teacher" (p. 4) in the sense of an outcome achieved. Like law's

distinguished domains, curricula can be distinguished as "intended" and "implemented" (Jacobs, 2004). The intended curriculum describes the legislated curricula of the state often referred to in practice as 'curriculum guides' or 'programs of study.' Like statute law, this kind of curricula contains the intentions and purpose - the philosophical underpinnings of the curricula, much in the same way Dworkin (1986) suggested "legislative history" fixed upon the "public statements" as "reports of public purpose and conviction" (p. 350). Legal decisions of integrity take these into account in a principled way helping to ensure a coherency in interpretation. It is the aim of this discussion to demonstrate that when curricula are considered in a similar light, it too should have a similarly sound foundation from which to guide decisions.

Law and Curricula

But what of the comparison of common law to curricula, how might that relate? Jacob's second term, 'implemented' curricula refers to the curriculums commonly found in classrooms: the curriculum of the teacher (Jacobs, 2004). The implemented curriculum is unique to classrooms and schools much like common law is normatively unique if we accept the proposition that schools and education have a culture (Deal & Peterson, 1999). The recording of common law might be considered similar to the recording of unit plans and even lessons. However, the comparison begins to become strained since the implemented curricula falls out of or follows the intended curricula according to Jacobs (2004). This kind of relationship is not necessarily shared as explicitly between common and statute law. Dworkin (1986) suggested that the same guiding principles of fairness, justice, and integrity apply to both statute and common law. This raises a question for discussion regarding whether both the intended and implemented curricula are also guided by like principles. That is, can we apply conceptions of law to curricula as tests of soundness regarding what curricula represent? Therefore, for the sake of advancing this discussion, we can accept that as law is distinguished in type and properties, so is curricula. In accepting this we can confirm the analogy as having some legitimacy giving license to further, more characteristic comparisons. Before proceeding I wish to point out some other deductive similarities that appear rather dogmatic but interesting nonetheless.

Curriculum Is Like Law When...

If "Law is an interpretive concept," (Dworkin, 1986, p. 410) then curricula must also be. Teachers, educators, and professors decide the curricula for schools and educational systems by interpreting the general theories of knowledge and learning, the bodies of knowledge or disciplines, and the past successful practice of other educational professionals. Any one curriculum is intended to be the best interpretation of these concepts. This alone is a compelling argument for the consideration of applying the test of soundness associated with law to curriculum. But this would suggest that any interpretive act should be able to be challenged by this test. The interpretation of a passage of a foreign language or a grand master's paintings would also likely survive such rigor, so this does little to suggest curriculum is any more similar to law than language or paintings.

Law text sets out parameters to guide behavior of those in a society. Curricula delineate the knowledge base. It guides the learning of those within the society. But while it could be said that both have the potential to guide community members, it could not be declared that either are the sole sources of guidance. We learn from sources other than the formal curricula of school just as our societal behaviors are guided by other things beyond the text of law. Simply declaring both as being guiding forces within society is interesting but hardly reason to advocate for the use of rigorous legal tests for curricula.

Certainly time has an effect on both law and curricula. Controversies due to the antiquity of either certain laws or parts of curricula raise issues of reform. While Dworkin (1986) made an elegant argument for and against the validity of using conventionalism, or pragmatism as a means of determining controversial questions in law, there is no such discussion regarding how controversies in curricula are decided leading one to think that a more ad hoc, political, and less principled approach might be in service. This opens the door to consider integrity, which Dworkin promoted as the ultimate approach to resolving controversial legal issues, as a possible method of developing a consistent approach to examine curricula controversies.

Both law and curricula have divisions or compartments that in educational terms are described as disciplines or subjects. There are more than fifty-five different divisions of law (Black, 1979) from Adjective to Written. Using the programs of study of Alberta, Canada, as an example, Kindergarten to Grade 12 education offers seventy-nine disciplines or subjects from Aboriginal Studies, to Swine husbandry, to Wildlife. This works in favour of curricula as it does law. First, it promotes predictability in that structurally they "make sense to people" allowing interpretation with "practical boundaries that seem natural and intuitive" (Dworkin, 1986, p. 252). Second, because the compartment grows antiquated or isolated, examination and interpretation of the condition is warranted in both settings. Possibly 'Forrest Law' has succumbed to the same aging fate as 'Latin.' The question for both judges and educators regarding how to deal with the controversial question of their future is the same one regarding the coherent integrity of the compartment with respect to the unified body of all the divisions.

Inherent power is part of both law and curriculum; however, originating from different sources (Marshall, 1998, p. 557). Government's legitimate use of coercive power as authorized by law is considered by Dworkin (1986) who argued that the source is not simply in the law or legal terminology but within constitutional structure and practices which cause citizens to "have a general obligation to obey political decisions that purport to impose duties on them" (p. 191). The legitimacy is strengthened through the integrity which the law has. Curricula's source of power is one of expertise in the sense that knowledge is a commodity controlled by officials authorizing curricula and teachers disseminating it within the class. Foucault's dissertations on knowledge-power have traced the more raw aspects of education, including discipline, punishment, and docility training to his studies of prisons creating an interesting intersection of law and curricula (Hoskin, 1991, p. 31). An additional common source of power for both law and curricula is located in legitimacy in the sense of imposition from above. The hierarchical position of the state's highest courts and legislative ministries are regarded as providing legitimacy to their own declarations. However, declaration and fidelity to what was declared in the process of implementation are often inconsistent reducing the effect of this power source (Dale, 1999).

The last two deductive comparisons I wish to offer seem more rational as they speak not to surface comparisons but touch upon the actual principles recognizable in both law and education. The first is the notion of examination which I wish to discuss in relation to our seeking the truth. The second is considering law as integrity and how this conceptualization fits with Wiggins and McTighe's (1999) proposition of "enduring understandings" (p. 10) in educational curricula. This discussion will lead to positing the use of the concepts of fairness, justice, and integrity suggested by Dworkin (1986) as tests of soundness regarding the intended and implemented curriculum.

Examining Examination.

From the outset, Dworkin (1986) guided his discourse regarding jurisprudence toward the revelation of "truth" (p. 4) regarding law. This is a logical quest given that jurisprudence is referred to as "the philosophy of law, or the science which treats the principles of positive law and legal relations" (Black, 1979, p. 767). Philosophy urges the consideration of our beliefs about truth, as Honderich (2005) has suggested, epistemologically as "truths of reason and truths of fact" (p. 704). Dworkin (1986) examined law in precisely this way as evidenced in his conceptualizations and arguments of conventionalism, pragmatism, and integrity. The word I wish to highlight is 'examination' as this use of the term is consistent with Foucault's description of a "special micro-technology" which "combines the deployment of force and the establishment of truth: examination" (Hoskin, 1991, p. 31). The force associated with examination is the power found in authority, expertness, or legitimacy equally evident in the education and legal systems. Asserting a compelling argument suggesting Foucault as being a "crypto-educationalist" (p. 29), Hoskin quipped of the need to become a detective of Foucault's text, "to examine and read what is, in retrospect, under the noses of everyone all the time" (p. 31). This is not unlike what Dworkin (1986) insisted upon in the interpretation of "the record of the legislature itself" (p. 336) as something more than the hopes, expectations, or speaker's meaning which only becomes a quagmire of incongruity. Interpretation is a rigorous examination. The rigor of the examination is located in justice, fairness, and integrity. The force of this examination is found in the rigor, specifically, how well these three conceptualizations have been developed by those examining.

An equally important interpretation of examination is the notion of self-examination as part of the process of learning to learn. Referring to Foucault's *La Culture du Soi*, Hoskin (1991) summarized a practice of the ancient Roman era of developing a "life-long pedagogic practice practiced on the self wherein one learns to internalize the pedagogic voice, which recommends the proper art of good living, within oneself until it becomes oneself" (p. 37). Is this pedagogical voice not required in order for us to succeed in determining our responsibility and liability for our actions which may cause injury (Dworkin, 1986, p. 302)? We cannot come to the decision the question asks unless we undertake self-examination of not only the facts but also our reasoning. The point being offered here is that citizens are required to develop and utilize examination, or possibly a more current phrase, critical thinking skills, which are the same skills hopefully taught through a learning curriculum and successfully applied in legal instances.

For much of this essay I have used the terms fairness, justice, and integrity as if there is a universally shared and accurate definition of these terms, when in reality they are interpreted differently by people. Therefore, before considering how law as integrity fits with the proposition of 'enduring understandings' in educational curricula, some clarification of these terms is needed.

Justice.

Justice, Dworkin (1986) wrote, "is a matter of the right outcome of the political system: the right distribution of goods, opportunities, and other resources" (p. 404). It has history and therefore an accepted social institution. Justice guides decisions in the sense of what ought to be compelling decision-makers to be virtuous in their distribution of resources and the protection of civil liberties in a manner "as to secure a morally defensible outcome" (p. 165). Black's Law

Dictionary (1979) is less descriptive but succinct noting justice to be, "the proper administration of laws. In Jurisprudence, the constant and perpetual disposition of legal matters or disputes to render every man his due" (p. 776). In this case, 'due' refers to the "fixed or settled obligation or liability" (p. 448), or in other words, the goods, opportunities, and other resources rightfully distributed to him. How this might be interpreted in and for curricula will be the focus of the final discourse. For now, it is worth recognizing that justice incorporates notions of propriety, constancy, and perpetuity regarding the right outcomes.

Fairness.

Some assume justice as fairness in that if something is fair, then it must be just. However, Dworkin (1986) suggested fairness is a result of the "test of justice" and that these two are "independent of one another" (p. 177). If justice is a socially institutionalized system of the distribution of goods, opportunities, or resources that is defensible morally, then "Fairness is a matter of the right structure for that system, the structure that distributes influence over political decisions in the right way" (p. 404). Possibly Dworkin was overly influenced by structuralism in his definition. His tenebrous description implied the right structure to mean a process that has as its virtuous qualities, impartiality, honesty, and freedom from prejudice, favoritism, or self-interest (Black, 1979, p. 535). These virtues appeared in Dworkin's character Hercules as he deliberated the difficult cases. If I understand Dworkin (1986) correctly he wanted us to be sensitive to the idea that fairness, unlike justice, is not an outcome but a strategic process constrained by the described virtues which produce the just outcome. Hence, he is able to argue legitimately that fairness and justice - or process and outcome, can be at odds with each other (Dworkin, 1986, p. 177). Framing fairness in this way will allow for its application to curricula in the latter part of this essay.

Integrity.

Were it possible to capture what Dworkin (1986) described as integrity in two words I might suggest 'principled coherency.' Principled in the sense of withstanding examination regarding fairness and justice and coherent in demonstrating those virtues in a light that does not waver when compared to similar acts with which fit is a criteria. Dworkin, himself stated this much less cryptically writing:

"We accept integrity as a distinct political ideal and we accept the adjudicative principle of integrity as sovereign over law, because we want to treat ourselves as an association of principle, as a community governed by a single coherent vision of justice and fairness and procedural due process in the right relation (p. 404)."

Often Dworkin used the term 'soundness' intimating strength and stability of interpretation resulting from a principled examination. How does integrity as described in law relate to curricula and in particular the concept of "enduring understandings" posited by Wiggins and McTighe (1999)?

Integrity and Enduring Understanding.

The work of Wiggins and McTighe (1999) in their landmark book, *Understanding by Design*, has challenged the commonly held worldview of teaching and learning that suggested understanding was synonymous with either content knowledge, skill attainment, or a combination of these two. These authors examined that view, not through quantitative comparative analysis of student test results, but by testing the soundness of the thinking itself. As an example, does a student's knowledge of the multiplication tables to 12 allow the teacher to justly determine that the student understands multiplication or the associative principle in Mathematics? The answer to the question is no, which accounts for the most common declaration made by students in many Math classes, "I don't get it!" It is not that they don't know it; it's that they don't understand it. Wiggins and McTighe wrote, "Understanding involves sophisticated insights and abilities, reflected in varied performances and contexts. We [the authors] also suggest that different kinds of understandings exist, [and] that knowledge and skill do not automatically lead to understanding" (p. 5).

Linking understanding with curricula, Brunner (1960, as cited in Wiggins & McTighe, 1999) noted, "The curriculum of a subject should be determined by the most fundamental understanding that can be achieved of the underlying principles that give structure to a subject." These understandings are described as "enduring" as they "go beyond discrete facts or skills to focus on larger concepts, principles or process and as such they are applicable to new situations within or beyond the subject" (p. 10). What Wiggins and McTighe described has some familiarity with law as integrity in that identifiable principles that are coherent across a discipline provide the soundness of structure on which to base understanding. Further, the identification of the limitations of a knowledge base of discrete facts or skills brings to question the coherency of the teaching and learning when it is focused solely upon knowledge and

skills.

Recalling that the principle underlying the integrity of a concept requires the concept to be assessed in light of justice and fairness, and that the latter is a result of the examination of the former, then it stands to reason to assess the conception of curricular content as being an 'enduring understanding' able to withstand the test of integrity. Wiggins and McTighe (1999) offered an assessment tool or filter which proves useful for distilling this conception. This filter was to be used on all enduring understandings that educators wished to designate as such. First, it asks if the concept being examined has enduring or lasting value beyond the classroom. Second, the concept must be considered to "reside at the heart of the discipline" (p. 23). Next, the concept for learning must be abstract in nature requiring not coverage, but un-coverage. Finally, the concept must possess relevancy in order to engage students in the learning. The test for integrity is not whether these criteria are fair or just but whether or not they advance placing curricula into a better light. All curricular outcomes are important. However, does this process of examination reveal the truth about which outcomes are critical in our construction of our understanding of the discipline? That is, does this examination of curriculum help to distinguish if the learning outcome sought by students and teachers is more just and does it do it in a manner that is fair? Can the curriculum examined withstand the test of integrity?

Like many topics within curricula, there is continuous controversy as to whether students need to understand multiplication and how that understanding is determined. Using this as an example will demonstrate the previous discussion. Certainly we can agree that knowing the times-tables has value beyond the classroom. However, with the widespread use of calculators and auto-calculating devices, the value might be regarded as declining. Do the times-tables reside at the heart of the discipline of Mathematics? No. Number operations, of which multiplication is only a portion, does. But the times-tables do not. They are simply a pre-calculated finite list of products involving an operator and operand. The finiteness of this list is an actual source of misunderstanding for children later when they attempt to work with integers and decimal numbers since the original list does not include numbers below zero or between 12 and 20. The curriculum of times-tables has failed the test of being considered an enduring understanding, but for the sake of discussion I will use this example to consider the last two criteria of the test.

The third criterion suggests that enduring understandings require un-coverage by the learner in that the concepts are complex and abstract and even counter-intuitive. The orbit of the earth around the sun is such an example especially when we see the sun rise every day in the East. Like earlier civilizations, young children intuit the sun revolves around the earth and learning otherwise is counter-intuitive. The times-tables hardly need uncovering; simple memorization will do. This means that students can know the discrete facts of multiplication but have no idea as to how those products are arrived at. Finally, does knowing or learning the multiplication times-tables engage students? More often it is seen as a source of frustration, particularly in a technology rich world where most children have experienced and recognize the use of the micro-calculator embedded in the ruler purchased by their parents at the school supplies store. Likely they have played intuitively with the device enough to be able to master the tricky memory keys that some adults have difficulty mastering. For these students, memorizing a table of a combination of 436 variables likely seems stupid.

Utilizing the test offered by Wiggins and McTighe (1999) illustrates that the multiplication times-tables cannot be justified as an enduring understanding. Forcing students to demonstrate their discrete knowledge of them as an outcome interpreted by their teacher as 'understanding' is morally misrepresenting the coherent set of principles within the Mathematics education system. This does not suggest that knowing the times-table is not important but it does challenge the justification for expending three or four months of implemented curricular time on the activity. It does challenge the judgments teachers make when they declare in their reporting to parents and students that students have an understanding of multiplication. As has been suggested earlier, fairness flows from justice. The structure of examination to determine whether the student has an understanding of multiplication, based upon her or his fluency with the times-tables is flawed, making the judgment unfair.

Finally, we must judge whether the drill-and-practice teaching of times-tables for numerous weeks portrays such a curriculum and pedagogy in the positive light of integrity. Beyond the fact that the concept and process have already failed the test of the first two constraints, justice and fairness, neither can memorized knowledge of the multiplication tables be defended by coherency. Knowing the discrete facts of the times-tables has no connection with understanding that numbers represent an amount or that the magnitude (an abstract concept) of an operator affects an operand in a manner governed by laws. Obviously this is not in the language of students, but the concept is observable in students work with mathematical arrays. The times-tables cannot be claimed as an enduring understanding as it fails to demonstrate integrity within the larger system of mathematics.

The gap in the preceding argument is that it was made upon the premise that curriculum is strictly that which is implemented in classrooms. However, at the outset I suggested that curricula can be viewed as what is commonly occurring in the classroom but also as textual ministerial decrees I regarded as the intended curriculum. To account for this gap we need to consider what the intention of the Mathematics program of study was for multiplication and the

times-tables. For this brief discussion we must accept that different communities have different curricula similar to different nation states having different laws. To facilitate this discussion I will use the Alberta Program of Studies (Alberta Learning, 1997) as an example, not because it is superior or substandard to other curricula, but because it, like many others, follows the guidelines and principles of the internationally recognized body, the National Council of Teachers of Mathematics (NCTM).

Teachers and parents alike express the conventional wisdom of knowing the multiplications tables. The Program of Studies (Alberta Learning, 1997) requires Grade 3 students to recall multiplication number facts to 49 justifying the implementation of rote memorization of the times-tables as an instructional practice. However, this is only a strategy for success regarding that specific outcome. Being able to "apply an arithmetic operation (addition, subtraction, multiplication, or division) on whole numbers, and illustrate its use in creating and solving a problem" (p. 19) requires more than rote learning and becomes the crux of controversy regarding whether the teaching and learning reflects integrity. Simply knowing a finite set of products does not imply students can authentically apply the mathematical understanding through their creation of problems to solve. At best they could parrot examples the teacher had provided previously through drill and practice exercises. Teaching for understanding the principle of magnitude of change would be a learner outcome requiring students to demonstrate an application of the intended understanding. An assessment strategy that would reflect integrity of that intention would require students to create a unique problem, not mimic a previously encountered one (Wiggins & McTighe, 1999, p. 51). The Program of Studies further requires the student to be capable of justifying the appropriateness of the use of the calculation using models, diagrams, or algorithms. In other words, to demonstrate curricular integrity, students are expected to apply and explain the principles of multiplication, not simply rhyme off the facts.

The press for examination, as in revealing the truth regarding the knowledge the student has, is found in the general learning outcomes which state, "The student will demonstrate an understanding of...calculations" (Alberta Learning, 1997, p. 19). Assessing a student's performance using a timed facts test is clearly neither a fair structure nor a just determination of a student's understanding of multiplication calculations. The practice overlooks assessing the grasp students are to have about the principles coherent within the discipline.

What becomes evident through this limited discussion is that teachers might appear to exercise pragmatic consistency of their interpretation of curriculum into practice. They teach and test for knowledge. However, the requirement is also to teach and test for understanding. My experience tells me that this practice is less coherent across a school or the teaching profession than the practice of determining students' skill levels in recalling and manipulating number facts.

Through this examination of one example I have argued that when we consider a controversial educational concept, our articulating, teaching, and testing of a subject's enduring understanding does reveal the curricular concept in such a way as to determine if the curriculum and associated practices withstand the tests of integrity. In this way curriculum, like law, can be examined and interpreted in a manner that is defensible.

When Is Curricula Not Like Law?

I have argued that curricula and law have similarities which would permit the possible use of conceptualizations from law to help judge controversial curriculum issues. However, there seems to be a blatant difference between law and curricula in the fact that curricula are not actively examined, contested, and reframed as law is. Instead, I would posit that curricula are likely to be more influenced by conventionalism and pragmatism, particularly political pragmatism and therefore show weaknesses in integrity. This may be because curricula acts more like policy than law. It provides purpose or a tendency of actions for the general interest (Black, 1979, p. 1041; Dworkin, 1986, p. 221). However, Dworkin (1986) offers that "the legislative principle of integrity demands that the legislature strive to protect for everyone what it takes to be their moral and political rights, so that the public standards express a coherent scheme of justice and fairness" (p. 221). If this be true, then everyone has a right to access and attain, not just knowledge and skills, but the resource of understanding as embedded within the coherent scheme. From this perspective, intended and implemented curricula should be rigorously examined as if law.

Law as Guidance Counselor to Curricula

If curriculum is more like law than it is not, as I have asserted throughout this essay, then we can apply the three virtuous conceptions of law as tests of soundness and constraint regarding the interpretation of curricula. This position has been established first by considering commonalities between jurisprudence and pedagogy which supported further investigation. A deductive approach reasoned that law and curricula, seen as facets of jurisprudence and pedagogy respectively, exhibited sufficient similarity to entertain the question of whether curricula issues can be interpreted successfully utilizing the virtues of fairness, justice, and integrity. Utilizing the concept of enduring understanding as a tool for examination, a process shown as common to both jurisprudence and pedagogy,

it was demonstrated that controversial issues within a curriculum can be judged with greater integrity and be made more defensible using a coherency of principles.

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