

August 7, 2024

VIA EMAIL

Act 156 Task Force on Parentage Laws
c/o Department of the Attorney General, Appellate Division
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Re: Supplemental Information re- 2024 Article 9 of the Uniform Parentage Act

Dear Hawaii Task Force on Parentage Laws:

USDCC appreciates the opportunity to engage with this task force in its discussions concerning inclusion of 2024 Article 9. We write to provide the following information for the task force's consideration to supplement our earlier submissions.

Why The Law/Government Needs To Require Identity Disclosure at 18

It is critical for the law/government to require gamete donor identity disclosure because research shows that many donor conceived people, when they reach adulthood, will have strong desires to know the donor's identity for several important reasons (health, identity formation, etc.). The State of Hawaii has already recognized this in the context of adoption where state law allows adult adoptees to obtain the records from their adoption proceedings, which often contain identifying information on the adoptee's genetic parent(s).¹

As leading legal scholars have recognized, commercial donor conception by its nature is different from private sexual reproduction and legislation is necessary to equalize families formed through donor conception. Indeed, legislation provides parentage protections and access to information.² And the failure to legislate in this area leaves families formed through donor conception vulnerable to harm, including through family separation, lack of medical history, and lack of identifying information. For these reasons, USDCC strongly supports comprehensive parentage updates provided by the 2017 Uniform Parentage Act, with the updated 2024 Article 9.

Additional Information For The Record:

¹ Haw. Rev. Stat. § 578-15 (b)(2) (providing that a sealed adoption record may be opened and inspected by, *inter alia*, an adopted individual after the individual "attains the age of eighteen and upon submission to the family court of a written request for inspection by the adopted individual or adoptive parents").

² Cahn, N. & Suter, S., *Developing a Reproductive Justice Approach to Regulating Formal and Informal Sperm Donation*, Sperm Health Politics (Dec. 14, 2023), available at <https://ssrn.com/abstract=4665036> (attached).

- Article 9 is needed in Hawaii because IVF clinics licensed in Hawaii collect and use donor gametes in Hawaii.³
- There are major egg banks that require all new donors to consent to identity disclosure at 18, including World Egg and Sperm Bank Inc.⁴
- Multiple major sperm banks—including California Cryobank since 2016—require all new donors to consent to identity disclosure.⁵
- California Cryobank’s pricing structure is a clear outlier when compared to its competitors, as shown in our prior submissions. Assertions that this disparity is attributable to identity disclosure (rather than other factors such as greater overhead/screening etc.) are purely speculative, particularly given that its competitors do not charge substantially more for identity disclosure donor sperm.

Thank you for your time and consideration of this important matter. We urge the task force to please include 2024 Article 9 in the draft bill that it sends to the legislature.

Sincerely,

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³ Customer service message from “Julie” with Donor Egg Bank USA, to USDCC (Aug. 5, 2024) (on file with USDCC); see also, e.g., Fertility Institute of Hawaii, *Become An Egg Donor*, available at <https://www.ivfcenterhawaii.com/3rd-party/become-an-egg-donor/>

⁴ Email from Wendy McCloud, World Egg and Sperm Bank, to USDCC (Aug. 7, 2024) (on file with USDCC).

⁵ J. Shamonki, *Sperm Bank BMPs*, in *Cryopreservation in Assisted Reproduction*, at 211 (2024).

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Act 156 Task Force
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Forthcoming in Almeling, Rene, Lisa Campo-Engelstein, and Brian T. Nguyen, co-editors. *Sperm|Health|Politics*. Under contract with New York University Press.

Developing a Reproductive Justice Approach to Regulating Formal and Informal Sperm Donation

Naomi Cahn & Sonia Suter

This essay explores the regulation of sperm donation from a reproductive justice perspective. It compares formal sperm donation, which involves fertility clinics and sperm banks, and informal sperm donation, which arises through social media, classified ads, conversations, etc. While there are reasons some donors and recipients may prefer the informal market, the piece notes the risks associated with the less regulated market. Finally, it examines and responds to concerns about regulating sperm donation, including worries about limiting sperm supply, reproductive autonomy, exceptionalizing assisted reproductive technologies, treating genetic connections as privileged, and majoritarian values hurting marginalized groups. Ultimately, it concludes that concerns about regulating sperm donation should be taken seriously, but rather than using them to prevent regulation, it argues that these objections should guide regulations to promote reproductive justice and equity for many groups, including parents, LGBTQ communities, people of color and donor conceived people.

The Supreme Court's opinion in *Dobbs* presents fundamental threats to reproductive autonomy in the United States, particularly for communities that already face inequity in accessing health care. In reaffirming *Roe*, the Supreme Court's 1992 opinion in *Planned Parenthood v. Casey* situated the right to abortion within the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy" (505 U.S. 833, 851). But *Dobbs* was entirely dismissive of this line of reasoning, which has implications for assisted reproductive technology ("ART") as a form of procreation. In the wake of *Dobbs*, both states and Congress have considered restrictions of, and protections for, ART. Colorado, for example, enacted ground-breaking legislation that recognizes the rights and interests of donor-conceived people (DCP) (Protections for Donor Conceived People and Families 2022). Congress has considered legislation that would protect access to fertility treatment (Choi 2022). And there has been a great deal of attention to potential laws that might prohibit discarding extra embryos or limit how many can be created in the first place (Tracy 2022), a limitation comparable to abortion bans.

At the same time, there are also fears that reproductive rights advocates will become splintered by class and race, with wealthier, white people concerned primarily about ART, while the reproductive justice movement focuses on broader issues of reproductive health and "the ability and rights of women to have or not have children, and to parent their children with dignity" (SisterSong n.d.). Consider, for example, that former Vice-President, Mike Pence, a staunch anti-abortion advocate, and his wife used IVF (Owens and González 2022). It is possible, then, to undergo IVF, ensure that no embryos are discarded, and support an abortion ban.

Less attention has been given to issues of accessibility and the cost of ART; this too is a reproductive justice issue that shows class and race disparities. In this essay, we focus on sperm donation, which raises issues concerning parentage, access, and reproductive justice. We explore the relationship between formal sperm markets—where fertility clinics or sperm banks process and sell sperm and made available through fertility clinics or sperm banks and which are loosely regulated by the Food and Drug Administration—and informal sperm markets—where recipients access sperm in more casual settings. This exploration highlights inequities in access to reproductive care and also shows concerns about regulation in the sphere of ART. While we advocate for additional regulations in the formal market, we are cognizant that certain regulations may push people toward the informal market. As we detail below, the actors and incentives in the formal and informal markets are different, and therefore the appropriate role of the law with respect to each market should reflect those differences.

As a preliminary matter, we note that sperm presents distinct issues for reproductive equity for several reasons. First, collecting sperm is a relatively noninvasive procedure that typically does not require medical intervention. Consequently, sperm donation can more easily evade regulation because it can occur outside of medical clinics. Second, although we recognize that an underground market can exist for eggs, like the “open secret” of organ donation (Goodwin 2006, 11), so far, there are few signs of such a market in eggs, one component of the possibly gendered tone to this Thinkpiece. Third, and correspondingly, we recognize that it is not just people who identify as cis-men who can donate sperm. This is particularly important, given that the field of masculinity and reproduction has typically focused on “cis- and heteronormativity and the assumed reproductive and sexual normalcy of the heterosexual matrix” (Mohr and Almeling 2020, 168).

The Formal Fertility Market

The formal fertility market consists of all types of legally regulated third-party reproduction, meaning the use of gametes or uteruses from people not intending to parent, as well as any involvement by health care professionals. This is broader than the CDC’s definition of assisted reproductive technology (ART), which includes all techniques involving eggs or embryos and does not include assisted insemination. According to the CDC, 2% of babies born each year were conceived via ART (CDC 2023), but it is unclear how many more children were born through sperm donation. The consumers of ART include medically infertile couples and socially infertile individuals, i.e., those who cannot reproduce without assistance from third parties such as physicians, donors, and/or surrogates (Sussman 2019).

The formal market is regulated by both governmental and private actors. The FDA imposes requirements for record keeping and for screening gametes, with a focus on sexually transmitted diseases (Cahn & Suter 2021, 41). And professional organizations issue guidelines, including recommended genetic evaluation of donors, that function as a kind of quasi regulation (American Society for Reproductive Medicine, 2021).

When it comes to accessing the fertility market, there are disparities across various demographics: Those with incomes under \$25,000 are half as likely as those with incomes over \$100,000 to see “a medical provider because they are unable to become pregnant” (Kelley et al. 2019, 562). For people with disabilities, who face twice the poverty rate of people without disabilities, the cost of infertility treatment can be “out of reach” (Davidson

2021). Black women are almost 40% less likely than white women to see a medical provider when they face infertility (Kelley et al. 2019), in part because physicians are less likely to refer them to specialists due to biases, such as “Black women can’t be infertile” (McFarling 2020). Only 14 states have fertility insurance coverage of IVF; legislation on that score is also stalled (Resolve 2023).

Pragmatic Reasons for the Informal Fertility Market

With these barriers to fertility-care access for both physically and socially infertile individuals, many recipients and donors may turn away from formal sperm donation—donation that involves sperm banks or fertility clinics and is regulated by the FDA—to informal (“DIY”) sperm donation—donation that might occur, for example, through social media postings or through conversations with a friend. Although the legality of informal market is unsettled, people are using it for several reasons.

First, it is potentially less expensive to purchase sperm through the informal market; a vial of sperm purchased through sperm banks can easily cost more than \$1,000 (Xytex Corporation 2023), while sperm from an acquaintance may well be free. Second, DIY sperm donation expands the types of potential donors, especially those who are underrepresented in sperm banks. Black donors make up less than 2% of donors in the largest cryobanks, in part because the screening criteria disproportionately exclude them. As the number of Black women turning to sperm banks increases, there is fierce competition among them for the small supply of sperm from Black donors (see Newman’s essay in this volume). The number of Hispanic and other non-white or non-Asian donors is also strikingly small. In addition, the FDA excludes gay male donors from providing their sperm (Ferguson 2022). Third, recipients who have an interest in developing a relationship with their donor might be drawn to the informal market (Jadva et al. 2018). While there is no formal prohibition on doing so in the formal market, purchasing sperm from an anonymous donor makes it unlikely that there will be a relationship (and intending parent[s] may value the security of legal parentage, with no unwanted donor involvement). Genetic testing might lead the intending parent to the donor, but there is no pre-existing agreement or relationship with an anonymous donor, nor any obligation to establish such a relationship.

For any of these reasons, some may choose to find sperm from a good friend, on Craigslist, or even a neighborhood listserv. Consider the Facebook group, Sperm Donation USA, a private group, with more than 23,000 members. Its public-facing page offers: “If you would like to find a sperm donor without the expensive costs of a sperm bank then join Sperm Donation USA!” (Sperm Donation USA, n.d.). Pollentree.com offers a free-matching service, albeit with a subscription fee (PollenTree, n.d.; Yarrow 2014; Russell 2021).

The informal sperm market may also be desirable to donors. Selling sperm directly gives them control over how many families use their sperm, how many children they help create, and even *which* families obtain their sperm. Donors have expressed the desire to ensure that they donate only to families who will care well for the future children (Sony Podcasts 2022). The DIY market also allows donors to earn more money than they might otherwise with cryobanks functioning as intermediaries; others may wish to avoid screening required by many banks (such as genetic screening) or by the FDA (which screens out gay donors). On the other hand, some donors may be drawn to the informal market for altruistic reasons, (Graham, Freeman, and Jadva 2019; Russell 2021) where some are willing to truly donate, rather than sell, their sperm (Bowles 2021).

Concerns about Lack of Regulation

At the same time, an unregulated informal market in sperm may also produce harms (Butler 2022). First, the lack of oversight raises problematic health risks. The formal sperm market may not provide full protection against the transmission of genetic disease, but it does protect against sexually transmitted diseases. Some donors will only provide sperm through intercourse (Russell 2021), which creates risks not only of sexually transmitted diseases but also sexual violence. Additionally, there is reason to believe that conception might be less successful in the DIY market, which does not involve sperm analysis to assess donor sperm motility (Russell 2021).

Second, informal markets feed into the illusion that parties are free to structure reproductive arrangements with no state role; in fact, the parties rely on the state not just for legal parentage determinations, but also for health-care support. Some state laws may not recognize family formations created through sperm donation outside the medical context, whether sperm is obtained through the formal or informal market. Using known donors and doing so without medical assistance increases the risk that donation does not satisfy laws modeled on prior versions of the Uniform Parentage Act, which prevent donors from having parental rights.

In fact, some courts have ruled that the sperm donor is the legal parent instead of the lesbian partner (Kay 2023; Culhane 2015). That is what happened in early in 2023, when an Oklahoma court issued such a ruling despite the fact that the lesbian couple was married *and* that the U.S. Supreme Court has found it unconstitutional to have different rules for married same-sex and heterosexual couples with respect to birth certificates for children conceived through ART (Sosin and Luterman 2023). The birth mother had obtained sperm through the informal donation site, Just a Baby (Meyer, Breasette, and Raache 2022). The site “allows you to meet and discuss your needs and wants with potential partners rather than relying on a one-night stand, an anonymous donor or an old friend” (Just a Baby, n.d.). Had the lesbian parents used sperm obtained through the formal market, the donor would have likely been anonymous until the child reached the age of 18. The bottom line is that using a known donor can be risky.

Third, the lack of regulation may ignore the interests of DCP, donors, and recipients, which is a problem in the formal market as well, particularly because economic incentives often shape sperm banks’ policies. For example, many DCP want to be able to learn about the medical history and identity of the donors who led to their conception (Gardner 2022; see also Weingarten’s essay in this volume). Many also want to limit the number of times individuals can donate, given that professional guidelines in the United States consider it “acceptable to produce 10,000 offspring per donor” (U.S. Donor Conceived Council 2022), which raises the potential for accidental incest (Cahn 2009). Donors may be receptive to initial outreach by offspring, but balk when fifty people reach out to them. Donor sibling groups also may feel challenged and commodified by the numbers of potential members (Hertz 2022; Kramer and Cahn 2013, 191–192), and recipients may want to limit how many “diblings” –half siblings from the same sperm donor -- their children have. Thus, both donors and recipients may be invested in limiting the number of families who use a donor’s sperm.

Regulating the Formal and Informal Markets

The law can shape the circumstances in which people obtain gametes and ensure that they maximize their reproductive options. This is especially true for the formal market; the informal market, by design, is harder to regulate directly. In the formal market, the law might step in to insulate against health risks and protect the interests of DCP. It might influence both markets to promote reproductive justice by creating an environment that enables people to understand the legal and personal implications of how they pursue gamete donations, enabling a wide range of options for pursuing ART, and ensuring secure determinations of legal parentage.

With respect to the informal market, we acknowledge the challenges of regulation and emphasize that we do not support banning it outright or criminalizing participation in it. We believe such actions would threaten reproductive justice – and would also be difficult to enforce, although the FDA has attempted to require compliance with its regulations for sperm donation (Abbasi 2013). But we do support regulations intended to address some of the harms of this market and to promote reproductive justice by maximizing the ability of participants to fulfill their parental goals through other means. The informality of the market raises the potential that participants may not realize the underlying risks related to health, thwarted legal parentage goals, or potential lack of enforcement of contracts between the parties.

In this context, the law could address some of those threats by reshaping parentage laws, recognizing and enforcing contracts, and sponsoring public announcements or information to be shared through health care providers and clinics to ensure that participants are aware of the informal market's limitations. We situate these proposals within a reproductive justice framework, which emphasizes attention to how systemic inequality affects reproductive access (Murray 2021, 2053). That framework has “[t]hree central tenets: the right to have a child, the right to not have a child, and the right to parent one’s children in safe and healthy environments” (Mutcherson 2023). It requires coming to terms with how “existing power structures [can be] used to regulate and surveil” reproduction (quoting Littlejohn’s essay in this volume). We recognize that some regulations could be perceived as potentially conflicting with reproductive justice, a point we address below.

Objections to Regulation and Responses

Scholars have raised both pragmatic and jurisprudential concerns about efforts to regulate sperm donation – such as imposing family limits, mandating identity release, or penalizing fertility fraud – particularly in a post-*Dobbs* world. In this section, we describe the objections and provide our responses. We acknowledge that the objections raise significant concerns about regulating the sperm market, both formal and informal. But they also reify the status quo, in which all of these objections are equally salient. Instead, as we discuss below, we believe these objections should guide regulations to ensure reproductive equity for multiple groups, including, parents, LGBTQ communities, people of color, and DCP.

Limiting Supply

A pragmatic concern is that various regulations protecting against donors’ misrepresentations about their medical history or mandating identity release could lead to potential shortages of donors (see Joslin et al.’s essay in this volume).

As a starting point, we note that a reproductive justice framework should support policies that do not diminish donor supply generally or with respect to certain groups. But the concerns about regulation limiting supply of donors are complicated. Some regulations, like the FDA's ban on gay men, limit supply and equity by prohibiting the participation of certain groups based on presumptions about their sexual behavior. In contrast, we speculate that family-limit regulations might encourage donors to participate who might otherwise be reluctant to provide sperm if they could not be sure they would not have dozens or hundreds of genetically related offspring. Family limits may be especially important to donors when their identity is accessible to DCP at the age of majority; the prospect of being contacted by large numbers of genetically related offspring could be daunting.

While some donors may not want to provide sperm - or may charge more - under a mandatory identity-release regime, evidence suggests such regulations may not decrease the supply of donors as some fear. For example, the number of donors increased when anonymity protections were removed in Australia, where payment for sperm is banned (Adams, Ullah, and de Lacey 2016). Moreover, with the ability to identify donors through direct-to-consumer genetic testing, anonymity can no longer be promised. Even so, the ability to be identified does not seem to deter donors (Wodoslawsky et al. 2023).

Reproductive Autonomy

The jurisprudential arguments focus on reproductive autonomy, exceptionalizing ART, and genetic essentialism. Regarding reproductive autonomy, donors might want to have the power, rather than the sperm banks or the government, to decide how many offspring can be produced from their gametes. Recipient families may also have concerns about regulating sperm donation: they may oppose identity release, may want to ensure an adequate supply of gametes for themselves, may worry that regulation would increase prices and make donor gametes unaffordable, and may fear regulation in this space is the first step along a slippery slope of limiting their reproductive rights. Because *Dobbs* has significantly limited procreative autonomy, another fear is that regulating gametes will further proscribe reproductive liberty for people who use ART to build families. The critique is that regulating forms of ART that do not involve third parties exceptionalizes these types of ART by singling them out and treating them differently (Cahn and Suter 2022, 83).

The arguments that identity disclosure infringes reproductive autonomy are multilayered (Cahn 2016, 1462). It is worth noting that even in the absence of explicit regulation, the law still defines the area, whether it is "hands off" or "highly regulated" (Cahn and Suter 2021, 85). For example, the lack of regulation to ensure that intended parentage is recognized may limit reproductive autonomy; failure to recognize nontraditional family formation limits the ability of same-sex and nonmarital couples to establish legally recognized and protected families. (Hazeldean 2022). Similarly, family limits for donors offer a measure of protection for reproductive autonomy if the goal is to have children without dozens or hundreds of half-siblings (Mroz 2021). Of course, such regulations might restrict the autonomy of any recipients who might want such an outcome, as well as donors who want to provide sperm for an infinite number of children. The presence or absence of such a regulation will affect reproductive autonomy in different ways. Regulation inevitably involves balancing interests.

Indeed, without regulation, the interests of DCP may not be adequately considered when they are not parties to the negotiations concerning sperm donation. Of course, the goal

is for the government to get the balance of all interests right and to “adequately” consider the needs of all who are involved, intended parents, donors, DCP and the groups who might otherwise be discriminated against without protections.

Genetics Essentialism

Another concern is that some of the potential regulations of sperm donation, such as eliminating anonymity, may privilege genetic relatedness, with the potential to “undermine the social standing and dignity” of more diverse families, i.e., those that do not conform to the married heterosexual family (Cahn and Suter 2022, 83; Joslin 2023).

We concede that limiting the number of children born per donor or mandating identity release does recognize the importance of genes to some people. But recognizing that genes are important to some people is entirely separate from recognizing families. When DCP describe their donors as parents or other children conceived by the same donor as siblings, they are not necessarily referencing them as true family members. Instead, they are using the very limited language we have to describe these connections.

Moreover, to suggest that wanting to know about one’s genetic origins means that DCP care only about genes and not about the families in which they are raised trivializes and essentializes the reasons for identity disclosure. Donor-conceived people have many reasons for wanting to know the donors’ identity (Gardner 2022). This criticism also ignores the fact that genetic traits are quite important in the selection of donors. Recipients often choose donors on the basis of many features with genetic components, such as physical and emotional characteristics, health, etc. But that does not suggest that only genetic-relatedness creates family or familial bonds. Instead, it is the commitment to care for a child and time spent nurturing the child that establishes parent-child relationships. The bottom line is that allowing DCP to learn the identity of their donor does not itself undermine the importance of families formed without genetic connections. While understanding one’s genetic origins is important to many people, it does not mean that it defines their relationships. Nor does it imply that genetic connections are important to everyone.

Exceptionalizing ART

Another jurisprudential concern is that regulating in this area treats ART differently from reproduction in the bedroom, where there are no government-mandated tests of gametes. This differential treatment, however, is consistent with the need to develop rules that address families formed both inside and outside of the traditional heteronormative model. For example, the Uniform Parentage Act has categories for the various types of parents and non-parents involved in reproduction. It explicitly states that a donor is “an individual who provides gametes intended for use in assisted reproduction, whether or not for consideration” and is not a “presumed genetic parent.” (Unif. Parentage Act §102 (3)(C), (9). Different rules for ART are essential to ensure that non-traditional groups have broader access to family formation by providing a mechanism to establish legal recognition of their relationship.

Of course, ART is not the only place in which there is a need to develop new rules. In the adoption world, for example, states are increasingly likely to enact legislation that allows adoptees access to their original birth certificates. (Ross 2021). We might, then, begin to think of the heteronormative model as exceptional, or simply recognize that there are alternative methods for forming recognized parental relationships.

Concern about Majoritarian Values

Finally, a critical concern is that regulation in this sphere might expand to harm marginalized groups. In an era when the LGBTQ+ community is under siege by conservative legislatures (Choi 2023), this is a critical concern. For example, in jurisdictions where the law does not adequately recognize legal parentage for intended parents using ART, increased regulation of sperm donation may open the door to further limits on family creation for less traditional families. This risk is greatest for single or same-sex couples (Choi 2023).

We are very sympathetic to these concerns, particularly in a post-Dobbs world. While we recognize that legislators may try to undermine families that are not heterosexual married couples, preventing lack of regulation in the gamete-donation context does not protect against these abuses, as we saw in Oklahoma. Regulation itself is not the threat; it is the nature of the regulation.

Conclusion

We want to close by emphasizing the limits and challenges of what we are suggesting in this essay. In the limited space we have, we cannot fully describe the optimal form of regulation for either the formal or informal markets. We are, as we have already noted, cognizant of the way in which each market may be affected by regulation of the other. For example, requiring fertility banks to set family limits could result in higher prices for sperm. Not only would this impact reproductive justice, it also might push people to the informal market. On the other hand, the threat of losing customers to that market might limit the price impact of such a regulation, thereby reducing the incentives to pursue the informal market. Mandating insurance coverage of medical and social infertility would increase accessibility of the formal market and decrease the need for the informal market, especially if coverage included a broad range of ART, including accessing gametes and even surrogacy. Changing donor qualifications, such as including gay sperm donors, might also expand the pool available in the formal market and could affect cost, while decreasing interest in the informal market.

In addition, we believe the various interests of family members—that is, the parents and DCP—must be accounted for carefully. Requiring identity release, in accordance with the interests of DCP, is only possible when the intending parents are secure in their legal rights. Given current legal conditions, that means DCP should only have the right to learn their donor's identity upon the age of majority, not as a child. That distinction is important from a reproductive justice perspective, because allowing DCP to learn their donor's identity as an adult does not impact the dynamic of child-rearing or interfere with parental decisions about what information to share with a child about their donor and when.

In our current legal landscape, we will continue to see discrepancies as to who has access to ART based on wealth, class, gender, sexuality, ability, and location, discrepancies that may inspire and support the free sperm movement (Appleton 2015). *Dobbs* has the potential to exacerbate the situation, and it certainly shows the need for solutions that are rooted in a reproductive justice agenda.

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