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ARTICLE

A New Genre for a Discipline Made New

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Abstract
New Private Law Theory: A Pluralist Approach is a new *kind* of book. Nevertheless, the book does have forebearers, as innovation is itself an old practice. The best way to understand the book, therefore, is to look farther afield, to a prior effort to produce a new kind of legal book—the first casebook ever published. Christopher Columbus Langdell's *Selection of Cases on the Law of Contracts* landed in circumstances that could hardly have been more different from the ones that *A Pluralist Approach* now engages. But these shallow differences should not be allowed to disguise a shared ambition, which these pages hope to lay bare. Uncovering the book's deeper ambition will make it possible to assess its prospects for success.

Keywords: Private Law; Legal Theory; Pluralism; Legal Formalism; Legal Realism

A. A New Private Law Theory

New Private Law Theory: A Pluralist Approach[1] by Stefan Grundmann, Hans W. Micklitz, and Moritz Renner (hereinafter "GMR") is, in a narrow sense, a book without predecessors or precedents. It is, in fact, a new *kind* of book. But in a broader sense, GMR's book does have forebearers, as innovation is itself an old practice. The best way to understand the book, therefore, is not to focus on its immediate, local context but rather to look farther afield, to a prior effort to produce a new kind of legal book. The earlier effort landed in circumstances that could hardly have been more different from the ones that GMR now engage. But these shallow differences should not be allowed to disguise a shared ambition, which these pages hope to lay bare. Uncovering the book's deeper ambition will make it possible to assess its prospects for success.

B. Part One

In 1871, Christopher Columbus Langdell, seeking to validate the common law as a university subject, invented a new kind of book—a new *genre*, really. Langdell needed a mechanism through which law might be taught by professors to students, gathered in Harvard's classrooms, rather by practicing lawyers to clerks and other apprentices, spread across the law offices of the still-young country. He came up with the casebook, and Langdell's *Selection of Cases on the Law of Contracts* is the first casebook ever published.[2]

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[1]Stefan Grundmann, Hans W. Micklitz & Moritz Renner, New Private Law Theory: A Pluralist Approach (2021).

[2]Christopher Columbus Langdell, A Selection of Cases on the Law of Contracts (1871).

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The university setting and the casebook genre suited—indeed, they both closely tracked—the conception of law, and in particular of private law, that Langdell sought, through them, to teach. Langdell's formalism conceived of the common law as a more-or-less free-standing set of principles, developed by appellate courts, following independent internal normative logics, and organized according to these logics. As the young Louis Brandeis observed when he reviewed the place that Langdell's *Selection of Cases* occupied in the history of the Harvard Law School, "[b]elieving that law is a science, and recognizing that the source of our law is the adjudicated cases, Professor Langdell declared that, like other sciences, the law was to be learned only by going to the original sources."[3] Appellate opinions could therefore be studied—indeed, they were best studied—by academics, in a university setting. The casebook collected the required objects of study and brought them inside the university for study and analysis, much as botanists might collect plant specimens in the field and bring them, in Wardian cases, back to their laboratories.

Langdell and his followers made this analogy self-consciously and took it literally. Langdell's own preface summarized the approach in botanical, even evolutionary terms:

> Law, considered as a science, consists of certain principles or doctrines . . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.[4]

Indeed, the biological analogy was not confined to the fieldwork, where cases were collected, but rather reached deep into the classroom, where they were studied and analyzed. Langdellian legal education sought to dissect or, as Brandeis put it, to "eviscerate" the opinions that casebooks collected, in order to reveal their inner workings.[5] This activity would, moreover, not only expose the inner logic of the law but also bend students' own intellects to match this logic. The case-method promised not only to reveal the principles of private law but also to lead students to internalize the scientific structure of legal doctrine, as what Brandeis called a "habit of mind."[6] Lawyers who possessed the habit, and made it their natural way of thinking, would be able to divine—to anticipate—the future developments already contained immanently inside the law's present logic.[7] This skill would make them better able to advise, and to serve, their clients.

The scientific model associated with Langdellian formalism did not just inspire a new genre; it also penetrated into the minute details of the common law casebook's construction and production.

First, Langdell's casebook was intensely and self-consciously selective. Langdell included only specific legal decisions rather than all—or even a representative sample: "[T]he cases which are useful and necessary" for mastering doctrine, he said, "bear an exceedingly small proportion to all that have been reported."[8] Moreover, Langdell chose his sample based on an expressly asserted hierarchy among judicial opinions and legal doctrines. "The vast majority [of opinions] are useless and worse than useless for any purpose of systematic study," he insisted, including for the reason that "the number of fundamental legal doctrines is much less than is commonly supposed," something that, he believed, would become clear as soon as "doctrines [are] so classified and arranged that each should be found in its proper place, and nowhere else."[9]

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[3]Louis D. Brandeis, *The Harvard Law School*, 1 GREEN BAG 10, 19 (1889).

[4]*Id.* at 28 (quoting LANGDELL, *supra* note 2).

[5]*Id.* at 20.

[6]*Id.*

[7]*Id.*

[8]*Id.* at 28 (quoting LANGDELL, *supra* note 2).

[9]*Id.*

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Second, Langdell's casebook was openly and confidently narrow, exclusive, and closed off from non-legal sources and materials. This is most famously revealed in Langdell's rejection of the mailbox rule as incompatible with the immanent logic of contract. As Langdell had it, contracts are special subspecies of promises—those backed by consideration—and the consideration for an offer is the offeree's return promise, which by its own nature cannot be complete until communicated.[10] According to this logic—ineluctable, in Langdell's system—an acceptance cannot become a promise, capable of providing the consideration that ripens an offer-promise into a contract, until it is received; and the mailbox rule that acceptances are effective on posting, therefore, cannot be good law. It did not matter, to Langdell, that the rule best served "the purposes of substantial justice, and the interests of the contracting parties, as understood by themselves."[11] That consideration, like all considerations based on extra-legal norms, was in Langdell's words "irrelevant."[12]

Both these features of genre that Langdell invented promoted his ambition of taking the study of the common law from the field and bringing it inside the university by protecting legal education from outside forces that might loosen the grip of academic lawyers. The tangle of detail and contingency that dominates law office life was rendered inert by the principle of selectivity. Norms and values from disciplines besides law—philosophy, economics, sociology—and also from political life (including democratic politics) were excluded as irrelevant.

In these ways, the casebook did not just bring the study and teaching of the common law inside the university; it also elevated and even underwrote the authority of academic common lawyers. A common way in which an authority might be legitimate is if people do better at conforming to the reasons that apply to them by complying with the authority than they could do by trying to discern and follow these reasons directly.[13] It is difficult to imagine how lawyers—much less academic lawyers—might possess such authority with respect to disciplines besides law, much less with respect to the moral and other values that occupy democratic politics. But it is not hard to see how lawyers—including, in particular, academic common law lawyers—might have authority with respect to the legal rules that comprise Langdell's formalist science of the common law. They, after all, are the ones who have collected, eviscerated, and organized the materials that the law consists in. So, Langdell's method and genre established a simple—even straightforward—way to elevate the position of the lawyers who practiced it. The prominence, prestige, and power enjoyed by US-American law schools today attests that Langdell's project succeeded beyond his wildest imaginations.

An irony lies behind this success, however. Even as Langdell compiled his casebook, the formalist account of law that gave the project its intellectual foundations was coming under a withering attack. Indeed, perhaps the most famous slogan rejecting Langdellian formalism—Oliver Wendell Holmes's remark that "[t]he life of the law has not been logic; it has been experience"—originated in Holmes's review of Langdell's *Summary of the Law of Contracts*, published a year before *Selection of Cases*. In the same review, Holmes derisively called Langdell a "legal theologian;"[14] and within two generations, legal realism would thoroughgoingly reject Langdell's formalism, at least in the US-American part of the common law world. Today, US-American lawyers almost uniformly embrace a quite radical version of functionalist legal realism, according to which law is a means to ends that can be fully specified, and evaluated, without reference to law as the means that produces them. Methods and ideologies as otherwise divergent as law and economics, on the one hand, and critical legal studies, on the other, agree on this jurisprudential bedrock. They disagree only on the extra-legal ends that law does and should serve, and, therefore, on whether a true assessment of law as a tool should celebrate or condemn its operation.

[10] *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 Univ. Pittsburgh L. Rev. 1, 4 (1983).
[11] Christopher Columbus Langdell, A Summary of the Law of Contracts 20–21 (2d ed. 1880).
[12] Id. at 21.
[13] *See generally* Joseph Raz, The Morality of Freedom (1986); Authority (Joseph Raz ed., 1990).
[14] Oliver Wendell Holmes, *Book Review*, 14 Am. L. Rev. 233, 234 (1880).

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This account of law makes the casebook almost literally a nonsense, as a legal text, because it insists that nearly everything of deep and fundamental importance—and of importance specifically to law—resides outside of the cases and, hence, somewhere off the casebook's pages. Certainly, the fit between form and function that led Langdell to invent the genre has been entirely dissolved. The casebook survives in US-American law schools only as a sort of reverse anachronism—a hangover from a prior era that, while widely understood to be inapt, cannot be got rid of. Efforts to accommodate the form to the new function abound, most notably by adding "and Materials" to "Cases." But teaching increasingly emphasizes the materials, with the cases no longer the main subject of law classes but rather an excuse to get to the subject. It becomes increasingly difficult to resist the suspicion that the casebook's durability has a self-serving component, as law professors cling to a genre that sustains their professional authority, even as it is based on a view of their field that they themselves reject. In this way, the casebook has become an instance of Niels Bohr's hope, as a scientist living in a house with a horseshoe over the entrance, that magic and superstition might bring good luck even if you don't believe in it. For all these reasons, a new genre is badly needed. At the same time, inspiration has run dry.

I recount these matters here because the US-American common law's condensed experience, played out in one country and over only about a century, sheds light on a similar development in the civilian tradition, played out over a much longer time frame and on a far grander scale. Law has long been a university subject in civilian jurisdictions. It has been conceived and taught in a largely—not unbrokenly, but dominantly—formalist manner, using distilled legal sources—not cases, of course, but codes and treatises—as the means for revealing law's inner logic. Indeed, on the one hand, Langdell's innovation was not to invent formalism but rather to adapt it to the common law, replacing instruction organized around treatises and other sources of general principles with instruction based on inference from particular cases. On the other hand, the functionalism that now dominates US-American common law thought has also gained a growing foothold in the civilian tradition. This means that civilian law, legal thought, and legal education face some of the same pressures on their methods and their authority that US-American common law does. Neither the length nor depth of the university-based study of civil law can insulate academic civil lawyers from the paradoxes that they face now, or from the imperatives that these paradoxes produce.

The story of the natural rise and surprising endurance of the casebook is therefore interesting in part because it captures—in a crisp, confined narrative and through the symbol of a single, distinctive genre—a trajectory that applies broadly across legal traditions. The need for a new approach to teaching and studying law, and possibly for a new genre to encapsulate and sustain this approach, is as pressing in the civil as in the common law world.

C. Part Two

This is the circumstance into which GMR now publish *A New Private Law Theory*.[15] Like Langdell's casebook, the book in effect proposes—by instantiating—a new genre, which aspires to do for functionalist legal thought and study—in both common and civil law jurisdictions—what the casebook once did for common law formalists. But after their shared ambitions, the two books diverge. Indeed, the ambition to find a form of book that might meet its moment, applied to such a new and different setting, again penetrates into the detailed construction of GMR's new genre, now leading them to reject both of the distinctive features of Langdell's casebook. Langdell and GMR's innovations are alike only in that they are both radical innovations. In respect of the substance of what they do, the two genres are more nearly opposites.

[15] Stefan Grundmann, Hans W. Micklitz & Moritz Renner, New Private Law Theory: A Pluralist Approach (2021).

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First, where Langdell organized cases and doctrines into a deductive hierarchy, in which certain principles are more fundamental and certain cases more authoritative than others, GMR organize doctrines and cases into a network, characterized by a dense web of interconnections among cases and principles, which influence one another reciprocally and without obvious dominance relations or order of priority. GMR call the method that generates this network hermeneutic. They emphasize that this approach invites a back and forth between norm and fact[16] and between general theory and particular instance.[17] The hermeneutic approach also involves a constant shifting across levels of abstraction and concreteness and a comfort with relations among principles and concepts in which seemingly opposed ideas, for example, public and private, in fact, sustain and even constitute each other, even as they compete for influence on their margins.

Second, where Langdell insisted that legal arguments must play out the immanent logic of the doctrines that he organized in his hierarchical way, so that the law is closed off from extra-legal values and forms of reasoning, GMR treat the law as radically open, indeed as porous to effectively any mode of thought or practice that wishes to impinge on it. This difference begins within the law. For Langdell, each department of law possessed its own inner logic—it was no accident that his first casebook was organized not around a set of practices in the world but rather around a doctrinal category, *contracts*. Other formalists followed Langdell's lead in this respect, including in Europe. As GMR point out, European scholars long treated private law as categorically distinct from and also prior to public law, both morally and especially intellectually, when viewed as an object for scientific study. Private law was framed, on this account, as pre-political and, therefore, as stable and enduring, even as public law bent to the winds of social and cultural fashion. Classical private law theorists liked to point out that France has had fourteen Constitutions and passed through five Republics since 1789, even as the Napoleonic Code, established in 1804, has endured through them all.

GMR, by contrast, jump doctrinally from department to department within legal doctrine and even erode the division between private and public law. As they say, constitutional law increasingly claims "supremacy" over private law and—critically for purposes of GMR's intellectual project—private law theory as well.[18] At the very least, GMR say, private law has increasingly become "constitutionalized," so that private and public law now stand in a "reciprocal relationship."[19] Even more importantly, GMR open legal analysis radically to the norms, concerns, and methods of other disciplines, making express and extensive reference, throughout the book, to sociology, economics, systems and discourse theory, moral and political philosophy, and legal history, and comparative law.[20] They insist, moreover, that these methods should not be brought to bear on legal problems through a matching process—that pairs a doctrinal problem with a cognate discipline, one-at-a-time—but rather pervasively, as phalanxes of interdisciplinary arguments bear down, in myriad patterns, on every doctrinal problem, all the time.

These innovations produce dizzying results. Doctrines, texts, and methods are combined and confronted with one another in astonishingly various patterns. In one chapter, Grundmann, using *United States v. Carroll Towing Co.*[21] to ask how an economic interpretation of negligence came to enter into the positive law of the United States, brings Joseph Raz's conception of the authority of the positive law into conversation with Josef Esser's hermeneutic approach to determining the "'freedom and limits' of legitimate decision-making by legal authorities."[22] Along the way, Grundmann takes up ideas from, among others, Richard Posner, Christopher Tomlins, John Hicks, Nicholas Kaldor, Horkheimer, Adorno, Schleiermacher, Dilthey, and Gadamar. In another

[16] *Id.* at 12.
[17] *Id.* at 19.
[18] *Id.* at 25.
[19] *Id.* at 25, 169.
[20] *Id.* at 18.
[21] 159 F.2d 169 (2d Cir. 1947).
[22] Grundmann et al., *supra* note15, at 35–58, 44.

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chapter, Micklitz, using *Urgenda Foundation v. The State of the Netherlands*[23] to ask how tort litigation to compel greenhouse gas regulation interacts with democratic politics, confronts George Ripert's critique of the supremacy of politics with Friedrich Kübler's concern for the evils that formalist, apolitical private law can countenance. He then confronts both these views with Thomas Wilhelmsson's analytic rather than moralizing classification of the various relations between private law and democracy that European legal orders have embraced. Once again, the book takes this variety merely as a starting point for a much greater range of texts and methods, as Micklitz's chapter includes discussions of work by, among others, Doug Kysar, James Gordley, Duncan Kennedy, Jellinek, and Ernst Bloch.[24] In yet another chapter, Renner, using the *Audiolux*[25] case to interrogate the duties that controlling shareholders owe to minority owners, confronts Otto von Gierke's *Gennossenschaftstheorie*[26] with Ronald Coase's theory of the nature of the firm. This time, the analysis takes up texts by, among others, Samuel Huntington, Berle and Means, Jensen and Meckling, Grossman and Hart, Raymond Saleiles, Milton Friedman, Michael Walzer, Charles Taylor, and Hegel.[27] These are just partial lists of the texts engaged in just three of twenty-seven chapters.

Both of these radical differences between Langdell's approach and GMR's have direct roots in the intellectual and disciplinary conditions into which GMR have published their text. Just as Langdell sought to invent a new genre to meet the needs of his time, so GMR seek to meet the needs of theirs. Then, Langdell wanted to make the common law—understood as a formalist enterprise—into a university discipline. The casebook achieved this by modelling legal thought on the beaux ideal of a discipline, namely natural science. Now, in both the common and civil law worlds, legal formalism has been widely discredited by realism and the broadly functionalist account of law that realists insist upon. This development has undermined Langdell's disciplinary claims. Just as realism threatens to undo the law/politics distinction in the world outside the university, so functionalism threatens to dissolve the disciplinary distinction between law and other subjects inside the university.

This threat is not abstract and distant but concrete and close. Interdisciplinary scholars, often with formal post-graduate training in fields other than law, play increasingly large and even dominant roles on law faculties, especially elite ones. At my own law school, roughly eighty percent of junior appointments made in recent years have gone to candidates who hold PhDs in some cognate field alongside their law degrees. As this development gains steam, law schools increasingly come to resemble mini-universities—or at least humanities and social science faculties—filled with professors whose principal methodological commitments tie them to the other disciplines—economics, philosophy, sociology, history—in which they are trained. Balkanization in the shadow of this interdisciplinary specialization—and the consequent destruction of law itself as a distinctive, institutionally organized, and sociologically recognized discipline—is perhaps the greatest threat that contemporary law schools face.

The central challenge for common law legal scholars and intellectuals in Langdell's time was the project that Langdell invented the casebook to meet—to establish the common law as a university subject, taught by professors in classrooms rather than by practitioners in law offices. Today, legal intellectuals—now both common and civil lawyers—once again face a challenge to their position and status in the university, but this time from within rather than without the university's walls. Today, law professors resist the law's dissolution into the rest of the university; they try to retain their departmental and methodological distinctiveness in the face of interdisciplinary pressure.

[23]HR 20 december 2019, NJ 2020, 41 m.nt. JS (Urgenda Foundation/Netherlands) (Neth.).

[24]Grundmann et al., *supra* note 15, at 180–192.

[25]Case C-101/08, Audiolux v. Groupe Bruxelles Lambert, 2009 E.C.R. I-09823.

[26]Otto von Gierke, Gennossenschaftstheorie (1887).

[27]Grundmann et al., *supra* note 15, at 360–368.

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The conventional way to meet this challenge is to follow Langdell's lead, trying again to discipline law, only now in a way that abandons his formalism and recognizes the functionalist turn. My own law school has made an effort in this direction by establishing—for the first time in a US-American law school and, as far as I have been able to discern, for the first time in a law school dominated by legal realism anyplace in the world—a PhD in law. This effort has met with mixed—at best modest—success. Our PhDs do become professors, and they retain a lawyerliness that young professors distracted by PhDs in cognate disciplines often lack. But their numbers remain small—too small to have much influence over law schools more broadly—and they are not growing.

GMR take a different—almost an opposite—approach to saving law as a university subject. The conventional approach rejects Langdell's formalism but, ironically, sticks with the generic form that he invented. It seeks to adapt Langdell's disciplinarity, and even his casebook—as in "cases and materials"—to a functionalist jurisprudence. GMR, by contrast, follow Langdell not in his petty details but rather in the grandeur of his ambition—they, too, seek to invent a new form to suit new circumstances. *A New Private Law Theory* aspires to save law as a distinctive scholarly practice not by disciplining it but by *undisciplining* it.

GMR seek, that is, to make law into an *anti-discipline*. Whereas every conventional discipline is characterized by its boundaries—by what is and what is not an instance of that particular form of knowledge production—law on GMR's approach is distinguished by its lack of boundaries, indeed by its rejection of boundaries. As the lists of scholars and methods recounted earlier indicate, effectively anything and everything can belong to legal knowledge. Similarly, whereas every conventional discipline is inward-looking and includes a self-consciously methodological interest in policing its own boundaries, law on GMR's approach is outward-looking and includes a self-conscious commitment to rejecting boundaries. In a sense, GMR respond to the crisis in legal thought not by denying, rejecting, or constraining but rather by embracing and expanding its sources. Their book is an instance of Hölderlin's motto that where the danger is, there grows the saving power also.[28]

Can this gambit succeed? Can methodological profligacy be made into itself a method capable of keeping its own home in the university and sustaining distinctive professional authority for law professors? This is the central question that GMR's remarkable text poses. On the one hand, the lawyer might be cast as a sort of exceptional generalist, possessed of the good judgment needed to span the vast variety of considerations at play in any moderately complex legal situation and to balance the incommensurable values that the situation invokes. GMR's repeated return to the hermeneutic process, which comes as close to the master method of their book as anything, resonates with this possibility. As they say, the vast range of the traditional disciplines and theories that they take up—a range bounded by only the contingent limits of the authors' own expertise—serves to "lay the foundations for a meaningful discussion" of how a cognate theory might address legal practice and how legal practice might reconstruct the theory.[29] Put a little differently, methodological profligacy may be the key to the practical wisdom and good judgment—framed in a way that draws an express contrast to technical expertise—that Anthony Kronman has identified as the lawyer's highest virtue.[30] GMR's undisciplining of law, therefore, has both methodological foundations and historical precedents. Their innovation is to create a new genre that can capture this undisciplining between the covers of a book. On the other hand, Kronman's example serves more credibly as a cautionary tale than a practical plan. Kronman's book—as its title, *The Lost Lawyer,* makes plain—is at least as much a lament over virtues that have withered as a plan to regrow them. Moreover, Kronman himself locates the virtue that he describes in lawyer's practical

[28]The motto was perhaps made famous by Martin Heidegger, The Question Concerning Technology: and Other Essays (William Lovitt trans., 1977).

[29]Grundmann et al., *supra* note 15, at 19.

[30]*See generally* Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993).

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engagements, in business and in politics rather than in the library or the study. Here, Kronman's views renew Holmes's aphorism: The life of the law remains experience, not logic.

This last point—that the radical pluralism GMR now embrace finds its most natural, and possibly its only stable, home in practical life rather than in university study—presents the deepest and most powerful challenge to GMR's aspirations to reconstruct academic law as an undiscipline. Quite possibly, the end point of the development that GMR now memorialize in their new genre is not the salvation of law as a university subject but rather the dispersion of law and legal scholarship into all the other disciplines of the university and the return of training for lawyers, rather than legal scholars, to the world of practice. Something like this development is already underway, in the rise (first in the United States and now increasingly internationally) of clinical legal education. If this trend continues—if the clinic comes to dominate the university-based training of practicing lawyers—then this will in effect undo the development that Llewellyn's casebook inaugurated. Academic lawyers will have dispersed across the university's other departments, and apprenticeship-based legal education will have reestablished itself, only now by bringing the law office inside the university. GMR will turn out to have eulogized the period that Langdell inaugurated. The separate and distinctive academic study of law, in the university, will be revealed as an interregnum.

If things play out this way, then the motto for GMR's book will turn out to come not from Hölderlin but rather from Fitzgerald. They will be revealed, alongside Gatsby, to "beat on, boats against the current, borne back ceaselessly into the past."[31]

[31]F. SCOTT FITZGERALD, THE GREAT GATSBY (1925).

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