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Consent and Sexual Emancipation

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Abstract

A Sexual Ethics of Consent does not give us the fullest substantially developed

view on what constitutes 'good' sex, but it does give us some crucial - be they

minimal - conditions of morally acceptable sex. When these are met, whatever

sexual project one favours, one cannot deny that these sexual relations are in an

important way better than those that do not meet these conditions. The

preconditions of valid consent, coupled with its rationale, are evaluationally

relevant and will figure in whatever emancipatory ideal of sexuality we could

rationally and intelligibly defend. Perhaps, then, a SEC is a marker of in stead of

a hindrance to an emancipatory sexual ethics?

Key Words: Ethics, Sexuality, Consent, Progressive Sexual Pessimism,

Emancipation

1. The Sexual State of the Nation

Lamenting the 'state of contemporary sex' seems to be a thriving academic business, and is, not surprisingly, probably just as booming as sex as a commercial business is blooming. These critiques come in many flavours, and are inspired by a range of different backgrounds and worries.¹

On the one hand of the spectrum we find conservative voices focusing on the alleged demise of traditional 'sexual morality.' Positions range from straightforward religious viewpoints, commendations and condemnations, to philosophical defences of chastity like G.E.M. Anscombe's, the sophisticated championing of traditionalist sexual ethics of Roger Scruton and John Finnis natural-law-based work on sexual ethics.²

Apart from these, we have the often politically inspired right-wing cultural critiques embracing a discourse warning us for a general demise of traditionally cherished values and norms – examples are the writings of Theodore Dalrymple (Anthony M. Daniels) and others, often underscoring the negative effects of a discourse in which individual rights trump socially-shared values and norms.³ But criticizing contemporary sexuality and sexual ethics and morality is not limited to these conservative voices alone.

Some feminists and some progressive intellectuals join the chorus, thereby echoing parts of the more conservative critiques, albeit on different grounds, from different backgrounds and defending different ideals.

Some contemporary feminists, inspired by second-wave analyses of gender inequalities and unequal power relations in contemporary 'post-sexual-revolution'-society, point out the persistence of a male-based sexual organisation of society hampering real sexual emancipation of female sexuality and perpetuating often

degrading and exploitative treatment and representations of women. These discussions on sexuality within the feminist movement are widely documented.⁴ The so-called sex wars from the eighties and early nineties are now being replayed in the discussions on the 'sexualization' and 'pornographication' of society and in the debates on (media)representation, female agency and the merits of 'postfeminism.' Right-wing and conservative religious voices cash in on this discussion as well.

Also a lot of contemporary 'progressive' - or 'liberal' - intellectuals, echo parts of these more conservative and feminist critiques. I label their position as 'progressive sexual pessimism' (PSP). Progressive, because they all share a broadly emancipatory outlook on sexuality, thus distinguishing their views from contemporary conservative critiques of (post)modern sexuality; and *pessimistic* because on the whole they take a rather dim view of the possibility of the realization of a healthy and emancipatory sexuality under the conditions of (post)modernity.

If all these divergent viewpoints have one thing in common, it is their unease with contemporary sexual practices, morals and ethics. Without necessarily going so far as the blatant moralistic outcries of the right and their Kinsey-bashing, there is a general tone of caution and disillusion. Have the sexual revolutions *really* brought us greater sexual emancipation? they wonder. Or have they only brought us more sexual liberties and opportunities - and licentiousness? - without a concomitant moral growth and sexual emancipation? And when did we go wrong, and why?

2. Critiques of Consent-Based Sexual Ethics

The sexual revolutions not only greatly transformed social and personal (sexual) life but had their impact on sexual ethics as well. Since the sixties and seventies, the idea that valid consent is not only a *necessary* precondition for allowable sexual conduct, but is also a *sufficient* condition has gained a firm footing in the minds of many laypeople and philosophers alike. A 'sexual morality of consent' probably is the *de facto* sexual morality of most of us.

A crucial part of the critiques of contemporary sexual ethics and morality has to do with the centrality, role and weight of this notion of valid consent in the development of such a contemporary sexual ethic and morality. Progressive sexual pessimists, some feminists and conservatives alike all have problems with an alleged 'reduction' of sexual ethics to a Sexual Ethics of Consent (SEC), thus impoverishing sexual ethics.⁸ In their view, the ubiquity of SEC contributes to our contemporary social, individual and moral malaise concerning sexuality because, among other things, such a SEC *cannot provide us with an emancipatory content and direction for a sexual ethics*.

A SEC, so it is claimed, is too 'minimalist' in scope. It can only teach us what actions are permissible and which are wrong, but offers us no further moral guidance. A SEC basically operates on the *normative* plane: it can tell us which actions are wrong and thus forbidden (non-consensual actions) and provides us with a necessary condition for all those sexual actions that are not-wrong, in the sense of 'permitted' (some consensual actions). But a SEC is mute on the issue of which actions are worthwhile or 'good' and is thus *evaluationally* neutral. Strong versions of an ethics of consent even argue that one can validly consent to what morally could be called 'bad' sex, like, e.g.,

prostitution sex, joyless sex, sexual objectification, etc.

A SEC, so the complaint goes, gives us only a *minimal normative and evaluative guidance*. It mostly tells us what *not* to do. And what it does tell us to do - making sure sexual acts are consensual - could perhaps better be formulated in the negative: avoid non-consensuality. But sometimes, perhaps, engaging in consensual sex isn't 'the right thing to do' - right?

Another way of formulating this objection is like this: a SEC is a formal ethic, focussed on procedures and necessary conditions, without substantial content and direction. According to Volkmar Sigush - one of the leading German critics of contemporary sexuality - such a SEC leads to a 'morality of negotiations' contributing to the demise of a more traditional sexual morality. In this traditional sexual morality the focus lies on the *quality* and *nature* of the sexual acts, intentions, feelings and thoughts. In a morality of negotiations, however, the focus is not on the qualitative aspects of sex, but rather on the *procedural* aspects of the negotiations and on the *technical*, *legal* validity of the given consent. Such an ethics of consent largely ignores which actions, thoughts, desires etc. are consented to - so long as they are not illegitimate, etc. A morality of consent therefore is potentially less restrictive than more traditional sexual moralities. No wonder it is widespread in the modern world in which sexuality is increasingly considered to be an issue of free choice in stead of destiny and fixed moral norms.

The *effects* of this SEC, according to the critics, have been devastating, and have lead to, among other things, a widespread egotistic ethical individualism; the misguided treatment of the sexual domain and our sexual lives as overly transparent and amenable

to full rational scrutiny and control; to a disengaged à *la carte* attitude to sexual relations; and to a conceptualisation of the sexual domain as a domain devoid of any intrinsically linked values, and hence without an ideal or *telos*. An 'art of loving' - an *Ars Amatoria* - is replaced by the skill of attaining consent and maximizing lust.

When the permissibility of a sexual action has everything to do with valid consent, the sexual domain is seen as a domain of free and perhaps even limitless choice, informed and restricted only by personal preferences and legal ramifications and restrictions. Sexuality becomes a domain in which no longer an ethically meaningful distinction can be made between 'good' or 'better' and 'bad' or 'worse' sex, over and beyond the prerequisite of valid consent. This leads, according to the critics, to a perspective on sexuality in which it is no longer possible to make any meaningful value distinctions in the ethical sense. ¹⁰ PSP, feminists and conservatives want to "go 'beyond' the narrow liberal horizon of consent," as David Archard has put it. ¹¹ For sexuality to be morally more than just acceptable - for it to be laudable - it has to be embedded within a broader outlook on the good life, although, of course, there are important different opinions concerning just what this good life consists in.

Progressive sexual pessimists, conservatives and many feminists "endow human sexuality with significance well beyond a mere source of a certain kind of pleasure." Many PSP argue that what they take to be the dominant contemporary sexual ethics is shallow: it lacks a personal & social ideal, over and above the immediate gratification of maximized desire. According to them a valuable sexuality cannot be dissociated from a rich and normative project of personal, social and political emancipation and an ethics of consent just does that.

The idea that valid consent not only is a necessary but also as a sufficient condition for morally acceptable sex has in recent times, then, received considerable flak. The literature on (valid) consent is immense. The notion of (valid) consent has already been scrutinized in hundreds, perhaps thousands of articles and books - and I won't even try to cover the whole of the debate. We have books and articles focussing the legal weight and implications of consent and we have more philosophically oriented as well as critical feminist studies. The role of consent has been studied within the context of, e.g., sexual harassment, rape and date rape, criticisms of a decontextualized liberal view on consent and legitimacy, regulation and evaluation of BDSM, prostitution and sex work, etc. And recently the process of consent-giving (or not) has been the object of a considerable amount of empirical research as well.

A thorough review of the role of consent in sexual ethics would also have to look at how consent ties in with different types of ethical theories. Teleological and deontological theories differ significantly on the relevance and force consent can have. Teleological theories tend to downplay the role of consent in favour of a eudaimonic-perfectionist *telos* or finality of ethics and moral life, or, in its consequentialist versions tend to take an instrumental attitude towards consent in morality. The weight of consent varies with the type of deontological theory one defends. In duty-based deontological theories on the one hand - like in Kant's constructivist ethics - consent is a necessary condition, but can never be a sufficient condition for a sexual morality. Rights-based contractualist theories, on the other hand generally see more mileage in the idea of consent. Consenting and having one's valid consent on non-consent respected is one of the cornerstones of this view.¹³

However, in the remainder of this talk I would like to elaborate only one (small) line of defence in favour of a sexual ethics of consent. I will focus on only one aspect of the discussion: the relation between sexual emancipation and a sexual ethics of consent.

3. Can an Ethics of Consent Pull Emancipatory Weight?

The question then becomes: can the notion of (valid) consent pull some emancipatory weight in a liberating sexual ethics, or is an 'emancipatory ethics of consent' *all fur coat but no knickers*?

Let us not forget the obvious. The notion of valid consent itself - its formal conditions and its rationale - already carries a considerable emancipatory payload. One could even argue that the centrality of the notion of consent in sexual ethics, and the recognition of consent as a prerequisite, is itself the outcome of an emancipatory process and can actively contribute to a wider project of social and personal emancipation.

A. Emancipation

What do we mean with 'emancipation?' We don't need a full-blown analytical definition, but are interested in how the concept is used in the context of sexuality.

Some pointers will do to get us started. Webster's defines emancipation as the "act of setting free from the power of another, from slavery, subjection, dependence, or controlling influence" and as "the state of being thus set free." Emancipation, then, has to do with liberation. Over and beyond this minimal definition, emancipation is often used to single out the freeing from influences and powers that are considered malign.

Not all instances of being freed from the power of another would count as equal examples of 'emancipation.' Taking these elements as markers of 'emancipation,' we can proceed to 'consent' and to how it might contribute to an 'emancipatory sexual agenda.'

B. Direct relevance: The formal conditions of 'valid consent'

The formal conditions of valid consent embody considerable emancipatory qualities. Just as we don't need an exhaustive analytical definition of 'emancipation' we don't need a full-blown definition of 'consent.' In this case as well, some pointers will do. Furthermore: there is no generally agreed upon definition of consent in either law or ethics. An intimation of how the phenomenon is generally taken to make a difference in sexual matters will do the job.¹⁵ In his widely & highly acclaimed essay on sexual consent David Archard outlines the contours of 'consent' as it is at home in what he calls the 'common view' regarding the role of consent in sexual ethics, namely, the view that "consent is the 'only rule in the sex game'." This is precisely the view under scrutiny.

Consent, so Archard argues, is "essentially agreement *to* something," thereby differentiating it from assent - with which it is often confused - and which basically means "agreeing *with* something." Archard argues that in the standard view, consent is normatively relevant, in the sense that giving consent is 'morally transformative.' By consenting to a sexual behaviour, I put myself under an obligation in respect of this behaviour, be it realising this behaviour, or not obstructing this behaviour. Consent is morally and legally (Wertheimer) transformative. This captures what Heidi Hurd has

called the 'moral magic of consent.' 18

Consent creates obligations, but not all instances of 'consent' create obligations, only valid consent does. Valid consent meets three necessary conditions: the consent "must be given by someone capable of doing so; it must be informed by knowledge of all relevant, material facts; and it must be voluntary." Establishing the principles of this 'valid consent' is, according to Alan Wertheimer, "the primary site of the philosophical action about consent." Archard rounds up some of the most likely candidates. Valid consent is given by those who are in the capacity of giving consent, who are informed in that they know what is consented to and what its implications are, and where the consent-giver is in the position the give the consent with an appropriate degree of voluntariness. There is a problem here: all three conditions allow for degrees, while, as Archard notices, consent does not: we do not consent 'a bit.'

These are the 'formal' conditions of valid consent. Already in this formal delineation of consent we can notice some powerful 'emancipatory' aspects.

Guaranteeing valid consent anchors sexuality within an emancipatory context, thereby directly promoting emancipation in sexual matters. Beyond this, consent as the cornerstone of a sexual morality and ethics also indirectly furthers a broader emancipatory cause.

B. Wider relevance: Securing the formal conditions of valid consent

Presumably, those who defend an SEC want to secure this valid form of consent and not a simulacrum of it as the cornerstone of their ethics. Valid consent presupposes agents that are (up to a certain degree) free agents, free from untoward external and

internal pressures, and well (enough) informed. Ideally, the consent-giver is an instance of a Kantian Enlightened agent: one who is free(d) from ignorance and is sufficiently autonomous in his actions - but, luckily, in reality a reasonably informed, capable and autonomous human being will do as well.

An ethics of consent is *normatively* relevant, by excluding some actions and permitting others. But beyond this, an SEC has a further normative relevance by also promoting some actions as 'right.' Most likely, those who defend a SEC will value this SEC, and therefore will also be favourable to creating the conditions in which this SEC can operate as a viable sexual ethic. Therefore, by extension, this probably means that those who defend an SEC most likely would want these conditions to hold as much as possible and, presumably, to actively further these conditions. Actions that promote the conditions of valid consent are 'right' actions. An authentic SEC is held to actively promoting these conditions, thereby turning a SEC into a broader emancipatory relevant positive ethic.

C. The rationale of a sexual ethics of consent

There is a further aspect we should consider, and that could bolster the emancipatory quality of consent and a SEC. Those who defend a SEC not only are favourable to the *formal* conditions of this ethic, but also towards the *rationale* of an SEC. What is this 'point' of a SEC? We can bring this out by retracing some of the steps Patricia Marino takes towards her defence of her position "that one *can* consent to being used" - a position Kantians and most feminists and PSPs would find abhorrent. She develops this position in the context of a discussion of moral status of sexual

objectification. Debating whether one can validly consent to being objectified, and hence to being used in some sense of the word, she argues that the moral touchstone in these cases is whether someone's autonomy is respected. There is, according to Marino, a weak version of sexual instrumental use that is morally acceptable. "[T]he crux of the moral matter when it comes to sexual objectivation," so she states, "is simply respect for autonomy." Respect for autonomy, or differently put, safeguarding the autonomy of the participants is in a sense more fundamental than consent itself. When we bring this to the subject of this paper, we could interpret this as implying that 'consensual actions' that erase autonomy altogether (a strong version of use like in 'consenting to real sexual slavery') are excluded because this consent-giving is not valid, because detrimental to autonomy. One could interpret 'respecting autonomy' as a 'further condition' for valid consent. But one could also argue that the 'point' of a SEC is ultimately respecting the (sexual) autonomy of people. The recognition of people as autonomous beings, and furthering respect for their autonomy is another clearly emancipatory aspect of a SEC.

4. Conclusion

There is an important link between recognizing the possibility that those who defend an SEC will be willing to promote the conditions of valid consent, and a possible *evaluative relevance* of consent to a sexual ethic. A sexuality that is morally regulated by a SEC will be a 'better' sexuality and morality of sexuality, than one that is *not* governed by this notion of valid consent. A sexual morality of consent may indeed be (up to a certain degree) mute about which sexual actions are better or good - in addition to merely permissible - but an authentic engagement to a project of SEC includes a

positive evaluation of working towards securing the conditions of valid consent (and these conditions fit within a broader scope of an emancipatory project).

All this is not to say that a SEC gives us the fullest substantially developed view on what constitutes 'good' sex. But it does give us some crucial - be they minimal - conditions of 'good sex.' When these are met, whatever sexual project one favours, one cannot deny that these sexual relations are in an important way better than those that do not meet these conditions. The preconditions of valid consent, coupled with its rationale, are evaluationally relevant and will figure in whatever emancipatory ideal of sexuality we could rationally and intelligibly defend. Perhaps, then, a SEC is a marker of in stead of a hindrance to an emancipatory sexual ethics? The centrality of consent for sexual ethics is as an outcome of an emancipatory process. It is the result of the opening up of the accepted or tolerated, behavioural, attitudinal, emotional and evaluational repertoire as a result of the sexual revolutions.

It is not because 'consent' does not give us a fully developed normative ethical theory or ideal, be it feminist or socialist, or progressivist in general, that its positive emancipatory role and meaning should be minimized. Emancipation has among other things to do with respect. It is about respect in interpersonal relations and relationships. But it is also about respect for people as free authors of their own life.

Notes

- 1. Compare Igor Primoratz, 'Sexual Morality: Is Consent Enough?', *Ethical Theory and Practice*, vol. 4, 2001, pp. 201-218, for a similar view. Primoratz focuses on three 'philosophies of sex:' the Catholic view of sex as procreation, the "romantic view of sex as bound up with love, and the radical feminist analysis of sex in our society as part and parcel of the domination of women by men." (from the abstract, p. 201) and argues that all three views have internal problems and are best interpreted as moral ideals concerning sex. For normative guidance purposes, or differently put: as the basis for a sexual morality, binding on us all, so Primoratz argues, consent indeed is 'enough.' In this text I focus on possible emancipatory effects of a morality of consent.
- 2. G E M Anscombe, 'Contraception and Chastity', *The Human World*, vol. 7, 1972, pp. 9-30; Roger Scruton, *Sexual Desire: A Moral Philosophy of the Erotic*, The Free Press, New York, 1986; John Finnis, 'Law, Morality, and "Sexual Orientation", *Notre Dame Law Review*, vol. 69, no. 5, 1994, pp. 1049-1076.
- 3. For a sample of these writings, see, e.g., Myron Magnet (ed), *Modern Sex: Liberation and Its Discontents*, Ivan R. Dee, Chicago, 2001.
- 4. See for an early overview of the debate: Ann Ferguson, 'Sex War: The Debate between Radical and Libertarian Feminists', *Signs*, vol. 10, no. 1, 1984, 106-112. For an overview of the sexuality debates see Jane Gerhard, *Desiring Revolution: Second-Wave Feminism and the Rewriting of Twentieth-Century American Sexual Thought*, Columbia University Press, New York, 2001. A critical-progressive perspective can be found in Lisa Duggan and Nan D. Hunter, *Sex Wars: Sexual Dissent and American Political*

Culture, Routledge, New York and London, 1995. For a radical critique of 'liberal' feminism, see Dorchen Leidholdt and Janice G. Raymond (eds), *The Sexual Liberals and the Attack on Feminism*, Pergamon Press, New York, 1990; the classic work 'starting' the war is, of course, Carole S. Vance (ed), *Pleasure and Danger: Exploring Female Sexuality*, Routledge and Kegan Paul, Boston, London, Melbourne and Henley, 1984. A recent overview of the feminist debates in: Estelle B. Freedman, *No Turning Back: The History of Feminism and the Future of Women*, Profile Books, London, 2002.

5. See, e.g., Feona Attwood (ed), *Mainstreaming Sex: The Sexualisation of Western Culture*, London and New York, I.B. Tauris, 2009 and Susanna Paasonen, Kaarina Nikunen and Laura Saarenmaa (eds), *Pornification: Sex and Sexuality in Media Culture*, Berg, Oxford and New York, 2007.

6. To name but a few and from different language areas: George B. Leonard, The End of Sex: Erotic Love after the Sexual Revolution, J.P. Tarcher, Los Angeles, 1983; Michela Marzano, Malaise dans la sexualité: Le Piège de la pornographie, JC Lattès, Paris, 2006; Koen Raes, 'Seksuele bevrijding is ook een ethisch project. Over de instrumentalisering van de erotiek' ('Sexual liberation is an ethical project as well. On the instrumentalization of the erotic.'), In Suzanne Haakma, Minnen met de zinnen: opvattingen over erotiek in verschillende culturen, Uitgeverij Prestige, Utrecht, 1999, pp. 11-40; Volkmar Sigush, Neosexualitäten: Über den kulturellen Wandel von Liebe und Perversion. Campus Verlag, Frankfurt/aM, 2005. Compare: "This (...) morally conservative critique may well be a (small) minority one today, yet echoes of the position can be traced even among self-styled progressives, especially those of a communitarian position and among those who lament the decline of social capital.

While distancing themselves from the political conservatism that underpins much of the critique, leading radical scholars, such as Zymunt [sic] Bauman (2003), polemicise against the dangers and threats of `liquid life', `liquid love' and `dark times', which while theoretically a million miles from the laments of conservative writers such as Melanie Phillips (1999) or Christie Davies (2006) come up with a similar cultural pessimism."

Jeffrey Weeks, *The World We Have Won: The Remaking of Erotic and Intimate Life*, Routledge, London and New York, 2007, p. ix.

- 7. Tom Claes, 'Progressief seksueel pessimisme', in Sensoa (ed), *Lief en leed: Jaarboek seksuele gezondheid 2006*, Sensoa ism met Standaard Uitgeverij, Gent, 2005,
 pp. 113-118.
- 8. On feminism, see, e.g., Allison Moore and Paul Reynolds, 'Feminist Approaches to Sexual Consent: A Critical Assessment', in Mark Cowling and Paul Reynolds (eds), *Making Sense of Sexual Consent*, Ashgate, Aldershot, 2004, pp. 29-43.
- 9. Volkmar Sigush, 'Lean Sexuality', *Zeitschrift für Sexualforschung*, vol. 15, no. 2, 2002, pp. 120-141.
- 10. Here is, e.g., Roger Scruton on consent and perversity: "For many a libertarian, pedophilia is wrong, not because it is the exploitation of innocence or the besmirching of the body of a child, but because children are not ready to consent to sex.

 (...) But this merely puts back the moral question (...) why we should demand, of the sexual act, precisely the level of consent of which a child is deemed to be incapable.

 (...) The real moral evil lies in the act itself, and in the damage done (...). (...)

 [V]ictims will not be disturbed by the thought that their consent was never obtained(...).

 [T]he remembered act will be understood as a desacration. And in that lies its evil. This,

surely, is why we should describe pedophilia as a perversion." Roger Scruton, 'Perversion: An "Outdated" Concept, Desperately and Perpetually Needed", *National Review*, vol. 56, no. 11, 2004, pp. 36-37.

- 11. David Archard, 'Review Article', *Journal of Applied Philosophy*, vol. 24, no. 2, 2007, pp. 211.
- 12. Igor Primoratz,. 'Sexual Morality: Is Consent Enough?', *Ethical Theory and Moral Practice*, vol. 4, no. 3, 2001, p. 201.
- 13. See Deryck Beyleveld and Roger Brownsword, *Consent in the Law*, Hart Publishing, Oxford, 2007, pp. 27-31. See also Raymond A Belliotti, *Good Sex:**Perspectives on Sexual Ethics, University Press of Kansas, Lawrence, KA, 1993, especially chapter 4: 'The Sanctity of Contract and the Horror of Exploitation:

 Libertarianism and Kantianism, pp. 86-108.
- 14 'Emancipation', Webster's Revised Unabridged Dictionary, (Accessed October 27, 2008).

http://dictionary.reference.com/browse/emancipation

15. Cf. "The concept of consent provides a template that organizes and focuses our attention on a set of relevant moral issues, but it cannot do much more. The question as to when we should regard it as morally or legally impermissible to engage in sexual relations will be settled by moral argument informed by empirical investigation, not metaphysical inquiries into the meaning of consent. The important question is not what consent 'is,' but the conditions under which consent is morally transformative." Alan Wertheimer, *Consent to Sexual Relations*, Cambridge University Press, Cambridge, 2003, p. 119.

- 16. David Archard, Sexual Consent, Westview Press, Boulder, CO, 1998, p. 2.
- 17. ibid., p. 2
- 18. Heidi Hurd, 'The Moral Magic of Consent', *Legal Theory*, vol. 2, no. 2, 1996, pp. 121-146.
 - 19. David Archard, Sexual Consent, p. 44.
 - 20. Alan Wertheimer, p. 122.
- 21. Patricia Marino, 'The Ethics of Sexual Objectification: Autonomy and Consent', *Inquiry*, vol. 51, no. 4, 2008, p. 19.
 - 22. Patricia Marino, p. 18.

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