University of New South Wales
University of New South Wales Faculty of Law Research Series
2010

Year 2010 *Paper* 8

The Great Escape: refugees, detention and resistance

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Abstract

In my book, Border Crimes: Australia's war on illicit migrants, I develop Green and Ward's (2004) focus on institutional deviance to argue that the Australian state's alienation, criminalisation and abuse of unauthorised migrants constitute state crime. In this context, state crime is defined by the forceful denial of the legitimate expectations of unauthorised migrants, rather than breaches of formal rights under international humanitarian law selectively bestowed by the state. This paper employs these themes to develop an analysis of the resistance by refugees to the Australian state, with a particular emphasis on escapes from detention. The paper outlines the extensive and often unreported forms of resistance undertaken by refugees before detailing particular examples of escapes. It then proceeds to analyse the High Court of Australia's decision in the case of Behrooz and its role in legitimising the mandatory detention policy. The paper then discusses how refugee resistance might be conceptualised within a state crime paradigm. It argues that in comparison to the state of absolute rightlessness epitomised by the 'Muselmann' of Auschwitz, refugees in Australian detention centres are more appropriately understood as being in a liminal state, in which they have a limited but fluid degree of agency and some capacity to engage with the civil society of the detaining state. Recognition of this liminal state is important for two reasons: in practical terms, it helps cohere opposition to state practice and policy within civil society; in conceptual terms it provides insight into the nature of the social audience capable of rejecting state practice as deviant and the ways in which such deviance can be formulated.

The Great Escape: refugees, detention and resistance

Paper delivered at the State Crime and Resistance Symposium
Victoria University of Wellington, New Zealand
18-19 January 2010[1]

Abstract

In my book, *Border Crimes: Australia's war on illicit migrants,* I develop Green and Ward's (2004) focus on institutional deviance to argue that the Australian state's alienation, criminalisation and abuse of unauthorised migrants constitute state crime. In this context, state crime is defined by the forceful denial of the legitimate expectations of unauthorised migrants, rather than breaches of formal rights under international humanitarian law selectively bestowed by the state. This paper employs these themes to develop an analysis of the resistance by refugees to the Australian state, with a particular emphasis on escapes from detention. The paper outlines the extensive and often unreported forms of resistance undertaken by refugees before detailing particular examples of escapes. It then proceeds to analyse the High Court of Australia's decision in the case of *Behrooz* and its role in legitimising the mandatory detention policy. The paper then discusses how refugee resistance might be conceptualised within a state crime paradigm. It argues that in comparison to the state of absolute rightlessness epitomised by the 'Muselmann' of Auschwitz, refugees in Australian detention centres are more appropriately understood as being in a liminal state, in which they have a limited but fluid degree of agency and some capacity to engage with the civil society of the detaining state. Recognition of this liminal state is important for two reasons: in practical terms, it helps cohere opposition to state practice and policy within civil society; in conceptual terms it provides insight into the nature of the social audience capable of rejecting state practice as deviant and the ways in which such deviance can be formulated.

[1] I am grateful to Richard Bailey for his helpful comments on an earlier version of this draft; and to Ian Rintoul and Claire O'Connor for providing information as footnoted below.

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Introduction

In March 2002, approximately 1,000 protestors converged on the remote Woomera immigration detention centre in South Australia. At that time, a number of detainees were involved in ongoing protests inside the centre. As the video footage you are about to see shows, the protestors unexpectedly broke through the perimeter fence to come face to face with the detainees. What happened next was unplanned and clearly took the authorities by surprise.

Excerpt from Woomera film[2]

About 50 people managed to escape during these protests although most either surrendered or were re-captured immediately. Twelve remained at large for over three years. In 2005, two Iranian escapees were arrested in Melbourne and re-detained. Both subsequently had their claims for refugee status accepted and were granted temporary protection visas. This triggered a series of surrenders by the remaining escapees during 2006. Eventually all of the twelve were accepted as refugees and granted permanent residence. At least one now has citizenship[3].

The events at Woomera were not isolated: between January 1999 and July 2008, there were 373 escapes from immigration detention (O'Neill 2008: 103). Some, like the break-out from Woomera, were totally unplanned; others, such as the tunnelling out from Sydney's Villawood detention centre in 2001, showed a high level of ingenuity. While the escapes will be the focus of this paper, they represent just one aspect of the sustained resistance by some of the thousands of people incarcerated by the Australian policy of mandatory detention of unlawful non-citizens. Since 1992, this policy has been central to the Australian state's response to illicit migration, especially refugees seeking to enter Australia by boat without a visa.

Both Sharon Pickering (2005) and I (Grewcock 2009) have argued that mandatory detention and other aspects of Australia's border policing policies constitute a form of state crime as defined by Green and Ward (2004:2): 'State organisational deviance involving the violation of human rights'.

[2] The film 'Woomera 2002' was made by activists involved in the protests; copy in author's possession. See also O'Neill (2008: 83-103).

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[3] Information provided by Ian Rintoul of the Refugee Action Coalition, personal communication 2 October 2009.

This paper seeks to locate resistance to detention within that state crime framework and in the process explore some of the conceptual issues arising from criminological definitions of state crime.

A state crime framework

Australia's border policing practices provide an example of why criminologists should adopt a state crime paradigm that goes beyond state officials committing unlawful acts. As successive Australian governments have repeatedly argued in response to critics, indefinite administrative detention of 'unlawful non-citizens' is lawful. It complies with a narrow reading of the Refugee Convention and international humanitarian law and operates in accordance with specific domestic legislation that has been confirmed as constitutional by the High Court of Australia. It has also operated with a high level of institutional legitimacy and political bipartisanship.

This has allowed successive governments to evade responsibility for the systemic and extensively documented abuse within detention centres by employing elaborate techniques of denial or blaming errant individuals in some of the most egregious cases. It has also enabled the criminalisation of resistance, even though such resistance can be understood as a legitimate response to state inflicted harm.

I have therefore used Green and Ward's (2004: 2) definition of state crime as a starting point but have developed it in two ways: first, to emphasise the state's use of force as an indicator of its deviant and damaging behaviour; and second, to focus on three dimensions of state crime relevant to border policing - the alienation, criminalisation and abuse of unauthorised migrants.

Each of these dimensions of state crime has shaped the nature of resistance within Australia's immigration detention complex, that has included off-shore centres on Nauru and New Guinea, and is now concentrated on the excised off-shore Australian territory of Christmas Island.

The alienation of detainees operates through their lack of lawful status; their restricted access to legal redress; their physical separation from civil society and their ideological construction as potentially dangerous outsiders. Resistance at this level represents a claim to legitimacy by those whose authenticity is systematically denied or challenged.

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The criminalisation of detainees derives from their construction as 'illegal'; their association with illicit migration agents, whose activities can now draw sanctions as severe as for the most serious violent offenders; and their incarceration in prison-like institutions. The highly regulated and oppressive conditions of detention necessarily shape the nature of resistance, which to some extent mirrors that of prisoners, although I will argue that escapes from immigration detention should be conceptualised differently to escapes from prisons.

The abuse of detainees can be measured in part by the psychological impact of detention. The extensive evidence of depression and mental illness being triggered or exacerbated by detention helps explain high levels of self-harming, suicidal and destructive behaviour but these can also represent desperate acts of individual protest in circumstances where all other avenues of complaint and redress appear closed off.

Resistance and escapes

While the detention policy has involved the systematic abuse or removal of rights, this has not resulted in the total destruction of the capacity to resist or the complete denial of agency to detainees. As I discuss below, this has significant implications for how we conceptualise the social audience, but at this point I want to emphasise the extent of the resistance by detainees, much of which has been misconstrued or barely reported.

Since the inception of the mandatory detention policy, but accelerating since the late 1990s, detainees have engaged in multiple, often overlapping, forms of resistance at both a collective and individual level. These range from low level non-compliance to full-scale riots and include: strikes by detainees employed to work in the centres; political protests and sit-ins; hunger strikes; acts of self-harm, including the stitching of lips, the carving of words such as 'freedom' onto limbs and jumping into razor wire; inter-detainee violence usually triggered by perceived advantages being given to a particular group; physical confrontations with staff, including responses to verbal and physical assaults by staff or institutional displays of force such as lock-downs; and individual and group escapes.

Many of these incidents have resulted in disciplinary sanctions, including prolonged segregation within the detention centres and transfers to prisons; others have resulted in criminal prosecutions and prison sentences. Such responses reinforce the deviance vested in detainees by virtue of their detention and can be used to legitimise the generally punitive response to unauthorised migrants.

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However, despite the official hostility to detainee resistance, the Woomera events illustrate how some of the refugees who escaped detention managed to negotiate surrender and obtain residence. In this context, it can be argued that escaping from detention ought to be viewed by criminologists as an aspect of the forced migration experience and as a legitimate act of survival, although this clearly confronts the state response to such actions.

The courts and the right to escape

While escapes from custody have inspired numerous anti-heroes within a rich genre of books and films, the legal consequences for escapees are generally severe. In New South Wales, for example, escaping from prison custody carries a maximum sentence of 10 years[4]. In Australia, the common law defence of necessity offers the only legal justification for convicted prisoners escaping custody. Australian courts have construed this very narrowly and will only countenance the use of the defence in life threatening situations, where the acts of the prisoner are proportionate to the acts faced – for example, a prisoner escaping from the immediate vicinity of a fire[5]. The position is a little more flexible in the United States, where access to the defence has been extended to include avoiding intolerable conditions (Brown et al 2006: 651-653).

The rigid approach to prison escapes derives from the nature of the prison sentence as a formally sanctioned punitive deprivation of liberty. However, immigration detainees are not serving a specific sentence imposed by a criminal court. Instead they are formally detained for administrative reasons in circumstances where their liberty is not denied for reasons of punishment. This is clearly of little consolation to detainees facing years of detention but attempts to justify escape on the grounds of harsh and inhuman conditions of a scale that could satisfy criminological definitions of state crime have not been successful.

In August 2004, the High Court of Australia handed down its decision in the case of Mehran Behrooz[6], an Iranian refugee who escaped from Woomera with five others in November 2001, only to be arrested a few hours later. Behrooz, who was charged with escaping detention[7], sought to obtain in the Magistrate's Court evidence detailing

[4] S310D *Crimes Act* 1900

[5] See for example, *R v Loughnan* [1981] VR 443; *R v Rogers* (1996) 86 A Crim R 542.

[6] *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36.

[7] Under s197A *Migration Act*, the maximum penalty for this offence is imprisonment for 5 years.

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conditions at the detention centre, in order to argue that the conditions of his detention were so harsh they fell outside the definition of detention in the *Migration Act.* It followed that as he was not lawfully detained, a charge of escape could not be made out.

The High Court rejected these propositions by a 6-1 majority. It found that immigration detention for administrative purposes was a lawful exercise of Commonwealth power and that the conditions of detention were irrelevant to determining its validity. Chief Justice Gleeson summed up the decision by declaring:

> Harsh conditions of detention may violate the civil rights of an alien. An alien does not stand outside the protection of the civil and criminal law....But the assault, or the negligence, does not alter the nature of the detention...The detention is not for a punitive purpose...And the detainee does not cease to be in immigration detention within the meaning of the Act[8].

The decision in *Behrooz* played its part in legitimising the use of detention[9]. The narrow legal distinctions between administrative and punitive detention facilitated official denial of the impact of detention on detainees in circumstances that reinforced their alien status.

Moreover, escaping such conditions reinforced the deviance of detainees, who were already being de-legitimised through their constant labelling by the government and the media as 'queue jumpers' and 'illegals'. This particularly applied to young adult men from the Middle East, who apart from being the main embodiment of the 'threatening asylum seeker' (Poynting et al 2004), tended to be those who were charged and brought before the courts[10].

While Mehran Behrooz was the subject of an ideological offensive conducted at the highest levels of the state, he and other escapees ultimately did not face extensive additional criminal sanctions. In October 2004, Behrooz pleaded guilty in the Magistrates Court to the original escape charge. In October 2003, following several suicide attempts, he had been admitted to a psychiatric hospital in Adelaide as a result of "serious suicidal intent and behaviours and symptoms suggestive of major

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[8] *Behrooz v Secretary, DIMIA,* as cited, at par.21.

[9] For a discussion of the various High Court decisions approving administrative detention, see Grewcock (2009: 250-259).

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[10] Personal communication from Adelaide barrister, Claire O'Connor, 11 December 2009.

depression"[11]. He remained in hospital until July 2004, when he was released into community detention, although still diagnosed as 'suffering from a major depressive disorder'[12]. In December 2004, given this history, the Chief Magistrate discharged Behrooz without recording a conviction, requiring him only to enter into a two year good behaviour bond.

In accordance with departmental policy, the Crown appealed against this and a number of similar sentences for escapees. In series of related judgements[13], the South Australian Supreme Court rejected the appeals on the basis that leniency should apply 'under the doctrine of mercy'[14]. This ensured that good behaviour bonds became the norm in subsequent escape cases before South Australian magistrates[15].

The Supreme Court's reasoning was clearly affected by the individual suffering of the escapees and despite the High Court's unwillingness to allow evidence of the conditions at Woomera, there seems little doubt that the environment within the centre was profoundly abusive. In particular, the Human Rights and Equal Opportunity Commission's report into children in detention (HREOC 2004) provided a devastating catalogue of abuse at Woomera. To quote just one example, a psychologist who worked there in 2002 recalled:

> The self-harming was so prevalent and so pervasive that no child would have avoided seeing adults self-harming….There was very visible self-harm, constant talk of it. The children for example when I arrived would have seen people in graves…Some of the children – it was their parents or people they knew. They knew why the parents were doing this. They knew that the parents were talking about possibly dying. They were on a hunger strike. There was visible self-harming on the razor wire. People were taken to the medical centre at regular intervals having slashed. People taken to hospital. There were attempted hangings that these children would have seen (quoted, HREOC 2004: 405).

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[11] Quoted in *Morrison v Behrooz* [2005] SASC 142, at par.8.

[12] *Morrison v Behrooz*, as cited, at par.11.

[13] See *Shillabeer v Hussain* [2005] SASC 198; *Police v Kakar; Elder v Kakar* [2005] SASC 222; *Boonstoppel v Hamidi* [2005] SASC 248; *Elder v Shojaee* [2005] SASC 285; *Elder v Said* [2005] SASC 286; *Bridle v Gomravi* [2005] SASC 295. My thanks to Adelaide barrister, Claire O'Connor, for alerting me to these cases and providing background information.

[14] *Morrison v Behrooz*, as cited, at par.46.

[15] According to O'Neill (2008: 103), of the 373 escapees, 'two were gaoled, 183 were re-captured and deported, and 13 left Australia voluntarily.'

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I have detailed elsewhere how such descriptions illuminate the systemic patterns of abuse operating within Australia's immigration detention centres (Grewcock 2009: 196-241).

In addition to providing legitimate reasons for why people like Mehran Behrooz would want to escape, such descriptions also give insight into the scale of desperate, high-risk, self-injurious resistance. At the time, much of this was dismissed by the government as manipulative behaviour but within the wider community, the revelations about Woomera contributed to a growing hostility to the government's policy (particularly in relation to children).

As confronting and damaging as acts of self-harm might have been, they nevertheless provided a mechanism for the plight of the detainees to be recognised. Combined with more orthodox protests and escapes they demonstrated that the detainees were prepared and able to act on their own behalf. This raises important conceptual issues for theorists of state crime regarding the levels of abuse required to satisfy definitions of state crime and the role of resistance in constructing the social audience.

Detention, social agency and resistance

One of the enduring debates about state crime is the extent of the social injury required to satisfy a criminologically sound definition. Narrow paradigms of state crime that require indisputable or egregious breaches of international law[16] do not have to engage much with this if, as suggested by Cohen (1993: 98), the focus is limited to 'gross violations of human rights – genocide, mass political killings, state terrorism, torture, disappearances'. Such state actions would satisfy any definition of state crime because of their unambiguous criminality and level of impact on the victim. Again, for reasons I have outlined elsewhere (Grewcock 2008; 2009: 12-20), such frameworks risk overlooking or excluding the continuum of abuses inflicted upon unauthorised refugees, especially in circumstances where the state can claim compliance with the law and neutralise the extent of the injury.

A corollary of an approach to state crime that takes genocide or mass killings as a benchmark is that the victims of state crime are reduced to a state of almost total

[16] For example, Cohen's (1993) framework: 'gross violations of human rights – genocide, mass political killings, state terrorism, torture, disappearances'.

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political incapacity. They are rendered to a condition where victim resistance is impossible or futile; and they must rely upon the responses of others to reject and resist the state's deviant behaviour.

In such circumstances, international legal institutions or external sources of power become a substitute for self-activity and in the process diminish the capacities of the victim to shape the perceptions of deviance within wider civil society. In other words, deviance is defined externally to the victim. It is identified through perceptions of loss and injury either not formulated by the victims themselves or limited to retrospective witness testimony, in situations where it is often too late to meaningfully alter the victim's circumstances or call the perpetrators directly to account.

However, incarceration within Australia's immigration detention complex represents a form of state crime not predicated on the reduction of its victims to an absolute state of rightlessness or powerlessness. As dismal as Woomera might have been, it was not Auschwitz. This is more than just a rhetorical comparison. The death camps of Nazism represented an extreme dystopia, where state organised violence literally did reduce many of its victims to the barest social existence as part of a wider government program of extermination.

Thus Sofsky (1999: 16-27), describes the concentration camp as a site of 'absolute power' of a 'distinctive and singular kind', that was incapable of being 'integrated into the history of despotism, slavery or modern discipline'; that could not 'be mapped onto a continuum of domination'. In this environment, 'the causal nexus between action and survival' was destroyed. 'The ultimate fate of prisoners did not depend on their own actions. Only a minute fraction managed to escape. The others survived only because the Gestapo released them or the liberators arrived in time' (Sofsky 1999: 25).

In his extraordinary testament of survival in Auschwitz, Primo Levi (1987: 93-106) distinguished two types of detainee - the 'saved' and the 'drowned':

> This division is much less evident in ordinary life; for there it rarely happens that man loses himself...
>
> But in the Lager, things are different: here the struggle to survive is without respite, because everyone is desperately and ferociously alone. If some Null Achtzehn [literally zero 18] vacillates, he will find no-one to extend a helping hand; on the contrary someone will knock him aside, because it is no-one's

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> interest that there will be one more 'musselman' [literally 'Muslim'][17]dragging himself to work every day...
>
> All the musselmans who finished in the gas chambers had the same story, or more exactly have no story; they followed the slope down to the bottom, like streams that run down to the sea...Their life is short but their number is endless; they, the *Muselmänner,* the drowned, form the backbone of the camp, an anonymous mass, continually renewed and always identical, of non-men who march and labour in silence, the divine spark dead within them, already too empty to really suffer. One hesitates to call them living: one hesitates to call their death death, in the face of which they have no fear, as they are too tired to understand.

For the musselman, resistance, escape or even a claim to identity was beyond their social capacity. As Giorgio Agamben (2008) describes, the existential desire of survivors like Levi to bear witness contrasted with the almost total denial of the existence of the Muselmann, even within historical accounts of the Holocaust. Here, we have a population not only reduced to a barely recognisable social state but almost beyond any retrospective designation of victimhood.

Yet even in these circumstances, it is important to recognise there was some resistance within the camps – particularly by those with histories of political activity (Bailey 2009). While the musselman should be remembered as a product of some of the worst experiences of state crime, there were those who fought to avoid being reduced to that status.

Liminality, deviance and the social audience

For theorists of state crime, looking back on this period allows us to generalise about the grotesque consequences of the enforced separation of designated alien groups. Even though some of the descriptions of life in Australia's immigration detention centres do conjure images of the living dead, and while the abuse is systemic and the degree of psychological damage often permanent and severe (Grewcock 2009: 217-229), it is important to recognise the relative degree of agency contemporary detainees retain.

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[17] For discussion of the origin of the term's use in this context, see Agamben (2008: 44-48).

Despite the Australian government's deliberate strategy of physically isolating refugees in desert camps or offshore islands, the social isolation is not total and the detainees' humanity is not completely destroyed. The deliberate restrictions imposed by the Australian state have not rendered impossible all communication between detainees and civil society: lawyers, non-government organisations and politicians can visit these centres; family members, friends, political activists and occasionally journalists can maintain communication through visits, letters, emails and phone calls. There has also been extensive illicit contact between detainees and supporters in the community.

Such links between the detainee and civil society are tenuous, imperfect and often conditioned by restrictive state practices. But combined with the actions of detainees themselves, they enable detainees to have a contemporary voice.

For these reasons, detainees ought not to be viewed as the modern day musselman. Instead, they are more appropriately understood as being in a liminal state[18], in which they have a limited but fluid degree of agency and some capacity to engage with civil society. From this miasmic zone of the social order, detainees' attempts to assert legal rights; their determination to resist and on some occasions escape; and their persistent claims to legitimacy have important implications for the way we construct a paradigm of state crime.

Within a state crime framework, recognition of the liminal state and potential agency of the immigration detainee is important for practical and conceptual reasons.

From a practical perspective, resistance makes detainees visible; it can highlight the contemporary reality of state organised abuse; it encourages a sense of social solidarity by appealing to a common humanity; and adds a sense of urgency for the need to change state policy and practice. In short, it helps opposition to the state to cohere within civil society.

Conceptually, state crime is a more dynamic and nuanced criminological concept when it incorporates a level of victim agency and can be based on a deviance identified and formulated from below.

[18] The term 'liminal' is taken from the work of anthropologist Victor Turner who used it in various contexts to describe a state of transition, 'a no-man's land betwixt and between the structural past and the structural future' (Turner 1986: 41). It has subsequently become a developing concept within refugee studies.

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In a criminological sense, detainees form part of and help construct the social audience capable of challenging the deviance of the state. As part of this process, detainee resistance challenges the static and conditional nature of human rights selectively bestowed by the state and subjugated to over-riding ideologies of sovereignty. It challenges carefully crafted mechanisms of denial such as the High Court's distinction between punitive and administrative detention. It lays claim to an authenticity and legitimacy denied to detainees by the state. It enables various forms of political solidarity to develop and it helps de-legitimise the systematic alienation, criminalisation and abuse of unauthorised migrants.

Conclusion

Criminological understandings of state crime are not absolutely dependent upon victim resistance. As the experience of the Holocaust demonstrated, there are forms of state crime that can remove the capacity of victims to resist, although not necessarily the ability of sections of civil society to intervene. (Arguably, the absence of opposition to the Holocaust within Nazi Germany represented political and ideological shortcomings rather than just the extraordinary violence of the state).

But while an absence of resistance does not negate the concept of state crime, I would suggest that resistance is possible – indeed likely - more often than not, and that the fundamental challenge for criminology is how to recognise and conceptualise it. Failure to do this leaves us with conceptions of state crime that appear incapable of challenge or solution; contribute to a sense of pessimism or powerlessness on the part of victims or those who reject the state's actions; and deny criminology a role in public discourse beyond critique.

Escaping from immigration detention is formally criminal and may be tactically counter-productive. There was certainly hostility to the escapes from some who were opposed to the government's detention policies (O'Neill 2008: 102-103).

But the actions of Mehran Behrooz and his fellow escapees also posed questions about the legitimacy and nature of the immigration detention regime. In doing this, they demonstrated that they were not helpless victims. Instead, they provided an opportunity for us to focus on the legitimate expectations and rights of forced migrants - rather than the determinations of courts, state agencies and non-government organisations - as a baseline measure of state deviance.

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