

# Sex Offender Law Report™

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## Sexual Assault in Military Versus Civilian Contexts, Part I

by Erin Bundra

The integration of women into the military has presented complex, and controversial, issues regarding a range of topics, not least of which is the sexual assault of individuals who have signed up to serve their country. As military women, especially, are faced with the challenges of whether to report peers and supervisors for sexual assaults ranging from harassment to rape, questions are raised about the motivating reasons and character of the perpetrators committing such offenses.

What, if anything, differentiates military sexual offenders from civilian sexual offenders? As in most cases, there is more available data on the victims than on the perpetrators of these crimes. However, surveys on sexual assault victims do shed some light on the alleged sex offenders and circumstances surrounding these incidences. This article summarizes the current statistics on military sexual assaults compared to sexual assault among the general civilian population. Furthermore, given this information, this article will recommend additional research steps to better understand and address military sexual assault.

### Definitions

The United States Department of Defense defines “sexual assault” as:

Intentional sexual contact characterized by use of force, threats,

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### *New Salem Witch Trials*

## Evaluating Bias in Expert Witness Conclusions of “Sexual Dangerousness,” Part I

by Daniel Kriegman, Ph.D.

**Author’s Note:** *In this multipart article, the author argues that the bias of expert witnesses determining the sexual dangerousness of the majority of men reviewed, committed, and recommitted as sexually dangerous, because of crimes they supposedly would commit if released, is reckless and arbitrary. This article explains that, under Massachusetts General Laws Chapter 123A, a sex offender can be temporarily committed in order to be examined by two “Qualified Examiners” (QEs) to determine if the offender is “sexually dangerous.”*

*If the QEs determine that it is likely that the offender will reoffend, a court can—and most often does—civilly commit him for one-day-to-life, i.e., until the day comes when another court finds that he is no longer sexually dangerous. Over the ensuing years, the offender is entitled to reviews by the judicial system to determine whether he remains sexually dangerous. A small number of compulsive recidivists who are truly dangerous are held indefinitely under this statute and repeatedly found to be sexually dangerous. However, as in the Red Queen’s better world, it can be shown that the preventative detention of the majority of men reviewed, committed, and recommitted as sexually dangerous because of crimes they supposedly would commit if*

*released is reckless and arbitrary with a level of validity approaching that found in witch trials.*

*Researchers have shown that there is considerable bias and/or questionable validity in expert predictions of dangerousness. (W.M. Grove, D.H. Zald, B.S. Lebow, B.E. Snitz, and C. Nelson, “Clinical Versus Mechanical Prediction: A Meta-analysis,” 12(1) Psychol. Assessment 19-30 (2000); E.S. Janus and R.A. Prentky, “Forensic Use of Actuarial Risk Assessment With Sex Offenders: Accuracy, Admissibility, and Accountability,” 40 Am. Crim. L. Rev. 1143-489 (2003); J. Monahan, Predicting Violent Behavior: An Assessment of Clinical Techniques (1981); G.G. Woodworth and J.B. Kadane, “Expert Testimony Supporting Post-sentence Civil Incarceration of Violent Sexual Offenders,” 3 L., Probability, & Risk 221-41 (2004).)*

*However, as we will see, when it comes to predicting the likelihood of future sex offending, the bias becomes literally astronomical. Based on the actual patterns of experts opining “sexually dangerous,” it can be established beyond the possibility of doubt that the methodology used and conclusions reached by the Qualified*

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Examiners employed by the Commonwealth of Massachusetts leads (or allows) them to grossly overpredict dangerousness.

In order to grasp the power of this demonstration, we have to leave the world of standard social science in which a finding that would be a random event less than 5% of the time is considered to be valid scientific finding, and enter the biological world of DNA testing in which we can have conclusions of near certainty. Indeed, our conclusions from DNA testing frequently overturn conclusions reached beyond a reasonable doubt, and it is this level of certainty we can reach about the extraordinarily high degree of bias demonstrated by “experts” in sexual dangerousness proceedings, a degree of bias that is so extreme that it may justify referring to the resultant courtroom proceedings as the “New Salem Witch Trials.”

“[T]here’s the King’s Messenger. He’s in prison now, being punished: and the trial doesn’t even begin till next Wednesday: and of course the crime comes last of all.”

“Suppose he never commits the crime?” said Alice.

“That would be all the better, wouldn’t it?” the Queen said.

Alice felt there was no denying that. “Of course it would be all the better,” she said, “but it wouldn’t be all the better his being punished.”

“You’re wrong there, at any rate,” said the Queen. “Were you ever punished?”

“Only for faults,” said Alice.

“And you were all the better for it, I know!” the Queen said triumphantly.

“Yes, but then I had done the things I was punished for,” said Alice, “that makes all the difference.”

“But if you hadn’t done them,” the Queen said, “that would be better still; better, and better, and better!” (Lewis Carroll, *Alice in Wonderland*)

**“Sexually Dangerous” Determination**

The Massachusetts Treatment Center (TC) is where men who have been found to be “sexually dangerous” (SD) are sent for treatment for one-day-to-life or until they are no longer deemed to be SD. They are required by the law to be reviewed annually by the Community Access Board (CAB) to determine if they remain SD. If they are no longer SD, then the Commonwealth is supposed to file a petition for a review of the commitment. While petitions can be filed by the Treatment Center after the CAB determines the offender is not SD, they can also be filed by the offender himself or a family member (regardless of the CAB opinion) after a year has passed since the last review. In actual practice, however, because of a backlog in the courts, reviews tend to occur only after three or more years have passed since the last petition for release was heard.

When the TC was run by the Massachusetts Department of Mental Health (from its inception until the early 1990s, a period of over 30 years), on a fairly regular basis the CAB would determine that a man no longer met the criteria to be considered SD and the TC would file a Section 9 petition to remove the SD label and end the day-to-life commitment. However, since the Department of Corrections (DOC) took over the evaluation and treatment of sex offenders—more than 20 years ago—this has never occurred. Also note that under the federal version of the SD law, the Adam Walsh Act (which authorizes day-to-life commitments to sex offender treatment programs run by the states when such state-run programs are available), a petition for release from the superintendent of the TC—an event that has never occurred under DOC control—is the only route to a review of the commitment and possible release.

This study compares an upper limit of the base rate for sex offense recidivism with the actual rate of opining SD (i.e., opining that the offender is likely to reoffend) by examiners hired by the Commonwealth as Qualified Examiners (QEs). The study then compares the known base rate of sexual dangerousness as defined by the law and established by decades of actual judicial findings with the Qualified Examiners’ patterns of opining SD. The question is whether the expert rate of opining SD is

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at all in synch with either an upper limit of possible likelihood of sex offense recidivism or the established rates of “sexual dangerousness.”

It is important to distinguish between recidivism rates as established by studies that followed released offenders to see which ones committed new sexual offenses and “sexual dangerousness,” which is a legal construct defined by the operation of a statute that calls for a legal conclusion by fact finders. Sexual dangerousness is not a term defined by psychology or psychiatry or any clinical field; it is a term solely defined and created by the operation of a legal statute. Thus, we can know the base rate or frequency of sexual dangerousness by looking at the actual rates of finding offenders to be sexually dangerous that were established by the judiciary of the Commonwealth. Indeed,

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***Sexual dangerousness is not a term defined by psychology or psychiatry or any clinical field; it is a term solely defined and created by the operation of a legal statute.***

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the highest court in the Commonwealth, the Supreme Judicial Court, has determined that the judiciary’s prior interpretation of “likely” (to reoffend sexually and thus to present a risk of significant harm)—which lies at the core of the definition of SD—is the proper and correct interpretation of the statute today. (**Commonwealth v. Boucher**, 438 Mass. 274 (2002).) Thus, the actual frequency of sexual dangerousness among sex offenders has been established and experts’ patterns of opining SD can be compared to the established base rate.

### **Null Hypothesis, Criteria Modeled on Legal Determinations**

We start with the null hypothesis: The Qualified Examiners’ rates of opining SD are consistent with the known frequency of the finding of SD by the courts. Then we look at the actual patterns of opining SD by the QEs. If the facts make the null hypothesis untenable—i.e., a possible but extremely improbable event—then we reject the null hypothesis. This same analysis can also be applied to the experts hired by the Commonwealth to sit on the CAB at the TC. The CAB’s panel of experts reviews all of the SD offenders in the Commonwealth

annually and issues opinions about whether each man remains SD. We can also use the same logic to evaluate the presence or absence of bias in the initial commitment hearings in which ordinary sex offenders are evaluated to determine which ones among them are SD.

We start with the assumption that the Commonwealth’s examiners’ methodology does *not* lead to biased conclusions and it leads them to make predictions that are more or less consistent with the actual risk. Normally, if the data then yields a probability of less than 5%, the null hypothesis is rejected. This means that 5% of the time when we reject the null hypothesis we are just dealing with a chance phenomenon, i.e., even if the probability is less than 0.05, there still is a possibility that there is no real bias. Given that I am alleging a degree of bias that rises to the level of ethical misconduct, I will use a more stringent criteria

modeled on legal determinations. I will even go further than *beyond a reasonable doubt* and will demonstrate that the bias is so severe that it goes *beyond the possibility of doubt*.

The frequency of QE findings of SD to be used in this analysis will come from two sources:

1. The QEs themselves from their testimony while under oath in the course of these trials; and
2. A memo compiled by the vendor who hired and oversaw the work of the QEs during the decade in which control of the TC passed from the Department of Mental Health to the Department of Corrections where it now remains.

I will compare the QEs’ rates of opining SD as determined by these sources with the true base rate of this legally created and interpreted notion as determined by judicial construction as well as comparing the rate of opining SD with the recidivism data from a 25-year follow-up study of men released from the TC. (R.A. Prentky, A.F. Lee, R.A. Knight, and D. Cerce, “Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis,” 21(6) *L. &*

*Human Behav.* 635-59 (1997).) Note that the Prentky, et al. study was not an attempt to estimate actual recidivism rates, but rather an attempt to compare recidivism rates based on different criteria, e.g., charges, convictions, or incarceration. Still, the study does give us some sense of the upper possible limit of a base rate of recidivism for this very specific population.

### **Determining Comparison Base Rate of Sex Offense Recidivism for Men Who Had Been Adjudicated Sexually Dangerous and Then Were Released**

The Prentky, et al. study produced an overall sex offense recidivism failure rate estimate derived from a survival analysis of 45% (actual observed recidivism was 29%) for SD men 25 years after release from the TC. Based on the Prentky study, a recidivism base rate estimate of 50% will be used for comparison with the state’s examiners’ patterns of opining. This is likely to be an overestimate, but this gives the Commonwealth and the Commonwealth’s experts the benefit of the doubt in evaluating bias, making it harder to produce a significant finding.

One objection to using such information and comparing it to real life clinical opinions is that the underreporting of sex offenses is typically taken to indicate that any empirically obtained rates seriously underestimate the actual offense rate. However, this is highly unlikely to be so in this case. There are 11 reasons for this; the following considerations make it almost certain that 50% is an overestimate of recidivism and lead to the conclusion that the figures from the Prentky, et al. study do not underestimate recidivism and may very well be an overestimate:

1. That, for each offender, being caught once eliminates the impact of any unreported offenses.
2. That the offenders in their study had been convicted more than once for prior sex offenses and thus, on average, were not very good at remaining undetected when compared to other sex offenders, many of whom are never caught.
3. That, if they were truly compulsive, repetitive offenders (as they had been adjudicated to be and as the state’s examiners were claiming they still were) were likely to commit more than

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- one or two offenses over a 25-year period and thus likely (given factors two and five) to come to the attention of the authorities (given enough time).
4. That they were given enough time (adjusted to simulate 25 years in the community for all of the men).
  5. That this group of compulsive repetitive offenders, who were below average for their ability to remain undetected, were under heightened surveillance over that long time period.
  6. That the 25-year estimates of recidivism that were used for the majority of men in the Prentky study who were not out for the full 25 years were based on the few men who had the opportunity to be out for the full 25 years and who were released at a younger than average age (a known risk factor) after having received much less treatment (another relative risk factor).
  7. That it was easier to obtain release during the first half of the studied period and thus, on average, younger and more dangerous men who received less treatment, punishment, and had aged less were used to estimate recidivism for all of the longer periods of exposure.
  8. That Prentky, et al. used the most inclusive estimate of recidivism, "charge," which surely included some false recidivists in this large study over such a long period.
  9. That 25-year recidivism estimates for the entire group were adjusted based on a tiny group of men who actually had been followed for 25 years, and this tiny sample included an unusually high percentage of recidivists, thus biasing the survival estimates downward.
  10. That, because new commitments under the civil commitment statute had been suspended and there were no new admissions for a decade, the men being considered for release during the period of the QEs' opining patterns examined in this study were much older and had been incarcerated much longer than the men released in the early part of the Prentky study and upon whom the 25 year recidivism figures were based.
  11. That the extremely low observed rate of recidivism over a five-year average period after release of SD men (2% if we assume that the one offender who

was charged with a new offense was so convicted) is simply not possible if the true recidivism rate were 50% or higher.

**Counting Recidivists, Not Offenses.**

First, Prentky, et al. were not counting offenses, they were counting *recidivists*. If a man was caught once, he was counted as a failure (a recidivist), and, even if he had committed other offenses that went undiscovered, he could not have been counted as more than one failure. So, even if there were unreported offenses, if the men under question are repetitive recidivists (which is what is claimed when a state examiner opines "sexually dangerous"), then even if most of their offenses went unreported, over a 25-year period they would be likely to be caught once. Thus, even if every one of a repetitive recidivist's unreported offenses had been known, this knowledge would not raise this man's contribution to the estimated rate of overall recidivism in this study.

**Unreported Stealth Offenders.** Second, it is reasonable to assume that some offenders are very good at escaping detection and that they account for a significant part of the unreported offenses. It is also fairly safe to assume that these stealth offenders were not, by and large, in the offender group in this study; remember, we are dealing with only repetitive and compulsive offenders who have already been caught more than once (and in most cases several times or more), as either extreme violence (e.g., murder) that almost never goes unreported or repetitive convictions were a requirement for commitment as a sexually dangerous person during the period of this study.

**Multiple Offenses.** Third, even if some offenses were not reported, if an offender was a true SD person—i.e., a compulsive and/or repetitive sex offender—then, given enough time, he was likely to either be caught or, because of the eighth reason (below), to be counted as caught. While there may be some men who are compulsive, repetitive offenders who would only commit one additional offense over a 25-year period, these are likely to comprise a small minority of truly SD men who are falsely considered not dangerous and released. We can expect that most of the false negatives (i.e., truly SD men mistakenly released into the community) would commit more than one or two offenses if they remained at large for 25 years. When this factor is combined with the previous factor (poor stealth among our sample) and the fourth and fifth factors

(long follow up and heightened surveillance for our sample), it becomes less likely that unreported offenses will lead to an underestimate of recidivism.

**Follow-Up Study Period Versus Estimates.** Fourth, the Prentky, et al. study used a very long follow-up period of up to 25 years for some men. The recidivism rate for the others were estimates based on the group of men who were released early enough that they could have been at large for the entire 25 years.

**High-Profiles Suspects.** Fifth, in my personal experience at the TC (1977-1991), when my patients were out in the community and a sex offense occurred in a geographical area that they could physically have been in, they were almost always investigated. Thus, unlike other offenders who could get away with numerous offenses without being noticed, current and former TC patients were high-profile suspects for the police long before Megan's Laws. This means that in this study, repetitive, compulsive offenders who were, on average, not very good at escaping detection were under heightened surveillance. Clearly, underreporting of offenses that would cause recidivists to escape detection is less likely to have been as big a problem for this group as for sex offenders in general.

**Long-Term Recidivism Rate Basis.** Sixth, the estimates of recidivism for the full 25 years for the majority of the men who were not released early enough to have been at large for 25 years were based on a small handful of men who were released early in the TC's history. Only this small group of men, who were released in the TC's first five years, could have been out for 20 to 25 years, and thus the long-term recidivism rate had to be based on this group of releasees who left shortly after the TC first opened. Since this group could only have been in the TC for a short stay of one to five years, they were also likely to be significantly younger than the men who are considered for release from the TC today (when the state's examiners were forming their opinions reported on in this study), most of whom (because of the tenth factor) have been incarcerated for more than 15 years, and many of whom have been in for more than 20 to 25 years, with much of that time being post-criminal sentence.

Thus, long-term recidivism was based on offenders who left after relatively short stays, often after having received little or,

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in the early days of the TC, poorly formulated treatment (if any). The 25-year risk was estimated based on the few men who had the opportunity to be out for the full 25 years, and who were released at a younger than average age, a known risk factor (H.E. Barbaree, R. Blanchard, and C.M. Langton, "The Development of Sexual Aggression Through the Life Span: The Effect of Age on Sexual Arousal and Recidivism Among Sex Offenders," in R.A. Prentky, E.S. Janus, and M.C. Seto, eds., *Sexually Coercive Behavior: Understanding and Management*, Vol. 989 59-71 (2003); R.K. Hanson, "Recidivism and Age: Follow-up Data on 4,673 Sexual Offenders," 17 J. Interpersonal Violence 1046-1062 (2002)), after having received much less treatment, another relative risk factor. (R.K. Hanson, R.K. Gordon, A.J.R. Harris, J.K. Marques, W. Murphy, V.L. Quinsey, and M.C. Seto,

up for Section 9 hearings now (see factor 10). Therefore, we can assume that younger men with shorter periods of incarceration and less treatment—thus, more dangerous men—were released in the early part of Prentky's study; i.e., on average, the group of men that were used to estimate long-term recidivism (as only the early releasees could actually have stayed out 15 to 25 years) were likely to be more dangerous than the average releasee in the study.

**Most Inclusive Measure of Failure.** Eighth, the high estimates of recidivism Prentky, et al. reported were based on the most inclusive measure of failure and surely contained some cases in which no recidivism existed. For example, a former TC patient is charged or arrested because an offense similar to his historical pattern was reported. Upon further investigation, the victim says he was not the perpetrator, or other evidence exonerates him. Though he was not convicted—and if the charges

**Older Group.** Tenth, because the old civil commitment law had been eliminated and there were no new admissions for a decade, the men being considered for release during the period of the QEs' opining patterns examined in this study were much older and had been incarcerated much longer than the men released in the early part of the Prentky study (i.e., those men upon whom the 25-year recidivism figures are based). (Robert Prentky, personal communication, May 2001, confirmed that the age of the men petitioning for release in the period of the current study was significantly older than the men in his sample.) As aging is a significant risk reducer, and as almost all the men evaluated for release from civil commitment during this study period would be entering or in old age before 25 years passed, this older group is likely to have a lower rate of recidivism than the group followed in the Prentky, et al. study.

**Observed Recidivism Rate Lower.** Eleventh, the observed recidivism of men who have been found not SD over the first decade of the TC's management by the Justice Resource Institute under the administration of the DOC suggests a much lower rate of recidivism. Note that the vast majority of these men were considered SD by the CAB and/or the Qualified Examiners at the time they were determined to be not SD by the court. During the nine-plus years that Dr. Barbara Schwartz had been the clinical director of the TC, approximately 50 men had been found to be not SD. Of these men, not one had been convicted of a new sex offense. (Barbara Schwartz, personal communication, Sept. 24, 2001.) It is just not plausible that the true base rate of recidivism for men released from the TC could be anywhere near 50% and zero out of 50 released men would be convicted of a new sex offense over an average of five years of living out in the community. Though it appeared at the time (2001) that one would be so convicted, this rate of reconviction (2% over five years) is almost impossible to conceive of if the true rate of recidivism for these men was greater than 50%.

**Reasonable Downward Adjustment to Overall Base Rate.** To summarize: Based on these considerations and the findings from the Prentky, et al. study, which produced an observed recidivism rate of 29% (with a failure rate estimate derived from a survival analysis on those who had been out for the full 25 years of 45%), we can be

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***Long-term recidivism was based on offenders who left after relatively short stays, often after having received little or, in the early days of the TC, poorly formulated treatment (if any).***

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"First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders," 14(2) Sexual Abuse: J. Res. & Treatment 169-94 (2002).)

**Avenues of Release.** Seventh, for the first one-and-one-half decades of the existence of the TC, there were two ways for a man to leave. The courts could adjudicate him no longer SD, or he could be released on parole while still carrying the SD label. This latter mechanism accounted for a significant number of releases. (Robert Prentky, personal communication, May 2001.) When the men had two shots at release—with both being genuine avenues of release—it was easier to get released from the TC. Since the mid-1970s, the parole option has been shut down, making release harder.

If the men used to estimate long-term recidivism had an easier time getting out, they would have been younger, on average, when they entered the community. This established risk factor (age) suggests that their recidivism rate should be higher than that of the older crop of men coming

were dropped, he may not even have been arrested—even if someone else was convicted of the offense, this counted as recidivism in Prentky's study. (Prentky, et al. counted such incidents precisely to attempt to offset the underreporting of offenses.) Keeping in mind that former TC patients were under heightened surveillance and were considered prime suspects for any sex offenses that were committed in the area they were known to live or work in, it is likely that there were some charges and/or arrests for offenses that did not occur.

**Small Sample Biases Toward Higher Rate.** Ninth, the 25-year recidivism estimates for the entire group were adjusted based on a small handful of men who had actually been followed for 25 years. This tiny sample included an unusually high percentage of recidivists and thus the 25-year failure rate estimate derived from a survival analysis for the entire group was likely to have been biased toward a higher recidivism rate based on very little information. (Karl Hanson, personal communication, 2002.)

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fairly sure that the true base rate of recidivism for men considered at recommitment trials is well below 45%, and that by using a 50% recidivism base rate for comparison we are giving the state's examiners a strong benefit of the doubt.

Given these qualifiers, Prentky's 25-year recidivism estimates of 52% for child molesters (actual number that recidivated during the study period was 32%), 39% for rapists (actual 26%), and 45% for all the offenders combined (actual 29%) should all be adjusted downward. Since lengthy involvement with therapy, documented behavioral change in the institution, and the passage of a one-and-one-half decades since

the last sex offense were the norm for these cases during the period of this study, the most reasonable adjustment to an overall base rate between 29% (actual) and 45% (estimate) is downward, making it highly likely that the majority of the men at Section 9 hearings are not SD. Thus, using a 50% recidivism estimate to evaluate the accuracy of the Qualified Examiner's findings, gives the Commonwealth's experts a very strong benefit of the doubt.

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*Daniel Kriegman, a licensed psychologist, served as the Director of Supervision and Training and the Director of Intake and Treatment Planning at the Massachusetts Treatment Center for Sexually Dangerous Persons at the Massachusetts Correctional Institution at Bridgewater, where he trained as a*

*student and later functioned as a clinical leader. He is a Qualified Examiner under the Sexual Dangerousness statute (M.G.L. Chapter 123A). He formed the Human Services Cooperative. He is the co-author (along with Dr. Malcolm Slavin) of the acclaimed book, The Adaptive Design of the Human Psyche: Psychoanalysis, Evolutionary Biology, and the Therapeutic Process (1992, Guilford Press), that created the psychoanalytic paradigm known as "evolutionary psychoanalysis," and co-editor (with J.G. Teicholz) of Trauma, Repetition, & Affect Regulation: The Work of Paul Russell (1998, The Other Press). In addition, he has published widely on topics related to the evolutionary understanding of human behavior and the theory and practice of depth psychological (psychoanalytic) approaches to psychotherapy. Dr. Kriegman has been on the Faculty of the Massachusetts Institute for Psychoanalysis, and was a founding board member of the Psychoanalytic Couple and Family Institute of New England, Inc. ■*

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