

Powerful Medicine: *The Synergism of Free Speech and Cybercommunications in American Multicultural Democracy*

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In the 1995 film "Crimson Tide", an American submarine commander, played by Gene Hackman, reprimands his executive officer, played by Denzel Washington, for expressing doubts about a decision in the presence of the crew. Well aware of the totalitarian nature of his leadership, and precluding any objections his executive officer may have about the abridgement of his rights of free speech, the commander emphatically pronounces "We're here to preserve democracy, not to practice it." The sub commander's theory of command, exemplified by this seemingly paradoxical formulation, brings the world to the brink of nuclear war by attempting to fire his warheads in de-fiance of protocol, a war prevented only by the democratically principled executive officer's refusal to submit to his commanding officer's self-willed cancellation of the rules of democracy. Americans have historically suspended democratic principles when national security or certain values or institutions – Christianity, the Union, family, and, in the South, slavery – seemed threatened.¹ Wartime has been regarded as an acute situation critical enough to warrant suppression of free speech and free media, as evidenced by the Alien and Se-

1 Paul L. Murphy, *The Meaning of Free Speech* (Westport, Connecticut: Greenwood, 1972), p. 15

dition Acts of the late eighteenth century, the Espionage Act during World War I, and the short-leashing of the American press during the Gulf War (a result of the lesson learned during the sixties from the negative public opinion and anti-war protests at least in part generated by the extensive coverage of the Vietnam War). But there is more at work in the dynamics of "Crimson Tide" than the restraints on free speech and the suspension of democratic rule. There is a powerful irony embodied in the juxtaposition of the sub commander's desire to "preserve democracy" by suppressing a differing opinion, with his subsequent willingness to rashly unleash weapons of mass destruction, which would immediately lead to retributive attacks against the very democracy he so vigorously defends. We can almost sense the sub commander's lingering, perhaps latent, urge to press the button, to fire his potent weapons, because, God knows, it must be a hellish tease to be continuously in possession of such technological wizardry and not, perhaps ever, have the opportunity to use it, despite, or due to, its devastating capabilities.

At the core of the dilemma is the virtually irresistible impulse to exercise the powers of technology, without regard to either the immediate or long-term effects upon traditional values – humanity in general and democracy in particular. Having achieved the transformation from agrarian to industrial society, America is now well into the process of becoming a technologically-driven communications and information society. If we accept Willem H. Vanderburg's assertion that "techniques have increasingly displaced the customs and traditions of a society's culture",² we would do well to ask ourselves what customs and traditions of American society are made vulnerable by the emergence of computer-driven communications and information systems. Are the principles of democracy threatened or enhanced by cybercommunications and an unrestrained corps of journalists equipped with the tools of the electronic media? Will these principles be expanded and accelerated to the point of mutation and self-destruction or improved upon in a long-term positive manner? Can we allow the expansion of communications technology and new mediums such as the Internet to go unchecked or is the growth of the state an

2 Willem H. Vanderburg, "Political Imagination in a Technical Age", *Democratic Theory and Technological Society* (Armonk, New York: Sharpe, 1988), p. 6.

acceptable countermeasure in response to the proliferation of these technological advances?

In *The Coming Information Age* Wilson P. Dizard argues that commercial information systems, left to the fate of laissez-faire economic policy, result in a widening gap between information-rich and information-poor, a process similar to the separation between knowers and doers in a technological society.³ What happens if and when these gaps occur in a multicultural America, already challenged by accelerating fragmentation? There is reason to believe that information-based divisions will correspond to economic and racial divisions plaguing America today, thus exacerbating tensions between rich and poor, black and white, educated and uneducated. Can we accept these costs in order to reap the benefits of improved information and communications. Vanderburg observes that

[s]ociety continues to act as though our striving for micro-level rationality and efficiency will translate into improvements on the level of the whole...this is not necessarily the case. Many of our advances on the micro-level are undercut by massive problems on the macro-level.⁴

The consequences cybercommunications will have upon American democratic theory and practice and upon existing economic disparities have only to a lesser degree initiated debate among citizens and politicians concerning the legislation directed at these expanding systems. Other age-old morality issues, such as the censorship of pornography and offensive speech, have been rejuvenated by the newer currents of political correctness, and prompted more radical reactions. Strange bedfellow alliances such as the National Organization of Women (NOW) and Christian coalitions have exercised their influence upon Congress in hopes of regulating both new and established mediums, even though their efforts may result in the imposition of restrictions in conflict with the First Amendment.

In the following sections I will briefly mention some of the potential effects cybercommunications may have upon democratic societies, and will then turn my attention to a few issues involving freedom of expres-

3 Wilson P. Dizard, *The Coming Information Age* (New York: Longman, 1982), pp. 186-190.

4 Vanderburg, *op. cit.*, p. 9.

sion and moral responsibility in general, and try to place them in context with threatening Internet censorship.

Cybercommunications and Democracy

What consequences can cybercommunications have for American democracy? Technophobes fear, primarily, the atomization of individual identities and the further erosion of social cohesion. Some argue that while mediums such as the Internet produce more democracy, they do not necessarily lead to better democracy. This is because the accelerated pace at which public opinion can be coalesced and communicated to politicians results in a further alienation of non-majority opinion. Public opinion, in such an effective mutation, has drastic consequences for a politician's ability to legislate for the long-term public good. The Internet, of course, is only one of the many utilities to grow out of giant leaps made in communications technologies this century. Before taking the floor to vote on crucial issues, politicians receive stacks of faxes, phosphorous waves of e(lectronic)-mail, on top of messages/opinions transmitted via "old-fashioned" telephone and antiquated (snail) mail systems (satellites and air delivery notwithstanding). This is democracy with exponential force, a hyper-democracy in which the role of civic-minded representation is greatly reduced and the self-interested voices of the people speak with deafening volume. With the weight of public opinion behind him and C-Span cameras in his face, the conscience and reason of the politician risks being chased into a forgotten corner along with any considerations for minority protection.

Mark Poster, in a *Wired* (November 1995) article entitled "The Net as a Public Sphere?" sees related threats to the practice of democracy created by the spread of the Net. He argues that Internet newsgroups are not "nascent public spheres that will renew democracy", observing that "[d]isembodied exchange of video text is not a substitute for face-to-face meeting", which encourages "rational argument" and "consensus". Traditional public spheres – "the ancient Greek agora, the New England town hall, the local church, the coffeehouse, the village square, and even

the street corner" – places for "political discussion and action...have largely been replaced by television and other forms of media – forms that arguably isolate citizens from one another rather than bring them together." One unifying characteristic of television, however, though it is being dissolved by the expansion of channels, is that it traditionally has succeeded in broadcasting the same messages to large parts of the population, thereby providing a common ground of entertainment, information and discussion. The Internet threatens to undermine this function of the mass media by providing radically easier access to a wider variety of divergent, polemical opinions to each on-line individual. Wilson P. Dizard reminds us that "[a] large democracy thrives only when its citizens share enough information, beliefs, and assumptions to function together in a rough consensus."⁵ In a democracy ruled largely by public opinion, with only occasional and erratic checking by the Supreme Court, the further loss of shared values and ideas could have dire consequences:

Is the fractionalization of audiences a net social gain?... What happens when each minority group can tune in to its own prophet? When there are no more Walter Cronkites each evening to reassure that despite all its afflictions the nation still stands?⁶

Cybercommunications, with its potential for social atrophy, combined with a nation already divided by economic disparities and ethnic, racial, gender and moral factions, is a potentially dangerous cocktail to mix. Add to this mixture the "powerful medicine"⁷ of free speech and the synergism could radically transform democracy as we know it.

If the tendency towards isolation continues for citizens of a society, it is perhaps inevitable that at some point they will accept it among their representatives. What happens to mutual interests, civic cooperation and empathy if and when international summits and congressional sessions and the greater part of political activity take place in cyberspace? Poster mentions the loss of consensus and the will to compromise in his piece, and, I think, understanding, tolerance and benevolence risk being sacri-

5 Dizard, op. cit., p. 12.

6 Douglas Cater, cited in Dizard, op. cit., p. 141.

7 In the Cohen decision of 1971, Justice Harlan said "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." Cited in Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976), p. 192.

ficed on the altar of technology as well. We cannot expect any type of cyber-fellowship to reproduce the positive feelings of community created by real-life gatherings full of eye-gazing, hand-shaking, back-slapping participants. The important qualities of physical warmth and contact risk being neglected in the wake of cybercommunications. The likely result will be a devaluation of policy created for the public good and an increase in special interests and self-serving motivations, relative even to the prevalence of these attitudes today.

The Internet does at least three things to affect our concepts of community: 1) it physically separates community members, or at least challenges the convenience and necessity of physical nearness; 2) it enables individuals to be more selective in choosing what messages they will grant attention to; and 3) it enables a larger number of people to express their ideas with greater frequency to an expanded audience. In other words, the Internet, if it becomes the, or even a , "way of life", will reduce physical contact, dilute society's base of shared knowledge (and, subsequently, its sense of history, tradition, values and goals), while generating more ideas to be considered in the political process.

There are legitimate fears about an electronically generated tyranny of the masses, but we certainly cannot derail or even regulate the Net because it promotes the political participation of more citizens, even though we may suspect that this will only increase incompetence in policy-making. No one, except anti-technology extremists, is arguing for pulling the plug out of communications technologies or imposing government regulations on these grounds. There simply is no "clear and present danger" to warrant suspension of First Amendment protection, only distant and obscure omens. In a free speech democracy the rise of a medium which creates opportunities for diverse splinter groups and free-thinking individuals to express their ideas in a public forum is seemingly a natural and positive development. Traditional (commercial) mass broadcast media have no obligation to assist these citizens in furthering their messages. To the contrary, they possess a godlike power to deny them access to their vehicles of communication, swayed only by factors related to profit. Broadcast media, as a form of public expression, are also subject to government censorship, unlike telephone systems, which are granted the status of common carriers, and thus are conduits independent of and not responsible for content, though there can be sanctions against users concerning obscene speech. If

the Net is recognized as a common carrier, rather than a broadcast media, which allows capital and censorship to limit the exchange of controversial thoughts, it has the potential to function as a conduit for largely unfettered expression, subject only to the limits of private systems operators and the informal restraints of Netiquette.

We know that improved communications and open discussion accelerate the pace at which countries move towards or broaden democracy. Today countries without democratic traditions are already feeling the democratizing influence of the Net:

The Internet international computer network was pivotal in telling the world about the pro-democracy demonstrations at Tiananmen Square in 1989. Similarly, when Soviet hard-liners attempted to recapture the government from the leaders of reform, Internet communications, both internally and to the rest of the world, helped keep up the pressure that ultimately led to the collapse of the coup.⁸

Furthermore:

...the explosion of new media outlets means that centralized proposals to regulate speech are increasingly doomed to fail in practice, no matter how cogently they are framed in theory. It will be hard to police the "marketplace of ideas" when there are so many more markets to monitor. And if existing free-speech doctrine is still founded on the utopian premises epitomized by Justice Holmes' metaphor of a perfectly deregulated "Free trade in ideas", the new media technologies may fulfill Holmes' vision dramatically.⁹

If the Net promotes democracy, at least initially, and expands the free trade of ideas, perhaps we should not worry that it also defies regulation. But Barbara O'Brien claims that "[t]he Net has become the world's bulletin board, on which anyone with a cause and a keyboard can spread his views. The result is a yeast of human craziness that is far more frightening than CD-ROM files of naked people", only to conclude "[d]on't get me wrong – I love the Internet. The free-for-all discussions on the Usenet have challenged my own assumptions and stimulated my thinking, and I believe the Internet should remain free and unregulated and open to all. I'm just not sure I want my children exposed to any of it."¹⁰

O'Brien's piece embodies some of the dilemmas and controversies

8 Lance Rose, *Netlaw* (Berkely, California: McGraw-Hill, 1995), p. 2.

9 Jeffrey Rosen, "Cheap Speech", *The New Yorker*, 7 August 1995, pp. 75-76.

10 Barbara O'Brien, "Cyberporn's No Big Deal, But Beware of Cybernuts", *International Herald Tribune*, 1 September 1995, p. 9.

generated by the Net. She admits that Net liberty and the resulting welter of radical, subversive and paranoid political chatter are "frightening", yet opposes regulation, and wants it "open to all", excluding her children, whom, we must assume, she, and not the state, should protect. Perhaps the most perplexing issues to arise from the rapid spread of modern communications involve the viability of American First Amendment democracy in the face of the actual and potentially infinite growth of anarchistic, racist, pornographic and other offensive expressions.

Cybercommunicatins and Morality

While the dissemination of political views, even those as far-fetched and anti-government as those O'Brien mentions, enjoy First Amendment protection, pornography on the Net has already caused enough uproar to lead to passage of the Exon amendment. Signed by President Clinton in February 1996 as part of the Telecommunications Decency Act, the Exon amendment prohibits the transmission of pornographic words and images over the Net and allows for prosecution for verbal (e-mail) harassment. The Exon amendment has caused an understandable outcry from on-line libertarians who feel that this is the first step down a slippery slope ending in the ditch of political correctness and Puritan censorship.

Marty Rimm's comprehensive, fear-inducing and flawed study of "Cyberporn" in *Time* magazine (3 July 1995) was one of the driving forces behind reactionist support and Senate passage of the Exon amendment. Rimm and his alarming statistics have since been debunked, but the atmosphere of fear and support for regulation remains. The Christians want pornography off the Net and so do the feminists. Most parents agree that childrens should be protected from it, but the questions of who should and can do the protecting and how cause conflict. These groups see obscenity and pornography as clear and present dangers to the moral fiber and gender perceptions of American citizens, and the Supreme Court has largely reinforced this attitude. By looking back at some of these precedent-setting cases, we can perhaps identify some of the fundamental issues which are at stake in the current censorship debates.

In 1973 a New York radio station operated by Pacifica Foundation aired a monologue by comedian George Carlin based on a list of "seven dirty words" banned from public expression. After complaints to the FCC from a father, the issue of whether dirty words may be broadcast over public airwaves reached the Supreme Court. The FCC based its objection on 18 United States Code, Section 1464, which states that "[w]hosoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years or both."

Five justices, for various reasons, ruled in favor of the FCC, finding the monologue not obscene, but indecent, and citing the individual's right to be left alone. The distinction between obscenity and indecency deserves some attention. While obscenity has been defined as expression emphasizing a prurient interest in sex and devoid of any other value, indecency is related more to the type material which can be deemed appropriate for children. So while certain material may not meet the criteria necessary to ban it on obscenity grounds, it may still be banned, if it has potential to be made available to children, as indecent. It is, in essence, a type of "heightened scrutiny" triggered by the risk of a child's exposure to objectionable material.

The language of the Exon amendment allows for censorship in either case, and encumbers systems operators with the heavy burden of age verification. Both Christian conservatives and feminists recognized and exploited parental fear – anxiety about the possibility of their children finding their way to pornographic texts or images on the Internet – as the key for gaining Senate votes. The act also aims to outlaw e-mail harassment and thus opens up a whole other can of worms about what constitutes proper, or simply allowable, speech. In order to assess the wisdom of such control, we must ask ourselves if it is reasonable and constitutional for government to whitewash society to the point of presentability for children, a line of action which (inadvertently?) relieves parents of much of their responsibility. And, if so, how can it be achieved without diminishing the lives of adults, in which many pleasures are found in the gray areas of acceptability? The issues to be decided and the reactionary atmosphere they are decided in have important consequences for not only First Amendment freedoms, but the role of the family as well.

What the Exon amendment regulates is substance of expression, since

the traditionally valid reasons for censorship – time, place and manner of speech – apply only ambiguously to the Net. Here no public facilities are disturbed and the transmitted material does not invade an on-line user's right to be free from pornography. The images are not imposingly transmitted to screens, a user goes in search of them. In the 1973 "seven dirty words" case, Justice Stevens argued that the pervasiveness of the broadcast media justifies legislation concerning what and when programs may be broadcast, but this does little to bring the voluntary nature of downloading into question. In my opinion, the argument does not even apply to the case at hand – the father who was offended by George Carlin's monologue could have simply turned the radio off and preserved both his privacy and his son's purity. Or, better yet, he could have used the incident as a point of departure for and explanation of his moral code. Relinquishing control of these crucial, daily decisions to governmental decree equals the raising of a white flag over the already heavily shelled bastions of parental authority and competence. In an eloquent, ringing conclusion to his essay "Computer Porn Panic", Andrew Calcutt warns against the tendency to rely on the state as a moral guardian:

The overall effect of this atmosphere is to create a dependency culture in which all of us – Net users and non-users alike – are encouraged to rely on the embrace of those in authority to save us from each other and from the beast within ourselves. This is an insidious invitation. The more we come to rest on the bosom of the state (regardless of how soft it feels), the more we are rendered incapable of acting outside the clutches of authority. This is the authority trap; and unless we reject the politics of safety as expressed in the arguments for reigning in the Net, and the anti-people assumptions behind these arguments, we will find ourselves locked into it. This aspect of contemporary society is more dangerous, debilitating and demoralizing than any amount of computer pornography could ever be.¹¹

The campaigns to regulate pornography and offensive speech have resulted in such strange bedfellows as Christian fundamentalists and radical feminists joining forces. The Christian coalitions emphasize the immorality of pornography, while feminists are more concerned with the oppression of women inherent to the genre. Catherine MacKinnon and her supporters argue that pornography is a violation of their civil rights

11 Andrew Calcutt, "Computer Porn Panic", *Futures*, volume 27, number 7, September 1995, p. 760.

12 Nat Hentoff, *Free Speech for Me But Not for Thee*. (New York: HarperCollins, 1992).

and that this supersedes any First Amendment considerations. Pornography, they say, is a subordination of women, sex-based discrimination, a perpetuator of male supremacy, a promoter of contempt for women, and, more concretely, an instigator of rape and violence against women.¹²

The danger that political correctness deters rational inquiries into the true prevalence and harmfulness of (computer) pornography does exist. But whether their assertions about the effects of pornography are true or not, and convincing evidence in these issues is hard to come by, the fact remains that many people have a strong aversion to pornography, vulgar speech, obscenity and indecency, for one reason or another. And if communities can muster a majority vote in favor of anti-porn legislation, should a democracy not recognize and abide by it? Not if the legislation is unconstitutional, and this is where the Supreme Court plays such an important role. This is, theoretically, the last bastion of constitutional rights. Even if an overwhelming majority (the Senate approved the Exon amendment 84 to 16) passes legislation prohibitive of free expression, and survives presidential veto powers, the fate of the act will not be determined until it endures the acid test of constitutionality in the Supreme Court. This, in the spirit and practice of checks and balances, serves to protect minorities from majoritarian tyranny, for instance when the minority consists of free speech advocates and the majority consists of government censorship advocates. Even if so many citizens and their representatives agree that public morality depends on censorship for its health, the mechanisms of a constitutional democracy, for better or worse, make it possible for a group of nine justices to override this consensus.

Walter Berns, a conservative legal scholar usually in opposition to judicial review, regards certain public expressions as offensive and disruptive enough to warrant legal restraints by way of government-initiated punishment. Keeping in mind the ambiguities of how "public" electronic speech on the Internet is, and the lapse of time since Berns published his opinions, we may still profit from an examination of his ideas in "Vulgar Speech and the Public Good" (The First Amendment and the Future of American Democracy, 1976).

In his essay, Berns expresses a desire to expand the Supreme Court's list of valid reasons to exclude some speech from First Amendment protection by adding substance to time, place and manner. He is confident

that legislators, law enforcement agencies and judges are capable of distinguishing between vulgar (unprotected) speech and polite (protected) speech. Yet he can only do so himself, in an exercise of *reductio ad absurdum*, by cursorily juxtaposing extreme cases of both. He admits that there "will be cases where the power to judge speech by its substance will be abused, but the answer to this is Supreme Court review; and of course there will be borderline cases, but the law faces that problem in many, if not all areas" (pp. 200-201).

Despite his efforts to disarm us by admitting his own flawed reasoning, Berns' logical hammerhead seems to have fallen off its shaft. Even allowing his ultimate (and sudden) faith in judicial review to go undisputed, we are still left with an argument that surrenders to the ambiguity of law and endorses the malting of more laws which are hopelessly inscrutable and open to subjective, or even radical, interpretation. Obscurity of law, inevitable as it may be in some, or even many cases, should be vigorously opposed, for with its triumph it replaces the democratic rule of constitutional law with the tyrannical rule of whimsical man.

If applied to the world of cybercommunications, the type of policy Berns proposes to protect public morality would have adverse effects on the openness of the Internet. With the spectre of regulation and the threats of cash damages or imprisonment hanging over their heads, systems operators and users will inevitably retreat into a defensive position towards the types of clearly benign materials and exchanges which can be permissibly transmitted over networks. If the wording of anti-pornography or anti-offensive speech legislation is enigmatic, and by nature it almost certainly will be, operators and users may find it wise to avoid even the gray areas of legal communications. Initiation of such caution constitutes a "chilling effect" upon expression, a phenomenon which First Amendment interpretations by the Supreme Court seek to prohibit.

Berns' argument grows out of his discussion of *Rosenfeld v. New Jersey*. Rosenfeld, while addressing a public school board meeting, "repeatedly criticized various teachers and board members" and "repeatedly denounced them as 'motherfuckers'..." Now, admittedly this is highly offensive and improper language. The truth of Mark Twain's claim that Americans are the only people to be blessed with both freedom of speech and the sense not to use it is severely damaged by such examples. But does this type speech constitute unacceptable verbal harassment or is ex-

posure to this type of vulgar behavior one of the risks inherent to life in a free speech democracy? Unfortunately, it appears to be both. We certainly are within our rights to deplore such behavior and deem it personally unacceptable, to complain about it, to ignore it, or, less productively, to return it. Yet we must also recognize that this is nearly a worst-case scenario, and that laws cannot eliminate these with surgical precision. At best, laws can only suppress or punish such behavior, rendering any considerations of and counterpoints against the speaker's motivations and claims as meaningless. This is in contrast to Holmes' ideal in which bad ideas (Rosenfeld's words express extreme opinions more so than a vulgarity to be taken literally) are defeated by better ideas. And for all the admirable intentions Berns has for deeming "incivility as a public offense punishable by the public authority", there seems to be no consistent manner of or, arguably, reason for, doing so, a point recognized by the Court's majority in the Rosenfeld decision.

Conclusion

The seemingly irresistible force of technology has led us to accept the inevitability of cybercommunications without considering its effects upon American democratic values. The greatly enhanced powers of the media and the rapid spread of the Internet will play major roles in how American and global democracies develop in the years to come. And there seems to be call for both concern and enthusiasm. But we cannot simply shrug our shoulders at the adverse ramifications these media may bear with them. Nor should we jump to the conclusion that only an expansion of police powers can protect us from their negative effects. We must acknowledge the mixed blessing nature of these mediums and use this consciousness to resist the atomization of our own identities, the threatening social alienation from our geographical communities and the tyranny of the on-line masses cybercommunications has the potential to bring about.

The Internet, aside from being perceived by so-called technophobes as eventually undermining the American political process, has also been

seen as a threat to public morality, and become the whipping boy of choice for diverse Christian, feminists and parental organizations. Their narrow agendas, in the spirit of political correctness, have led them to the conclusion that their rights not to be offended take precedence over the vital principles of the First Amendment. The prospect of facing a society of free-speaking individuals and unregulated media in the age of cyber-communications is a daunting one. But the lack of government interference does not leave communities without other mechanisms to control unacceptable behavior. Informal restraints such as ostracization, denunciation and even impromptu economic pressures applied to the offender have traditionally sufficed in discouraging inappropriate speech, especially when combined with proper parental involvement and guidance. Granted, a few incorrigible individuals and organizations will always remain immune to and defiant of the kid glove approach of private sanctions, but their imperviousness should not lead to regulatory impetuosity on the part of their deplorers. Taking recourse in the law in such matters involves an unnecessary abdication of personal responsibility and perpetuates a gravitation towards centralized regulation. What is needed instead is a recovery of private, individual and parental responsibility and the courage to declare independence from mediums which persist in subverting our values.

Of course, it is one thing to get rid of our televisions if networks send too much sex and violence for our liking, and quite another to get rid of our telephones if someone insists on regularly making obscene calls to us. With the Internet, an alternative power of choice reside within us; we can both keep it and decide what we are confronted with. It seems unnecessary and unreasonable to call upon state authority if we or even our children happen upon a pornographic image or are exposed to offensive language in a discussion group. And, with the passage of the Exon amendment, it is frightening to realize how eager it is to respond.

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