JURIS

THE DUQUESNE LAW SCHOOL NEWS MAGAZINE

ISSUE 1 VOLUME 22

Photo by Lynn Johnson

Up Front

Professors of law and professors of literature often don't have much to say to each other — or do they? In an exclusive interview, the controversial literary theorist Stanley Fish shares his thoughts on the implications of his theories for the study and practice of law. His theory that the meaning of the written word is found within the experience of the reader serves up a prospect for the analysis and decision of cases that is truly, in a word, tantalizing for scholars of any persuasion.

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Liability which makes the headlines these days is professional liability. Far from being confined to the medical and legal arenas, the theory of professional liability has extended into some unlikely fields of endeavor, particularly engineering and architecture. Professionals in these areas face consequences which are equally as heavy and perhaps even more complicated from a legal standpoint than doctors and lawyers. JURIS explores the growing number of problematic issues facing these professionals — issues that crisscross from contract to tort to insurance and back again.

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JURIS welcomes a woman of many faces — attorney, social activist, and mother — to the presidency of the Law Alumni Association of Duquesne School of Law. For those not fortunate to have met her yet in person, JURIS is happy to introduce June Schulberg in this issue.

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Teamwork is an often-neglected notion in both the legal profession and the publishing business, although it is truly a hallmark of both. This issue of JURIS is tangible proof of that point. The features within combine the hard work and talent of both the 1987-88 and 1988-89 staffs, as well as contributions from alumni. The results speak for themselves.

To give credit where credit is due, JURIS recognizes the considerable effort of Timothy G. Uhrich, former Editor-in-Chief, in getting this issue off to a good start. Fully half of it is a result of Tim's administration. The remainder is a result of contributions from a very promising new crop of staffers, most of whom will hopefully fill the pages of JURIS for many issues to come. We're sure that teamwork of past and present brings to our readers an informative and stimulating magazine.

Elisa M. Astorino
Editor-in-Chief

Inside Juris

Squibbs

Joseph L. Schiffhouer

Schiffhouer Joins Faculty

Professor Joseph L. Schiffhouer, Esq., is the newest addition to the Duquesne Law School teaching staff. Born and raised, in Etna, Pennsylvania, Schiffhouer graduated from North Catholic High School. Following graduation, he went in pursuit of higher education — a journey that took him from Pennsylvania to Ohio, Michigan, Illinois, Washington, D.C. and finally back to Pittsburgh. He began by earning a Bachelor's degree in Philosophy and English from the University of Dayton in 1974. From there he traveled to the University of Michigan for graduate school in philosophy. After his graduate studies, he moved to the University of Chicago in pursuit of a law degree.

Upon entering law school, this philosophy major had not even considered a career in tax. "It was the course I thought I would hate the most," he said. Fortunately, through the guidance of Schiffhouer's own tax professor, Walter J. Blum, he found the key to unlock the mystery of taxation.

In 1979, after graduating near the top of his class, he was offered a position with Jones, Day, Reavis and Pogue in Washington, D.C. He than earned a Master's degree in taxation at Georgetown University. He was offered a position at Buchanan Ingersoll in 1983 — a move which brought him home to Pittsburgh to stay. He became a shareholder in 1986.

According to Schiffhouer, "It's Kismet!" that brought him to Duquesne Law School. Throughout his education he had dreamed of becoming an educator. Also, he wished to settle down with his family.

He married his wife Renie in 1974. Their daughter, Danielle, was born during his second year of law school. Three years later, they added a son, Bryce.

Much of Professor Schiffhouer's time is devoted to his family, but he has found time to do a little writing. He co-authored a *Tax Management Portfolio* on the effects of corporate liquidations under §338 of the tax code published by BNA. He also has published articles in the professional journal *Taxation for Lawyers* authored a chapter on the "at risk" rules of the Tax Code as part of Matthew Bender's new study of the federal income tax, to be published in the coming months.

Schiffhouer is a member of the Pennsylvania and Washington, D.C. Bar Associations, the Allegheny County Bar Association and the U.S. Tax Court Bar.

Cathy Waggle is an Associate Editor of JURIS Magazine. Photo by **Bernard La Fleur.**

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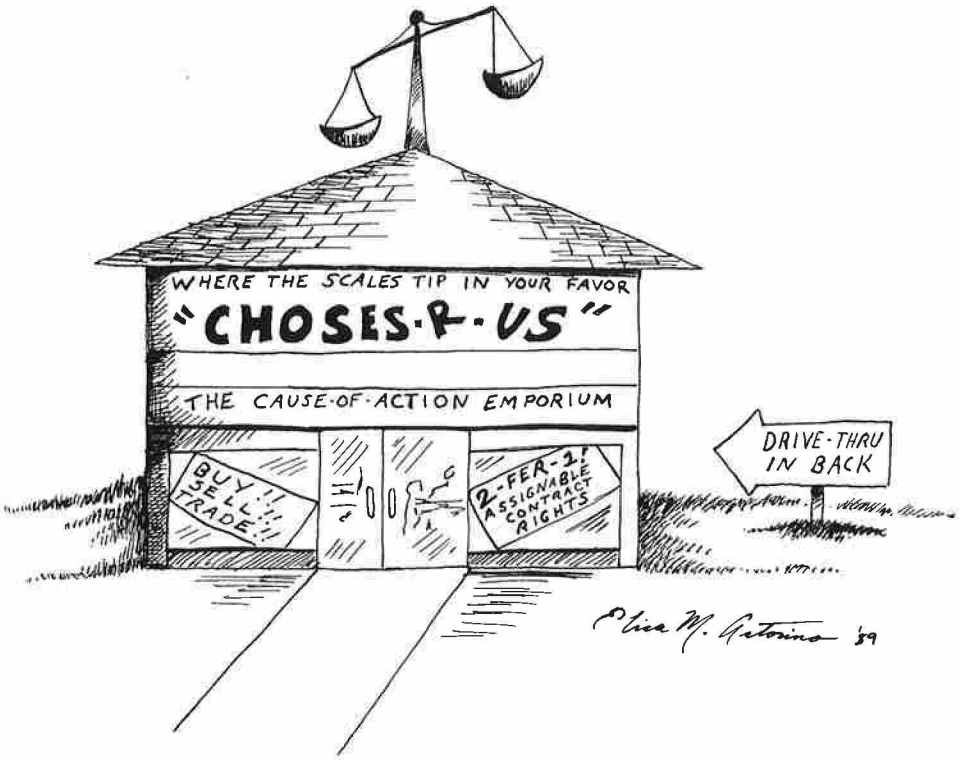


Faculty Notes —

Associate Professor **Maureen Lally-Green** served as a panelist for the Allegheny County Bar Association's symposium, "The Shrinking Industrial Workforce: Rights, Responsibilities, Risks & Solutions for Employees, Unions and Management," on October 17. Attorney **Bruce Bagin,** Supervisor of Investigations, with the United States Equal Opportunity Commission and Library Supervisor at Duquesne University School of Law also served as a panelist.

Professor **Bruce Ledewitz's** tribute to Judge Robert Taylor on the occasion of his death was published recently in 55 Tenn. L. Rev. XVI (1988). On September 15, the Wall Street Journal published his editorial piece "Pro-Lifers Should Appeal to Constitution's Heart." Also Professor Ledewitz discussed the cancellation of Pennsylvania's judicial elections on WDUQ Radio and the KDKA-TV "Weekend Magazine" program.

Associate Professor **Mark D. Yochum** is directed "The Odd Couple - Female Version" at the McKeesport Little Theatre November 4-27.

Linda Dominguez, 4E, was awarded the Selected Professions Fellowship for 1988-89 by the American Association of University Women. The fellowship is given to women in the final academic year of education in professions where female representation is traditionally low. Miss Dominguez was one of six recipients nationwide.

JURIS, Ledewitz Win Awards at ABA Convention

JURIS Magazine garnered a second place Award of Excellence for entire magazine, reporting over the year (Class A) in the 1987-88 American Bar Association Law Student Division Newspaper Conference. An article by Professor Bruce Ledewitz, "Original Intent: Does the Double Jeopardy Clause Apply to Incarceration?" won a first place Award of Excellence. The article appeared in the winter 1988 issue of JURIS.

Joy Appoints L'78 Graduate as General Counsel

PITTSBURGH, PA . . . Jane G. Davis has been appointed Vice President and General Council of Joy Technologies Inc. Ms. Davis will be responsible for the direction and supervision of the company's legal affairs and its corporate legal staff and will also continue to serve as Corporate Secretary.

Davis joined Joy in 1981 and previously held the positions of Senior Attorney and Associate General Counsel. She is a 1978 graduate of the Duquesne University School of Law.

Joy Technologies Inc., a Pittsburgh-based company, is a producer and worldwide marketer of capital equipment and associated services and systems for mining, environmental control, waste-to-energy, electric utility and materials management applications.

Design Professionals

Their Liability To Third Parties

Having survived the process of competitive bidding or formal contract negotiations, the contractor is now prepared to commence construction of the intended structure in accordance with the drawings and specifications prepared by the owner's architect and engineer or design professionals. In the course of construction, it is not uncommon for a contractor to sustain damages as a result of incomplete or defective plans and specifications. When this occurs, the contractor will find himself in a no-win situation as he will be expected to complete the project within the original budget and time schedule, as well as being compelled to uncover, announce and possibly devise a remedy for the errors and omissions of the design professionals.

To compound matters, it is the design professional that the owner has retained and empowered to administer the construction contract and render initial rulings on the contractor's request for pricing of change orders. Where the genesis of a requested change order lies in the uncovering of errors and omissions of the design professional, the pressures of the owner may be sufficient to motivate the design professional to render opinions that are less than unbiased. In addition to finding himself in a precarious situation that could jeopardize necessary working relationships, the contractor will have sustained substantial economic loss and may, by contract or through lack of privity, find himself a direct remedy against the design professional.

The contractor's contract with the owner, typically AIA Document A201, 1976 Edition with the 1987 Edition of General Conditions, sets forth in Article 1.1.2 that:

> "The Contract Documents shall not be construed to create a contractural relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor."

In spite of the above cited representation, the General Conditions also bestow upon the architect a host of rights and duties, such as the right to stop the work, approve the contractor's shop drawings and payment applications and be the initial party to rule on the contractor's requests for extensions of time and increase in the cost of the work. In light of the all powerful rule assumed by the architect and his cabinet of engineers, it is reasonable that such authority carry with it commensurate foreseeable legal responsibilities. Thus contractors are not without a basis in fact to advance the argument that design professionals be precluded from escaping liability to third persons who sustain economic damages merely because such injured parties lack privity.

Typically, courts have been reluctant to allow a direct action by a contractor for economic losses not due to personal injury or property damage where the cause of the loss could be traced to the design professional. However, it appears that a movement is afloat in many states to discount the defense of privity so as to enable contractors to successfully hold design professionals liable where their negligence caused the contractor to sustain economic loss. Courts are becoming cognizant of the true tripartite relationship that exists between owners, design professionals and contractors and are accordingly piercing the shield of privity.

The 1958 decision in *United States ex rel. Los Angeles Testing Laboratory v. Rogers & Rogers* has often been cited as the case which opened the door to the demise of the privity defense to design professionals. In *Rogers*, the contractor successfully sued the architect to recover economic losses sustained as a result of the architect's negligent interpretation of concrete test reports. The architect's attempt to secure a summary judgment based on the fact that he was not in privity with the contractor and therefore owned no duty of care to the contractor in his interpretation of the test reports was not received favorably by the court. The court's rationale was that the determination as to whether a defendant will be held liable to a third person not in privity will turn on the balancing of factors such as:

1. The extent to which the transaction was intended to affect the plaintiff.
2. The foreseeability of harm to the plaintiff.
3. The degree of certainty ascribable to the injury of the plaintiff.
4. The closeness of the connection between the defendant's conduct and the injury suffered.
5. The moral blame attached to the defendant's conduct, and
6. The policy of preventing future harm.

In finding that a right of action should exist against the architect, the court held that considerations of reason and policy impel the conclusion that the position and authority of a supervising architect are such that he ought to labor under a duty to the contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner. The court found that substantial control over the contractor necessarily rests in the hands of the supervising architect and that accordingly the architect was under a duty imposed by law to perform functions affecting the contractor in a non-negligent manner. The degree of authority vested in the architect mandates that he be burdened with commensurate legal responsibility.

The *Rogers* decision has not gone without criticism, although the brunt

of the criticism has been directed at the stated test for liability as opposed to its rejection of the privity defense. Opponents of *Rogers* have argued that it is inappropriate to impose liability upon the design professional simply on the basis of assumptions regarding his status and powers. Rather, whether a duty is owed the third party should be predicated upon:

1. The scope of the professional's obligation under the owner-professional agreement; and
2. Whether the contractor's reliance upon the professional's careful performance of such obligations was reasonably foreseeable.

In light of the controversy that has arisen as a result of the *Rogers* opinion, it may be appropriate to restate the negligence standard by which a design professional's liability will be measured. In the absence of an express contractual warranty, proof of negligence has been required prior to the imposition of liability in damages upon the design professional. Proof of professional negligence is customarily established by expert testimony. The basic rule has been succinctly stated as follows:

> Plaintiff was an engineer and was employed as such. In performing the work which he undertook, it was his duty to exercise such care, skill and diligence as men engaged in that profession ordinarily exercise under like circumstances. He was not an insurer that the contractors would perform their work properly in all respects; but it was his duty to exercise reasonable care to see that they did so.

While *Rogers* may be cited as the case which initially pierced the shield of privity, courts may nevertheless effectively refuse to permit a contractor's right to action against design professionals based on economic loss limitations. Generally, the law of torts will preclude recovery in a negligence action where the plaintiff's losses were entirely economic in nature. Contractors have not been equally successful in overcoming the economic loss limitation. Courts have steadfastly required a showing of physical injury to one's property or person as a predicate to the recovery of purely economic losses and have failed to characterize lost profits to be injuries to property.

The South Carolina appellate court in July, 1988 heard *Carolina Winds Owners' Association, Inc., v. Joe Harden Builder Inc.*, No. 1192 and reaffirmed the economic loss doctrine by barring the negligence claim asserted by the plaintiff against the contractor with whom there was no privity. The court restated the economic loss doctrine by stating that "an action will not lie in tort for a product defect without a claim of injury to the person or other property of the plaintiff." The court further explained that the rule reflects the distinction between tort, involving injury to the person or property, and contract, involving a diminution in the expected value of a product. It is noteworthy that courts that have addressed the issue have permitted recovery in the absence of actual injury **only** where the agent causing the economic loss was hazardous and manifested itself in a sudden and calamitous manner. This very rationale was advanced successfully in *Pennsylvania Glass & Sand Corp. v. Caterpillar Tractor Co.*, 652 P.2d 1165 (3d Circuit 1981).

The design professional's duties to both the owner and the contractor are said to arise from and be governed by the contracts related to the construction project. Such duties do not arise by common law and will not be found outside the four corners of the contract documents. Various theories have been advanced by contractors in their efforts to overcome the economic loss limitations. Such theories include: (1) challenges to the adequacy of the original design; (2) failure to supervise and inspect; (3) improper project administration; and (4) failure to coordinate and schedule. In evaluating such challenges, courts have focused their attention on the scope of the design professional's responsibilities as expressed in the owner-professional agreement, the conduct of the design professional throughout the course of project administration, the foreseeability of the contractor's reliance on the professional's performance of such duties, and to evidence of the professional's compliance with prevailing standards of care.

The existence and validity of a contractor's right of action in tort against the design professional may be a very important avenue of relief to the contractor in his effort to secure compensation for losses sustained in contract performance. Additionally, this remedy may prove attractive where the owner-contractor agreement contains exculpatory provisions or other contractual bars to recovery. Where one finds himself with an insolvent owner, the design professional and its insurer may constitute the only available sources of reimbursement for a contractor's losses.

It must be noted that the prosecution of a claim against a design professional should not be the contractor's first line of attack in pursuing relief as a result of participation in a construction project. Not all jurisdictions have ruled on the demise of the privity defense and fewer have construed the particular facts of the case to allow the contractor a cause of action in tort to economic loss in the absence of either privity or some clearly identifiable duty bestowed by contract upon the design professional. The burden of proof and persuasion will clearly be on the contractor. Particular attention should be directed at negotiating favorable terms and conditions in the owner-contractor agreement so as to make clear that a duty exists on the part of the design professional in favor of the contractor. Likewise the general and supplementary general conditions to the contract must be reviewed and modified so as to consistently impose a duty on those most able to address and insure against the foreseeable consequences of the exercise of their professional obligations. In the absence of established case law uniformly sustaining a contractor's right of action against the design professionals for economic loss where privity does not exist, skillful drafting of the construction contract and ensuring that the owner has required errors and omissions insurance coverage from his design professionals are the contractor's primary means of safeguarding his projected profit.

Joseph H. Bucci is a recent graduate and Articles Editor of JURIS. He is a member of the Legal Department of Mellon Stuart Company. Photograph by **Lynn Johnson** of Pittsburgh.

Sports, Entertainment Law Society Meets

The newly formed Entertainment and Sports Law Society co-sponsored a speaker's forum on April 19, 1988 along with the American Bar Association Forum Committee on the Entertainment and Sports Industries. The featured speakers were Ralph Cindrich, Esq. and Arthur J. Rooney II, Esq. of Pittsburgh and Marc Jacobson, Esq. of New York.

Brian Koeberle, founder of the Society at Duquesne, said that his impetus to form the society stemmed from a general lack of information about the field of entertainment and sports law, but particularly the absence of vocational guidance available to students. Koeberle emphasized the fact that students possessing a keen interest in the area are very much "on their own" in terms of finding work.

Mark Yochum, Associate Professor of Law and Faculty Advisor for the Society served as moderator of the forum.

SPORTS

Ralph Cindrich

As an attorney and agent in the sports area, Ralph Cindrich has experience on both sides of the proverbial fence. He spent four National Football League seasons with the New England Patriots and the Houston Oilers. Following his football career, he received his law degree from the University of Pittsburgh.

Cindrich takes pains to distinguish his legal practice from his work in sports representation. As an agent, he provides a full range of services for his clients in addition to legal advice: contract negotiation, accounting, investment and purchasing advice, as well as banking and bookkeeping services.

A career in sports agency, said Cindrich, requires an intensive knowledge of marketing in a highly competitive area. While he admits that his background as a professional athlete was a great advantage, he claims that such experience is not necessarily a prerequisite to entering the field. "It helps to be a street fighter," he said.

Arthur J. Rooney II

The Rooney name is best known locally through its connection with the former NFL champion team, the Pittsburgh Steelers. It is not surprising, therefore, that Arthur J. Rooney II claims that his own involvement in the field of sports law came from a family connection.

Rooney is a 1982 graduate of the Duquesne University School of Law. Presently, he is a managing partner of the Pittsburgh law firm of Berkman Ruslander Pohl Lieber and Engel. The firm represents a number of sports organizations, among them the Steelers.

Although Rooney's own involvement in the field of sports law sprang from his family's ownership of the Pittsburgh team, he encouraged "outsiders" to pursue careers in the area, as did Cindrich. However, he cautioned that the market is limited.

"Become a good lawyer first," he advised. "Sports management needs good talent in all areas of the law. There are less people who are actually sports lawyers, but rather combinations of different disciplines."

The best way to begin a career, according to Rooney, is to specialize in a related area and then seek out a firm with sports clients.

ENTERTAINMENT

Marc Jacobson

"Knock on doors!" is the advice of Marc Jacobson, counsel to Berger and Steingut of New York City. A graduate of the New York University Law Center, Jacobson specializes in entertainment law but possesses expertise in several related areas, namely corporate, copyright and real estate law as well as litigation. He is also chairman of the New York State Bar Association Special Committee on Entertainment Law and an editor of *Entertainment Law and Finance.*

Jacobson echoes the advice given by Cindrich and Rooney, emphasizing the strong development of fundamental professional skills prior to specialization in the field of entertainment law. As far as specialization itself is concerned, said Jacobson, it is especially crucial to develop a thorough knowledge of corporate and contract law, particularly the drafting of contracts. "It's all royalty based — you have to know the stream of (a client's) income from the bottom up."

Because a great deal of his own practice involves the representation of actors and other professionals in the arts, Jacobson states that the harsh reality for locals who intend to practice entertainment law is that they must relocate. "My major practices are in New York, California, Florida, and Nashville. I just can't attract a clientele here," he said.

Elisa M. Astorino is JURIS Magazine's Editor-in-Chief

June Schulberg

June Schulberg, Esquire, one of the city's most respected and successful attorneys, is the 1988-1989 President of the Duquesne University Law School Alumni Association. Ms. Schulberg graduated from the school's evening division in 1969, and worked for the former County Coroner, Dr. Cyril Wecht. While maintaining a solo practice in family law and administration law, Ms. Schulberg has established herself as one of the county bar's esteemed members. Her election to the Presidency of the alumni association reflects the high regard in which she is held by her fellow law school alumni.

Membership in The Alumni Association is available to anyone who has successfully completed the law school's program. Members are actively practicing in all aspects of the legal profession. The president ideally performs two functions. First, he or she represents or epitomizes those qualities and standards of the profession by which all its members are evaluated. Second, the president is a representative of the Law School itself as well as the type of attorney its program produces. If this is the case, then members of the Duquesne Law School community are fortunate to have a president with the professional stature and qualifications of Ms. Schulberg.

Ms. Schulberg believes that the Alumni Association can benefit the institution in a number of ways, especially in terms of increasing the amount of scholarship funds provided by the association. Likewise, she feels that the association serves an important function in that it fosters, nourishes and maintains the close almost quasi-fraternal feelings that most of the school's graduates have towards one another. According to Ms. Schulberg, her election as president is one of the most satisfying honors and awards of her professional life and hopes that she will be able, as president, to do something beneficial for an institution that has provided her with so much.

Since graduating from the Law School in 1969, Schulberg has maintained strong ties with the school. She has actively participated in the school's annual Trial Moot Court Competition in the capacity of a judge. Furthermore, Ms. Schulberg's ties with the school have been strenghthened by the fact that two of her children have completed their professional education at Duquesne. Her sons Arnold and Howard Schulberg have completed their studies and her third son, Chad Bowers, is presently a second-year day student. Schulberg has been active in the Alumni Association for many years, prior to her election as president. She has, since 1984, served in a number of executive positions on the association's board.

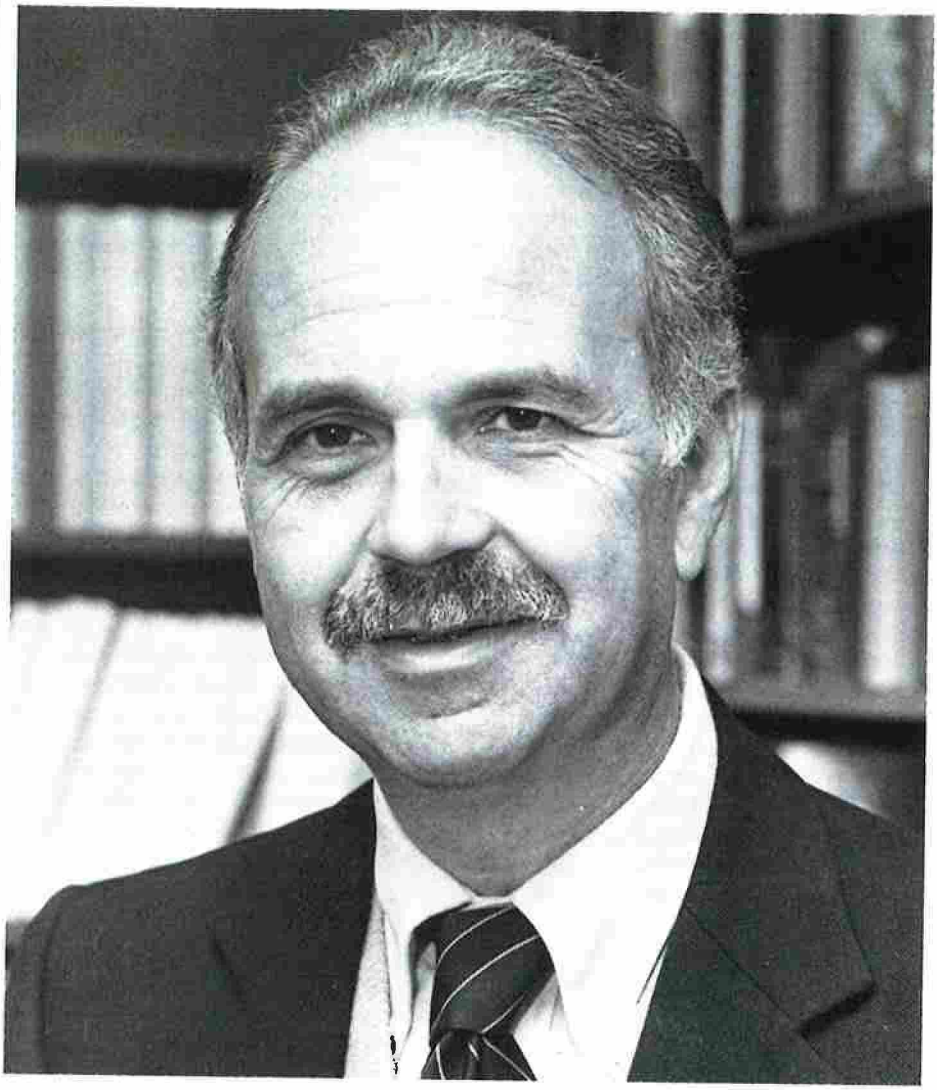
Furthermore, Ms. Schulberg has been the recipient of a number of professional awards, distinctions and appointments. She has an AV rating from the Martindale-Hubble Directory; this is the highest professsional rating awarded by that publication. She was the second woman to belong to The Academy of Trial Lawyers of Allegheny County and has twice served on the Board of Governors of the Pennsylvania Trial Lawyers Association and is currently a member of the Board of Governors for The Academy of Trial Lawyers.

Ms. Schulberg is active in a number of community affairs programs and public charities which include the United Way. Schulberg is also deeply committed to freedom of expression for Soviet Jews and is the chairperson of the Pittsburgh Conference of Soviet Jewry and past regional chairman of the Anti-Defamation League.

In 1984 and 1985, Ms. Schulberg visited the Soviet Union in order to meet with and provide moral support to a number of "refuseniks." A "refusenik" is a citizen of the Soviet Union who wishes to emigrate to another country but is refused this right. Most "refuseniks" are Soviet Jews who want to emigrate to Israel in order to freely and openly practice their religion. According to Ms. Schulberg, these visits profoundly affected her and strengthened her resolve to aid the Soviet Jews in their plight.

Michael Leo Ivory is an Associate Editor of JURIS Magazine. Photo by **Bernard La Fleur.**

Ms. June Schulberg



Dr. Stanley E. Fish

Stanley Fish: Reading Between The Lines

Depicted by his critics as iconoclastic, egocentric, an unabashed self-promoter and an incorrigible polemicist, Professor Stanley Fish has desecrated the temple of literary criticism, inciting rebellion against its doctrines that define precisely what one does when reading the written word. Indeed, in the course of two decades, he has nearly reversed the direction of literary thought. According to long established theory, literary scholars formerly searched for the meaning of a particular work of poetry or fiction by scrutinizing the content and structure of its text. In what appears to be a complete departure from this theory, Stanley Fish, Arts and Sciences Distinguished Professor of English and Law at Duke University, has lead a new and growing congregation, proselytizing the view that the meaning of a particular work is to be found **outside** of the text and within the experience of the reader. Since legal philosophy and practice rely to a substantial degree upon the interpretation of textual materials, Professor Fish's views present serious implications for the profession's understanding of what is law.

According to Oxford scholar Terry Eagleton, "For Fish, reading is not a matter of discovering what the text means, but a process of experiencing what it **does** to you." In a similar way, Dr. Denis Donoghue, Henry James Professor of English and American Letters at New York University, comments that Professor Fish "has been largely, though not solely, responsible for establishing the reader's experience as a respectable question."

With the clarity of a trumpeter's commencement of the hunt, Professor Fish announced his new view with the 1967 publication of *Surprise by Sin,* an analysis of Milton's *Paradise Lost.* He argued that the essence of the work lay not in Milton's poetic syntax *per se,* but rather in the reader's reaction to that syntax. Forced by this syntax to formulate repeatedly incorrect inferences and conclusions, the reader continually discovers his errors as Milton then undercuts each inference and conclusion. According to Fish, as the reading of *Paradise Lost* becomes a process of humiliation, it simulates for the reader the process of becoming a Christian. Fish comments, "The difficulties one experiences in reading the poem are not to be lamented or discounted, but are to be seen as manifestations of the legacy left to us by Adam when he fell." In this way, Fish discovered meaning in Milton's work not through abstract analysis of textual form, but rather by giving credence to the reader's experience.

In a later essay entitled "Literature in the Reader," Professor Fish asserted that a text is not a "self-sufficient repository of (its) meaning." Rather, its meaning is discovered only upon recognizing the "dynamic relationship" between the reader and the text. Textual materials do not stand apart from the reader as entities to be understood in a vacuum. On the contrary, they exist as an entity only when the reader initiates the process of interpretation.

According to Fish, meaning is not discovered by the reader; rather, it is created by him. "Literature is a kinetic art," writes Professor Fish, "but the physical form it assumes prevents us from seeing its essential nature . . . The availability of a book to the hand, its presence on a shelf, its listing in a library catalogue — all of these encourage us to think of it as a stationary object . . . we forget that, while we were reading, **it** was moving (pages turning, lines receding into the past) and forget, too, that **we** were moving with it."

In recent years, the appeal of Professor Fish's new view of the process of textual interpretation has expanded beyond the boundaries of literary

criticism. He continually receives invitations to share his thoughts at conferences in such disciplines as psychoanalysis, modern languages, economics, and law. "The reason for these invitations has nothing to do with my expertise in these fields," he explains, "I have none. (But) in recent years, in almost every discipline, there has emerged a growing interest in the theory of interpretation as a general topic. Questions like — 'What is the nature of evidence?' 'What, if any, are the constraints on interpretation?' 'What are the sources of interpretive authority?' 'What is the relationship between professional activities and the search for truth?' 'What is the relationship between discourse and fact?' — have now begun to be asked in every field, and, as a result, members in disciplines in which these are new questions have been on the lookout for work that would be helpful. Consequently, a number of people working in literary criticism have become figures of discussion and debate in disciplines apparently far removed from literary criticism. I am fortunate to be one of them."

After accepting one such invitation extended by Duquesne University's College of Liberal Arts and Sciences, Professor Fish presented his novel and often controversial views to the students and faculty at Duquesne through a seminar entitled "A Symposium on Critical Thinking." Consisting of a series of lectures, a roundtable discussion, and a panel discussion involving Professor Cornelius Murphy of Duquesne School of Law as a principal participant, the seminar attracted the interest of individuals connected with such diverse disciplines as English literature, philosophy, history, theology, political science, and law. With the help and influence of Dr. Albert C. Labriola of the Department of English, co-coordinator of the program, JURIS was fortunate to obtain a brief interview with Professor Fish to investigate his views regarding legal theory and interpretation.

JURIS: Professor Fish, you have stated in your essays that the process of reading textual materials involves the creation of meaning by the reader rather than a discovery of meaning within the text itself. If this is the case, how can the reader ever determine what an author "really intended"?

FISH: The reader can't — indeed he never could. The only way in which it would be possible for a reader to make such a determination would be if there were a distinction between utterance meaning and speaker's meaning. Many philosophers of language maintain that such a distinction exists, because it makes possible the separation of meaning as embedded in language from meaning as a function of the speaker's intentions. I disagree with this view. The distinction between utterance meaning and speaker's meaning cannot be made, because it is impossible to construe sense without at the same time assigning intention. In other words, I maintain that the process of understanding oral or written communication does not consist in a two stage procedure, where the listener or reader first receives signals and then secondly makes something of them. The very hearing of the words is a "making something of them." When a person hears or reads something, that person is always understanding it as the intentional product of some human agent. Indeed, the shape that the word has for a reader is a function of his prereading assumption of the origin of those words, a prereading assumption of the kind of writer who produced them. Therefore, a dispute over the meaning of a given text always involves a dispute not about the words of the text but about the intentional context within which the text is received, whether it is read or heard. Since intentional context is always a matter of construction, there is no condition in which interpretive construction is not operating. And since interpretive construction is precisely interpretation (an activity performed from a point of view), any interpretation will have its force from within some point of view. Moreover, since there is no interpretive activity that ever occurs independently of any point of view, there is no neutral vantage point from which one can distinguish between competing accounts of what a text means — no neutral vantage point to determine what intentions were involved in the moment of utterance. Therefore, what in fact determines the meaning of a text or an utterance is persuasive argument — an argument which has been found by the relevant hearers to be persuasive. Persuasive argument is the source of meaning.

JURIS: But doesn't the difficulty in construing meaning from written text emerge from the fact that the author may not be available to defend his words?

FISH: Not at all. I've been confronted with this question before, which makes the assumption that face-to-face communication is a kind of communication which significantly differs from communication either from the written page to someone in the next town, as in the case of a letter, or even from the written page to someone in the next century, as in the case of a novel or poem or constitution. There is no such distinction. No matter whether it's communication between two people separated by a foot and a half or between people separated by five hundred years in the grave, all communication is exactly on par with respect to the necessity for the reader or listener to do interpretive work. Interpretive work does not become more or less accurate in relation to the distance — whether physical or temporal — between the so-called communicators. This argument sounds counterintuitive at first, but, if you think about it for a moment, you will realize that there have been times in your life when you felt that you knew the mind of an author, dead perhaps some two hundred or three hundred years, better than you knew the mind of your brother, or your girlfriend, or your roommate. I'll even go so far as to say that you know **yourself** only through interpretive activities.

For example, you, like me, have probably had the experience of walking away from a conversation in which you participated and saying to yourself, "What did I mean by that?" At that moment, which is not so unusual, you become the interpreter of your own intentions. Whatever you decide about your own intentions will itself be an interpretive act. Insofar as the result of that interpretive act is knowledge by yourself of who you are, you will have in that moment interpretively constructed yourself.

This seems to me to be the absolute, bottom-line case. If it is true that when you are talking to yourself (either metaphorically or silently) you are in the course of that talk constructing yourself, then it is certainly true that you are doing the same thing when you are talking to people in the same room. And since you are doing precisely the same thing when you are reading the works of authors who are long dead, there is no distinction between face-to-face communication and communication through a written medium.

JURIS: But certainly the listener can obtain a better understanding in the case of face-to-face communication, since he can obtain clarification by asking the speaker "What did you mean by that?" After all, authors long dead can't talk back.

FISH: The speaker in face-to-face communication may certainly answer the question "What did you mean by that?" But here is the crucial point. What will the speaker then **do?** What kind of answer will you get? You'll get an answer which is necessarily a verbal answer. And what status does that verbal answer have in relation to the verbal structure that you want explained? It's going to have exactly the same status. That is, words which are brought forward in order to help interpret other words are themselves necessarily the objects and products of interpretation. A useful example that illustrates this point quite well is the domestic quarrel. And in using the term "domestic quarrel" I am of course referring to those rather disturbing moments in which you find yourself engaged in a discussion with someone whom you've known for a number of years, during which you suddenly feel that you haven't the slightest idea of what this person means. Whenever this happens, you naturally start asking questions like "Well, what did you mean by that?" or "Didn't you mean X?" to which the other person responds "No, I didn't mean X; I only meant Y." Is this answer convincing? Not at all. And the reason why it isn't convincing is that, rather than solving the interpretive problem, the answer becomes an occasion for its extension.

A cartoon appeared in *The New Yorker* a number of years ago which provides a perfect example. The cartoon presented a woman standing over a man seated in a chair. The man was presumably her husband. He had his eyes glued to the television set, obviously trying hard not to look at her. The man appeared to have done something wrong, and then moments before this scene he must have acted and uttered in ways signifying "I am sorry." The caption read, "You say you look sorry; you act sorry; you say you're sorry; **but you're not sorry.**" The reason why she does not believe him emerges from the fact that she hears the words of her husband as coming from the kind of person she knows him in advance to be. Everything he says, therefore, comes out in the form and the meaning that she in advance ascribes to this person. For this reason, words used to explain or to interpretively clarify other words become themselves the occasion for further interpretive puzzles. So the fact that the speaker of an utterance is available to answer questions does not reduce the distance between interpretive construction and clear, absolute meaning. It simply produces more occasions for the construction of meaning.

JURIS: Many scholars view the analysis of constitutional law as a search for "original intent" — that is, a search for what the framers of the document would have said if they were available today for comment. In light of what you have just told me, is an argument based upon "original intent" merely a fallacy?

FISH: The whole question of the intention of the framers is a question that is largely misguided, because it assumes that there is a choice between reading the Constitution independently of intention and reading the Constitution in light of intention. My argument is that reading anything independently of intention is an impossibility. One cannot read words without simultaneously assuming intention — without hearing and construing language as originating from some intentional being. One does not assume intention after conducting historical research. We assume intention all the time. It's natural; indeed, it's inevitable. Therefore, an argument basing its credibility and legitimacy upon "original intent" is just as much an act of constructivism as are the supposedly wayward acts of constructivism which the argument is being used to condemn.

JURIS: Methods of legal interpretation such as the original intent argument and others presuppose that some sort of unattackable single meaning exists which may be "discovered" by using the right road map or theory.

FISH: Right, but this assumption is false. For example, arguments based upon precedent flow from the fact that different persons see different text — they see the text differently and therefore, **make,** through the act of seeing, different text. There is a school of thought driven by the notion that text can act as a constraint on interpretation. The notion, which is a long-time dream of formalist linguistics, is that, if we could write constitutions, legislation, and judicial opinions in such a way as to render them absolutely perspicuous and invulnerable to interpretive manipulation, we would be in much better shape. There wouldn't be all of that room for interpretive maneuverability that imprecise and vague language allows. One of the texts often cited as an example of such perfect language is the clause in the Constitution requiring that the President of the United States must be thirty-five years old. But take a look at the notion of "thirty-five years." Is that clause really as invulnerable to interpretation as it is sometimes claimed?" All that is required to chip away at this linguistic armor is to ask a question which at first seems almost nonsensical, "What do they mean by 'thirty-five'? One can then build up a quite reasonable argument in which the age of thirty-five is to be understood in terms of life expectancy, educational patterns, et cetera. That is, this age was really chosen because it was thought to represent a certain point in a man's development before which he will have attained the necessary training and experience, and at which point he will still have enough years left in his life so that his powers will be assumed not to diminish during the course of his office. But of course those sets of conditions under which thirty-five was designated as the minimum age of the President are no longer in force. If we make calculations relative to our own situation we can now say with certainty — with **certainty** — that when they said thirty-five, **they meant fifty.** It's a piece of cake! Indeed, no piece of language that anyone has ever delivered or could deliver is invulnerable to that kind of interpretive effort. And so, even though it is perfectly proper and in fact necessary given conventions of the law to cite text, statute, and precedent, one must keep in mind that doing so is not the performance of an innocent act in which one's interpretive powers are held in abeyance, having been surrendered to an independent text. In this style of argument, one performs an interpretive act all the way down.

JURIS: Professor Fish, the method you are using to arrive at your views regarding the nature of interpretation is the introduction of the observer or reader into the experiment, which is reminiscent of the development of the general and special theories of relativity in the science of physics and the development of phenomenological theory in the science of psychology. Would you agree?

FISH: That is absolutely correct. This is the moment of interpretation, if we wanted to give it a name. The kind of argument that I have been making, both in literary studies and more recently in the law is an argument that is strongly appearing in almost every disciplines like zoology and biology and others which have been thought to be the very antithesis of interpretive theory. Scholars in these disciplines are recognizing the irrelevance behind the question of inten-

tion as it is usually posed, because it usually poses a choice between doing intentional interpretation and doing some other kind of interpretation. I maintain that there is no other kind. The relevant circumstances within which a text is read will always be intentional circumstances.

JURIS: Intention, as most people conceive it, incorrectly presupposes some kind of unattackable single meaning.

FISH: Right. But it doesn't In fact intention — even when it is known — is always known interpretively. And that includes your knowledge of your own intentions. The proof of this point is the fact that your knowledge of your own intentions can change. That is, you can realize at a later time that what you thought you meant by saying or doing "X" was actually not what you meant by saying or doing "X." You meant something else. This is often an event that occurs in the course of psychoanalysis, for example. In fact, this could be thought to be the whole of psychoanalysis — the succession of realizations that what you thought was the innocent activity or utterance that you had performed ten years ago was in fact fraught with meanings that you now see. In this way you have become, as you always are, the interpreter of yourself.

JURIS: Is this freedom to interpret one's self an extension of the notion in Christian theology of the gift of free will from God?

FISH: Well, yes and no. You see, there is nothing free about this. There are constraints. But they are not constraints which exist in the text or in some kind of object that is phenomenologically fixed.

JURIS: Would you say that these constraints rather derive from one's past experiences and the present contexts in which one finds himself? In any given period of time, certain assumptions and givens exist that one does not realize.

FISH: It's not so much that one doesn't realize them; it's that he couldn't realize them. In other words, they are so much the furniture of his consciousness that it would be impossible for him to put them on the table and examine them, because the very structure of examining is formed by them. The constraints are the product of socialization. A student's experience in law school is a wonderful example, as you know. Depending upon how quickly you tumble into the manner of speech accepted in law school (let's say that this occurs by the end of your first year), at that point you will pick up a case and begin seeing it from the first time as "a case." After the first year you wouldn't understand what it would mean not to see a case as a case. But in those first few months of law school, you don't know what the professor means when he says that something is a case. To know what is a case, you simply cannot pick up your first one, start to read it, and recognize it as a case. Rather, you must have a whole sense of the legal enterprise — of the various steps and procedures and obligatory activities and egregious mistakes. How do you pick that up? Well, you couldn't pick that up if someone merely gave you a set of rules or abstract descriptions of it on the first day, because you wouldn't know what they meant until you had been through the whole initiatory process of contracts, torts, criminal law, evidence, procedure, et cetera. Then, after you have experienced this initiatory process, you suddenly find that the very way in which you are looking has changed. And at that point your new perspective organizes materials for you as they come to you. Since you could not then choose to perceive otherwise, the constraints have become internalized. They are not constraints in the text; they are constraints which are now the form of your consciousness, of your attention, of your attending mechanism.

JURIS: Before experiencing his first year in law school, the student considers the law to be merely a schedule of rules rather than a process of interpretation.

FISH: That's right. In *The Concept of Law,* H.L.A. Hart tries to build a system of law just on that basis — the concept of law as a system of rules. Hart's theories ascribe a preference for having a system of rules in relation to which the interpretive power of men and women will be held in check. According to Hart, one needs rules to stand as an impartial, publicly available network of constraint.

JURIS: Isn't the common law doctrine of *stare decisis* supposed to effectuate a similar network of constraint?

FISH: Perhaps, but it doesn't. Now to understand the nature of arguments based upon precedent, a view to its historical context is useful. My colleague at Duke University, William Van Alstyne, gave an interesting talk at the AALS meeting in Los Angeles recently, where he pointed out that other Western societies have a view different from ours regarding the force and effect of their respective constitutions. In other societies, the amending process is much easier and more the ordinary course of events than the extraordinary process that our mechanisms make it. As a result, we in this country are committed to the continual reinterpretation of a constitution in ways that we would perhaps not need were the mechanisms for amending it easier, more ordinary, more everyday than they are now. In a sense, then, it is just a historical accident that the operation of the law for us must alway be a backward-looking operation. We must always attempt to align our present decisions both with the Constitution and with the history of judicial decisions. The concept of "precedent" is very interesting in this connection, because one tends to think of precedent as a means of allowing a stable and settled past to order and clarify a troubling and perhaps ambiguous present. In this way, if one can show that the present case resembles a past, already decided case in perspicuous and important ways, one then feels that one has a way of taming, as it were, the difficulties of the present case. The question I always ask at this point is, "But what does the **past** case resemble?" My first point is this: there is no case which is known in and of itself. The past case became settled only as a part of history. At one point in time, then, the past case was exactly in the position of the present case. After making this realization, one might ask, "Where do the pressures to make an argument based upon precedent come from?" The pressures come from the present and are directed at the past. In other words, our description of the past case is ruled by our concerns about the present case. My second point is this: when one makes an argument based upon precedent, the past gets rewritten so that it can then be invoked as an independent support for the present, in whose surface it was rewritten. One invokes precedent as if it were a check against the interpretive powers of the present, but in fact the way precedent operates is as an interpretive mechanism by which the present gets to rewrite the past and then gets to cite the rewritten past as its justification.

JURIS: One can find situations throughout legal history in which the past is continually rewritten in this manner, as in the Supreme Court's eventual abandonment of the "interference with contract" argument and its acceptance of substantive due process arguments after the *Lochner* era.

FISH: Right. Other examples include the whole precedure of the supposed demise of classical contract that Gilmore describes in *The Death of Contract*, and the whole way in which the contract-tort distinction has become more and more difficult to be maintained. Once you grasp what it means to distinguish a precedent, you know that precedent is never a constraint unless you want it to be.

JURIS: According to scholars in the Critical Legal Studies, "Crits" school of thought, there is no objectivity left in the law. In making his decisions, the judge has nothing really to rely on other than his own preconceptions, prejudices, and biases. How do you respond to this theory?

FISH: In the sense that one cannot point to a preinterpretive fact or text or rule, it is true that there is not objectivity. However, the argument that we are then left to the subjective whims of judges is wrong. What the "Crits" fail to see is that the argument against objectivity is also an argument against subjectivity.

Recall the conclusion form the argument against objectivity: the so-called objective rule can always be rewritten through the process of interpretation into whatever form we take to be persuasive. Also recall that in the older vision, one supposedly had two competing centers of interpretive authority — either defer to the independent text or defer to the independent whims of the interpreter, but in the new post-structural, anti-foundationalist view, neither the text nor the interpreter is independent: there is no neutral vantage point from which one can choose among competing accounts of what a text or utterance means. The fact that the text is not independent provides the argument against objectivity. The fact that the interpreter is not independent provides the argument against subjectivity. At this point I ask a simple question, "Where do the preferences of the interpreter-judge come from?" The answer suggested by the "Crits" is that these preferences originate from the judge himself. But what sense does that make? These preferences, as well as the judge's sense of what he is doing, come from the public structure of conventions and practices within which the judge is situated as an agent. What judges are left with is their sense of what it means to be a judge. And, therefore, the constraints that operate on them are the ones I spoke of before — the kinds of constraints that are already operating on law students at the end of their first year. So this myth which people like Ronald Dworkin promote, that a judge is always ready to fly into some realm of subjective and whimsical choice, is simply that — a myth. The constraints are operating insofar as one is an imbedded member of the practice, whatever it might be. Indeed, the search for theory and rule will be fruitless, since it is a search for constraints above and beyond practice. There simply aren't any.

Terence Plizga is a 1987 graduate of the Duquesne University School of Law. He is currently employed by Hyatt Legal Services.

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