

## 9.2: PART I- MARRIAGE

### What constitutes a valid marriage in NYS?

Domestic Relations Law (DOM) Sections 5-25 spell out the rules for getting married in New York.

- **Is a marriage license required?** Yes. A couple who intends to be married in New York must apply in person for a marriage license to any town or city clerk in NYS. That application must be signed by both parties in the presence of the town or city clerk. A marriage ceremony cannot take place until 24 hours after the license is time-stamped. The license is valid for 60 days, beginning the day after it is issued.
- **Is a blood test required?** No. Blood testing is not required to get married in NYS.
- **What is the age requirement?** With the consent of both parents (in some instances only one parent's consent is necessary) and the approval by a Supreme Court judge (in some instances a Family Court judge), you can get married at age 17. Otherwise it is 18 years of age.
- **Do you have to be single to get married in NYS?** Yes, you must be single. This is true in every state. Polygamy is illegal in the United States.
- **Can you get married if you have been married before?** Yes. If you have been married and divorced, you must provide proof of the divorce.
- **Familial Restrictions:** NYS does not allow a marriage between an ancestor and descendant, siblings whether full or half-blood, an uncle and niece or nephew, or an aunt and niece or nephew.

### Court of Appeals of New York.

Huyen V. NGUYEN, Petitioner, v. Eric H. HOLDER, Jr., United States Attorney General, Respondent.

NY Slip Op 07290

Decided: October 28, 2014

Michael E. Marszalkowski, for petitioner. Michael C. Heyse, for respondent.

The United States Court of Appeals for the Second Circuit has asked us whether a marriage between a half-uncle and half-niece is void as incestuous under Domestic Relations Law § 5(3). I agree, for the following reasons, that we should answer that it is not.

I

Petitioner is a citizen of Vietnam. In January of 2000, at the age of 19, she was married in Rochester, New York to Vu Truong, who was 24 and a naturalized American citizen. Later that year, petitioner was granted the status of a conditional permanent resident in the United States on the basis of her marriage.

According to the factual findings of the United States Board of Immigration Appeals, which the Second Circuit accepted as supported by substantial evidence, petitioner's mother was born in 1950 to a woman named Nguyen Thi Ba. Twenty-five years later, Nguyen Thi Ba gave birth to Vu Truong. Petitioner's mother and Vu Truong had different fathers. Thus, petitioner's mother was Vu Truong's half-sister, and petitioner is his half-niece.

An immigration judge ordered petitioner removed from the country on the ground that her purported marriage to an American citizen was void, and the Board of Immigration Appeals affirmed. Petitioner sought review of that ruling in the Second Circuit, and the Second Circuit certified the following question to us:

"Does section 5(3) of New York's Domestic Relations Law void as incestuous a marriage between an uncle and niece 'of the half blood' (that is, where the husband is the half-brother of the wife's mother)?"

II

Section 5 of the Domestic Relations Law reads in full:

"A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:

"1. An ancestor and a descendant;

"2. A brother and sister of either the whole or the half blood;

“3. An uncle and niece or an aunt or nephew.

“If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner.”

We must decide whether subdivision 3 of this statute should be read to include a half-uncle and half-niece (or half-aunt and half-nephew). There is something to be said on both sides of this question.

In common speech, the half-brother of one’s mother or father would usually be referred to as an uncle, and the daughter of one’s half-sister or half-brother would usually be referred to as a niece; the terms “half-uncle” and “half-niece” are not in common use. Thus, it is perfectly plausible to read subsection 3 as including half-blood relatives. On the other hand, the authors of Domestic Relations Law § 5(2), when prohibiting brother-sister marriages, went to the trouble of adding the words “of either the whole or the half blood.” No similar words appear in section 5(3), arguably implying that the Legislature did not intend the uncle-niece prohibition to reach so far. The statute is ambiguous. Perhaps the likeliest inference is that the authors of section 5(3) gave no particular thought to the half-uncle/half-niece question, since if they had they could easily have clarified it either way.

Nor does New York case law point to any clear conclusion. In *Audley v. Audley*, (196 App.Div. 103 [1st Dept 1921]), the Appellate Division held a marriage between a half-uncle and a half-niece to be void under section 5(3). But in *Matter of Simms*, (26 N.Y.2d 163, 166 [1970]) we, without deciding the question, expressed doubt about *Audley*’s conclusion:

“If the Legislature had intended that its interdiction on this type of marriage should extend down to the rather more remote relationship of half blood between uncle and niece, it could have made suitable provision. Its failure to do so in the light of its explicit language relating to brothers and sisters suggests it may not have intended to carry the interdiction this far.”

Thus, there is a holding from the Appellate Division pointing in one direction, and dictum from this Court pointing in the other. Neither is binding on us. I would resolve the issue by considering the nature and the purpose of the statute we interpret.

Domestic Relations Law § 5 is in part a criminal statute: it says that the participants in a prohibited marriage may be fined, and may be imprisoned for up to six months. Penal Law § 255.25, using language very similar to that of Domestic Relations Law § 5 (“ancestor, descendant, brother or sister of either the whole or half blood, uncle, aunt, nephew or niece”), makes entry into a prohibited marriage a class E felony. Where a criminal statute is ambiguous, courts will normally prefer the more lenient interpretation, and the courts of several other states have followed that rule in interpreting their criminal laws not to prohibit relationships between uncles and nieces, or aunts and nephews, of the half blood (*State v. Craig*, 254 Kan 575, 580, 867 P.2d 1013, 1016 [1994]; *People v. Baker*, 69 Cal2d 44, 50, 442 P.2d 675, 678 [1968]; *State v. Bartley*, 304 Mo 58, 62, 263 SW 95, 96 [1924] ). The Government says that these cases are distinguishable because they were criminal cases; but we are here interpreting a statute that applies in both civil and criminal cases, and it would be strange at best to hold that the same words in the same statute mean different things in different kinds of litigation.

I also conclude that the apparent purpose of section 5(3) supports a reading that excludes half-uncle/half-niece marriages from its scope. Section 5 as a whole may be thought of as serving two purposes: it reflects long-held and deeply-rooted values, and it is also concerned with preventing genetic diseases and defects. Sections 5(1) and 5(2), prohibiting primarily parent-child and brother-sister marriages, are grounded in the almost universal horror with which such marriages are viewed—a horror perhaps attributable to the destructive effect on normal family life that would follow if people viewed their parents, children, brothers and sisters as potential sexual partners. As the Appellate Division explained in *Matter of May*, (280 App.Div. 647, 649 [3d Dept 1952], aff’d 305 N.Y. 486 [1953]), these relationships are “so incestuous in degree as to have been regarded with abhorrence since time immemorial.”

There is no comparably strong objection to uncle-niece marriages. Indeed, until 1893 marriages between uncle and niece or aunt and nephew, of the whole or half blood, were lawful in New York (see L 1893, ch. 601; *Audley*, 196 AD at 104). And sixty years after the prohibition was enacted we affirmed, in *May*, a judgment recognizing as valid a marriage between a half-uncle and half-niece that was entered into in Rhode Island and permitted by Rhode Island law. It seems from the Appellate Division’s reasoning in *May* that the result would have been the same even if a full uncle and full niece had been involved. Thus, Domestic Relations Law § 5(3) has not been viewed as expressing strong condemnation of uncle-niece and aunt-nephew relationships.

The second purpose of section 5’s prohibition of incest is to prevent the increased risk of genetic disorders generally believed to result from “inbreeding.” (It may be no coincidence that the broadening of the incest statute in 1893 was roughly contemporaneous

with the development of the modern science of genetics in the late 19th century.) We are not geneticists, and the record and the briefs in this case do not contain any scientific analysis; but neither party disputes the intuitively correct-seeming conclusion that the genetic risk in a half-uncle, half-niece relationship is half what it would be if the parties were related by the full blood. Indeed, both parties acknowledged at oral argument that the risk in a half-uncle/half-niece marriage is comparable to the risk in a marriage of first cousins. First cousins are allowed to marry in New York, and I conclude that it was not the Legislature's purpose to avert the similar, relatively small, genetic risk inherent in relationships like this one.

Under our longstanding principles of statutory construction, I conclude that a marriage between a half-uncle and half-niece, or a half-aunt and half-nephew, is permissible in New York based on the structure of Domestic Relations Law § 5. As this Court observed in *Matter of Simms*, (26 N.Y.2d 163 [1970]), the Legislature included language in subdivision two of this statute that prohibits a marriage between a brother and sister of "the half blood," but there is no comparable clause in subdivision three voiding marriages between uncles and nieces or aunts and nephews. When the Legislature includes a condition in one provision but excludes it from another within the same statute, there arises an "irrefutable inference" that the omission was intentional (*Matter of Raynor v. Landmark Chrysler*, 18 NY3d 48, 56 [2011] [internal quotation marks and citation omitted]; see also McKinney's Cons Laws of NY, Book 1, Statutes § 240). Hence, the contrast in the plain language of Domestic Relations Law § 5(2) and (3) compels the conclusion that marriages between half-siblings are outlawed but marriages involving half-uncles and half-nieces or half-aunts and half-nephews are permissible.

Nevertheless, I write separately to emphasize that the Legislature may see fit to revisit this provision. The record before us does not address the question of genetic ramifications for the children of these unions. Some of my colleagues assert that marriages between half-uncles and half-nieces, or half-aunts and half-nephews, are no different than marriages between first cousins. Perhaps there is no genetic basis for precluding such unions, but this Court was not presented with any scientific evidence upon which to draw an informed conclusion on this point.

From a public policy perspective, there may be other important concerns. Such relationships could implicate one of the purposes underlying incest laws, i.e., "maintaining the stability of the family hierarchy by protecting young family members from exploitation by older family members in positions of authority, and by reducing competition and jealous friction among family members" (*Benton v. State*, 265 Ga 648, 650, 461 S.E.2d 202, 205 [1995, Sears, J., concurring]). Similar intrafamilial concerns may arise regardless of whether the uncle or aunt in the marriage is of whole or half blood in relation to the niece or nephew. The issue of unequal stature in a family or cultural structure may not be implicated in this case but certainly could exist in other contexts, and a number of states have retained statutory prohibitions involving such marriages.<sup>[1]</sup> These considerations are more appropriately evaluated in the legislative process.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH, PIGOTT and RIVERA concur. Judge SMITH concurs in an opinion in which Chief Judge LIPPMAN and JUDGE Rivera concur. Judge GRAFFEO concurs in an opinion in which Judges READ and PIGOTT concur. Judge ABDUS-SALAAM took no part.

### Who can perform the ceremony?

A marriage ceremony must be performed by one of the individuals specified in Section 11 of the New York State Domestic Relations Law which includes:

- The current or a former governor;
- The mayor of a city or village;
- The former mayor, the city clerk, or one of the deputy city clerks of a city of more than one million inhabitants;
- A marriage officer appointed by the town or village board or the city common council;
- A justice or judge of the following courts: the U.S. Court of Appeals for the Second Circuit, the U.S. District Courts for the Northern, Southern, Eastern, or Western Districts of New York, the New York State Court of Appeals, the Appellate Division of the New York State Supreme Court, the New York State Supreme Court, the Court of Claims, the Family Court, a Surrogates Court, the Civil and Criminal Courts of New York City (including Housing judges of the Civil Court), and other courts of record;
- A village, town, or county justice;
- A member of the clergy or minister who has been officially ordained and granted authority to perform marriage ceremonies from a governing church body in accordance with the rules and regulations of the church body;
- A member of the clergy or minister who is not authorized by a governing church body, but who has been chosen by a spiritual group to preside over their spiritual affairs;

- Other officiants as specified by Section 11 of the Domestic Relations Law.

If the marriage is being performed in NYC, the person performing the ceremony must be registered with the City of New York. The officiant does not have to be a resident of New York State. The fact that you are a ship captain does not authorize one to perform marriage ceremonies in New York State.

- **Where must the marriage take place?** A NYS marriage license is only good within New York State.
- **What is required of the ceremony?** There is no particular form or ceremony required, except that the parties must state in the presence of the officiant that they take each other as spouses.
- **Are witnesses required?** In addition to the officiant, there must be a least one witness to the wedding ceremony. There is no age requirement for the witness. However, the witness must be old enough to be able to testify in court in the event that was to become necessary.
- **Must the parties be a man and a woman?** No. In 2011, New York became the sixth state to legalize “same sex marriage” through legislation. However, the right for same sex couples to get married under the U.S. Constitution was decided in *Obergefell v. Hodges*, 576 U.S. \_\_\_\_, (2015), a landmark civil rights case in which the Supreme Court of the United States ruled in a 5–4 decision that the fundamental right to marry is guaranteed to same-sex couples.

## SUPREME COURT OF THE UNITED STATES

### OBERGEFELL et al. v . HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al.

576 U.S. \_\_\_\_ (2015)

(Case Syllabus edited by Author)

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the [Fourteenth Amendment](#) by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners’ favor, but the Sixth Circuit consolidated the cases and reversed.

*Held:*

The [Fourteenth Amendment](#) requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution of marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners’ own experiences.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation’s experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers v. Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” *Lawrence v. Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States v. Windsor*, 570 U. S. \_\_\_\_\_. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue.

(b) The [Fourteenth Amendment](#) requires a State to license a marriage between two people of the same sex.

(1) The fundamental liberties protected by the [Fourteenth Amendment](#)'s Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U. S. 438, 453; *Griswold v. Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving v. Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner v. Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as did *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, e.g., *Lawrence*, *supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., *Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence*, *supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, e.g., *Pierce v. Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at \_\_\_\_\_. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard v. Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.

(3) The right of same-sex couples to marry is also derived from the [Fourteenth Amendment](#)'s guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki v. Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, e.g., *Kirchberg v. Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, e.g., *M. L. B. v. S. L. J.*, 519 U. S. 102, 120–121.



The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the [Fourteenth Amendment](#) couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the [Fourteenth Amendment](#).

The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the [First Amendment](#) ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.

(c) The [Fourteenth Amendment](#) requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

## Notes

<sup>1</sup> Together with No. 14–562, *Tanco et al. v. Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al. v. Snyder, Governor of Michigan, et al.*, and No. 14–574, *Bourke et al. v. Beshear, Governor of Kentucky*, also on certiorari to the same court.

1. (see Ala Code § 13A–13–3 [a][4]; Alaska Stat Ann §§ 11.41.450[a] [3]; 25.05.021[2]; Colo Rev Stat Ann § 14–2–110[1][c]; 750 Ill Comp Stat Ann § 5/212 [a][3]; Ky Rev Stat Ann § 530.020[1]; La Civ Code Ann art 90[A] [2]; Minn Stat Ann § 517.03[3]; Mont Code Ann § 40–1–401[1][c]; NJ Stat Ann § 37:1–1[a], [b]; ND Cent Code Ann § 14–03–03[3]; Or Rev Stat Ann § 106.020 [2]; Tex Fam Code Ann § 6.201[3], [4]; Utah Code Ann § 76–7–102[1][b][i]; Va Code Ann § 20–38.1[a][3]; Wash Rev Code § 26.04.020[1][b]; W Va Code § 48–2–302[a], [b]; Wis Stat Ann § 765.03[1] ). ↵

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