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Recorded February 20, 2000
Unitarian Universalist Fellowship
Anchorage, Alaska

Submitted to the Exxon Valdez Oil Spill
Trustee Council on February 29, 2000

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P R O C E E D I N G S

Side A (Tape 1 of 1)

(On record)

MS. OBERMEYER: Sunday, February 20th, and I'm on my way to see -- hear David Oesting speak on the Exxon Valdez, "Justice Delayed is Justice Denied".

MR. McCONNELL:Wisconsin lad from north of Green Bay. I tell the truth, the whole truth and nothing but the truth.

(Laughter)

MR. McCONNELL: I got a lawyer it's (indiscernible) candidate for America, oh, my God, pressure, terrible. And I'm not feeling any of it.

Anyway, coming from north of Green Bay he was raised as a Quaker, went to school at a Quaker college, is that right? And then went to Washington University in St. Louis for his law degree. Came here in 1980 for a two-year stint, loved it, worked for Davis, Wright and Tremaine, loved in and came back and in 1980 he and Susan, who's with us today. Susan. We'll have coffee later, you can say hello to Susan, she's a counselor over at Dimond High School and loving every minute of it, she told us.

Anyway, since 1980 they have been here, raised three children and they're all grown and away and he's here to speak this morning, Dave is, moral authority and citizen

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1 responsibility. And if you look at the name it's not Esting
2 [sic], it's not Osting [sic], it's Oesting, and he just told me
3 that he spelled the name about five times.

4 Yes, Rose.

5 ROSE: I just wanted to say that the title of
6 the talk got in incorrectly, so (indiscernible - away from
7 microphone)

8 MR. McCONNELL: Yeah, do you remember what it
9 was in the paper, Rose?

10 ROSE: Well, it was simply how to get Exxon to
11 pay up.

12 UNIDENTIFIED VOICE: (Indiscernible - away from
13 microphone)

14 MR. OESTING: Actually any of them will do.

15 MR. McCONNELL: And David was appointed by the
16 court way back when to represent the plaintiffs in the Exxon
17 Valdez case and we may get into that a little bit this morning,
18 he says, with "tongue in cheek".

19 MR. OESTING: Yes.

20 MR. McCONNELL: Thank you for being here, Dave.

21 MR. OESTING: My pleasure, my pleasure. I
22 should tell you as you're all probably aware, the practice of
23 law can be very rough. Although that happened in my parking
24 lot in front of my office the other day.

25 You know, in thinking about the risks of having a lawyer

1 address morality, I should tell you the story of a lawyer that
2 arrived at the pearly gates a few years ago and he was, like,
3 10th in line. The attendant looked back at him and said, gee,
4 you don't need to wait, come on up, Mr. Peterson. Here, come
5 right on in, we'll show you to your quarters. And he was
6 walking down the street with little one-room bungalows on it
7 and they turned left on this beautiful avenue with gorgeous
8 buildings. He went to the second large lovely house and he
9 said, this will be your quarters. And he said, huh, who lives
10 in those bungalows. And the attendant say, oh, those are the
11 Popes. And the lawyer said, I get a house like this and that's
12 how the Popes live? And the attendant said, well, sure, we got
13 lots of Popes up here, but you're the first lawyer.

14 (Laughter)

15 MR. OESTING: I'm going to mix a more generic
16 lecture on jurisprudence and morality, if you will, and then
17 tie it into the travail of the Exxon Valdez oil spill
18 litigation. And, hopefully, bring it up to a point where
19 people can ask questions on that topic.

20 But let me start back in the generic realm with the juris
21 prudence. Something a lot of people don't appreciate is that
22 the law does not establish or even deal particularly with
23 morality. In fact, it is vaguely reflective of the morality
24 which is the expected and tolerated acceptable behavior
25 standards, truthfulness, and the various things that we deal

1 with every day in making our decisions. The law can only
2 reflect the morality of a particular society. And I'll give
3 you a good example of hugh struggle that we're having today
4 with that very thought, and that's the abortion debate. Very
5 simply, that is, for most people, a loaded moral clash between
6 pro-choice and the other side. I can't even say the right term
7 for it. Right-to-lifers.

8 But you note the law has to stay and is staying very
9 carefully completely out, for the most part, from that debate,
10 other than little nibbling pieces because you get nothing but
11 catastrophe and scofflawism [sic] when the law doesn't simply
12 reflect the moral values of society, but rather attempts to
13 establish them contrary to the general populace as a whole is
14 going to accept. And I give you Prohibition as a good example
15 of that. There a morally based, one could argue, principle of
16 tee-totalling was enacted into law, constitutionally, in fact,
17 and it made an entire nation scofflaws because society as a
18 whole was simply not going to give up its liquor and they
19 ignored the law and we had speakeasys throughout the land,
20 bootlegging became a huge industry and, eventually, the law had
21 to step back from setting a moral imperative out of sync with
22 the moral imperatives of the society to which it was addressed
23 and correct the problem. We repealed Prohibition.

24 With that said, the other aspect about the law and
25 morality is that the law punishes or addresses and imposes

1 behavior standards at a level that I would say is well below
2 what is morally acceptable. A good example, when one looks at
3 lying, we all consider from a moral standpoint inappropriate
4 and unacceptable behavior. But none of us have ever given an
5 excuse that wasn't 100 percent true with respect to going to
6 the Aunt Tillie's for Thanksgiving dinner, have we? And so we
7 raise a society of people who, to greater or lesser degrees,
8 are willing to engage in falsehoods, depending on the
9 circumstances. We punish none of those falsehoods from a legal
10 perspective. To give you the gradation, unless there -- it is
11 testimony in court and there is something that is outcome
12 determinative about that testimony with respect to the dispute
13 being addressed, then we will not tolerate lying and we call it
14 perjury and we criminalize it. But there's nothing criminal
15 about telling all kinds of falsehoods in everyday life. We
16 don't approve of people who are not truthful, we try not to do
17 business with them or deal with them, but unless you're
18 deprived of money on a falsehood or unless you are testifying
19 in a court of law, we do not punish falsehoods.

20 There's a -- what I mean by the law reflects the morality
21 of society, but it only does so when one deviates so far,
22 behavior-wise, from acceptable behavior to the level that we
23 will either punish it or criminalize it. And that's kind of
24 the framework with which one has to address law and morality in
25 all of the aspects of where the two intersect, basically.

1 Now, the Exxon Valdez. You all have heard this story,
2 I'll give you a shorthand, thumbnail sketch. But let me start
3 with the proposition from the morality and the ordinary citizen
4 or the corporate citizen in this particular case. Exxon, to
5 this day, maintains that Captain Joseph Hazelwood, one, was not
6 inebriated on that bridge and, two, did not cause the grounding
7 of that vessel and the spilling of 11,000,000 barrels of oil.
8 I mean, that's a remarkable statement when one thinks about --
9 gallons I mean, but it's a remarkable statement when one thinks
10 about it. But that's -- the aspect of the law that is often
11 not appreciated you must have a factual predicate and you have
12 to have it submitted in -- out of stone, it has to be an
13 absolute fact before one may begin bringing moral perception
14 and moral -- making moral decisions about it. And for a
15 litigant going into a courtroom, one of the real questions that
16 we always face as lawyers is, do any of us know the facts
17 before either the judge has said "this is a fact" or the jury
18 has said "we find as a fact." And that was what the lion's
19 share of the entire first half of the Exxon Valdez oil spill
20 trial was all about.

21 Exxon flatly refusing to acknowledge, factually, until
22 they were told by the fact-finder, the decider of facts, that
23 Hazelwood was intoxicated or that the vessel hit the reef or
24 that they spilled all that oil or the damage to the
25 environment. And that's the way the law is administered in a

1 courtroom.

2 Ultimately the evidence was showed and we assumed that the
3 jury found he had a .248 blood alcohol content at midnight on
4 the night of the 24th. He had set the vessel up on a collision
5 course with Bligh Reef, out of the shipping lanes, and was
6 accelerating, one might say impaired judgment at work, and then
7 turned to a fatigued third mate who did not know the waters,
8 was not endorsed to pilot vessels though them and didn't know
9 where he was at that moment and said "here, Greg, you drive,
10 I'm going below." Then he went down and opened his bottle of
11 Jack Daniels which was ultimately thrown overboard when the
12 Coast Guard arrived on the scene 10 hours later.

13 You know of the destruction, essentially, of the economies
14 of Cordova, the severe impact it had on people's lives in
15 Kodiak. Chenega Bay has half the population, the Native
16 village, that it had before the oil spill occurred, by reason
17 of the simple destruction of their entire surrounding
18 environment from which they, as subsistence users, really
19 thrived and depended for their livelihoods. Tatitlek is coming
20 back, but it was very seriously impaired by reason of the
21 destruction that occurred in the Sound. And many of those
22 areas, even today, haven't recovered yet and Exxon, even today,
23 still contends that Hazelwood wasn't drunk and his -- if he
24 was, it didn't cause the accident. So there we are with that
25 stage of it.

1 We tried the case, and then we come to the law and
2 morality intersection in the process. The jury found those
3 facts, as I just recited them to you, awarded about 500,000 in
4 compensatory damage, 500,000,000 rather and then they had the
5 choice of awarding punitive damages. And here's law and
6 morality reflecting each other. There are certain types --
7 remember I commented earlier, that there are certain types of
8 morally unacceptable behavior or unprincipled or unacceptable
9 conduct with regard to others that we will criminalize. And it
10 has to deviate significantly from the vicissitudes of everyday
11 life and banging up against each other before we criminalize it
12 and the morally acceptable or the behaviorally acceptable
13 conduct.

14 What happened in this instance, and what the law does do,
15 is we can anticipate by our experience with the species hugely
16 deviant behavior and we'll always have it with us. Murder,
17 assault, theft, the 10 Commandments, they're all right there.
18 And we criminalize that behavior, but modern man and his
19 machinery are capable of doing what we would consider
20 unacceptable and deviant things in ways that none of us can
21 anticipate or imagine would happen. Putting a drunk in charge
22 of a tanker with 250,000 barrels of oil on it that might be
23 going through ice and Exxon, frankly, as a corporate citizen,
24 had every warning and ability in the world to know that was
25 going to occur.

1 Captain Hazelwood who had been reported drinking on the
2 job to the point of impairment, 10 or 12 times, when he was
3 actually caught and observed between 1985 and 1989. He was a
4 rehabilitated alcoholic, he went to the school in '85. And the
5 night of March 14 and the tanker departed San Francisco heading
6 north, Hazelwood in command, and he came aboard the launch to
7 go to the tanker, grabbed the radio from the launch operator's
8 hand and began profanely accusing a fellow skipper with another
9 tanker in the bay of all sorts of outrageous conduct to where
10 his second mate and the crewman had to subdue him and haul him
11 aboard the vessel and put him in his cabin while they left San
12 Francisco Bay. And it was reported to Exxon management, the
13 Port Captain, and they, yet again, did nothing.

14 That is hugely deviant behavior. And who would have
15 anticipated that a corporate citizen, like Exxon, would say "we
16 don't want to address the problems, we'll risk it. If we have
17 to fix it, all these things will occur and we'll have a big
18 problem. We'll get in a lawsuit with Hazelwood, we'll get in a
19 lawsuit with the Masters Union, et cetera, let's just hope it
20 doesn't happen." And look what they put at risk and the risk
21 occurred, we had the spill.

22 When unanticipated deviant conduct occurs, which we can't
23 imagine will occur sufficiently in advance to criminalize it
24 and establish sanctions for it, the law permits -- the common
25 law permits society to mete out punishment for that deviant

1 behavior. And that's what punitive damages are, they are
2 simply punishment, it's an ad hoc fine levied against a
3 wrongdoer, in this case the Exxon Corporation, for having
4 completely ignored at horrendous risk to the fellow members of
5 society and we Alaskans and Prince William Sound and all those
6 communities by permitting this drunk to drive their tanker.

7 And what happened, and the jury heard that, and were given
8 the guidelines for an appropriate sanction, even though it is
9 ad hoc and it is unique to this particular case, they assessed
10 a \$5,000,000,000 award against Exxon. And now we've had a
11 trial and we have the judgement with the \$5,000,000,000 award
12 and Exxon has appealed that judgment, which it's got a right to
13 do, but they have appealed every single aspect of it. They
14 have attacked every single legal decision that the trial court
15 made, every evidentiary decision with what would be allowed
16 before the jury the trial court made and continued to maintain,
17 as I started out, he wasn't drunk, but if he was it didn't
18 cause the accident.

19 And they have done so in a way to simply paralyze our
20 judicial system. And that, frankly, is one of the most
21 disappointing aspects of the entire litigation from my own
22 personal perspective. It's been 11 years, 10 years and 13
23 months, since the Exxon Valdez hit Bligh Reef and we have yet
24 to get out of the court of appeals and collect our judgment and
25 it's because of the incredible tolerance that this society and

1 the law shows because it doesn't administer morality, it's only
2 reflective of the morality that society -- that Exxon could be
3 a scofflaw and thwart the process to that degree. And when you
4 bring those two together it is, once again, the law's
5 reluctance to state what the moral principle or rule or the
6 correct result ought to be in a given circumstance, it only
7 wants to address in a normanative standard setting way the kind
8 of deviance that they won't put up with. And as long as Exxon
9 fights in court, we're willing to allow that fight, even if it
10 paralyzes the system and delays justice to the degree it has.

11 And I don't have any further answers for how we would
12 alter our legal system to permit that without getting into the
13 prohibition context or getting to the area where the law become
14 repressive for 49 percent of our population unnecessarily
15 because of someone else's moral imperatives and standards in
16 how things ought to be administered. But you see that what
17 Exxon is doing may be offensive and it's a complete denial of
18 reality and, you know, frankly, untruthfulness with regard to
19 the whole event, is morally unacceptable from my standpoint,
20 but from a legal perspective we simply have to fight it out in
21 the arena until they've been brought to task and paid their
22 judgment. And that's what I'm currently about in a portion of
23 my career as you can imagine.

24 With that I'll throw it open to questions.

25 MR. McCONNELL: Jay, I saw your hand first,

1 then John.

2 JAY: I have a specific comment (indiscernible
3 - away from microphone) First of all, does the -- quick
4 question first. Have they paid the compensatory settlement
5 yet? Or it's still open.....

6 MR. OESTING: They're appealing -- they have
7 made payments on account of advance of about half of the
8 compensatory damages, they are appealing the other half.

9 JAY: Okay. As far as the punitive damages is
10 the comment only. First of all, the specific thing is just
11 looking at the specific case, \$5,000,000,000 it's going to be
12 -- if it's paid, it's going to be dumped into a relatively
13 small number of pockets in Alaska and the comment I have, kind
14 of, is has anybody thought about the detrimental effect that'll
15 have on the rest of the people that aren't getting money? For
16 instance, like these people are going to invest in land in
17 terms of investment and drive prices up, so people like me or
18 somebody else it's going to make it more difficult for us, so
19 that's one thing. And a more general comment is with respect
20 to punitive damages in general, is I don't understand, the
21 compensatory damages, people are being compensated for
22 everything, including pain and suffering.

23 MR. OESTING: Uh-huh. (Affirmative)

24 JAY: So shouldn't punitive damages really -- I
25 agree with the principle that, you know, there needs to be

1 punishment, you know, if that's warranted, but why should the
2 punitive damages go into the same pockets of the people that
3 are already compensated, including the attorneys? Wouldn't it
4 be more beneficial if that 5,000,000,000 went into a state fund
5 or something more general (indiscernible - interrupted).....

6 MR. OESTING: I won't argue with you, 50
7 percent of the states that allow punitive damages, have enacted
8 legislation that provide that half of punitive damages awarded
9 is the state's money.

10 JAY: See, that's something that really -- you
11 know, that's a side I saw immediately when -- for some reason
12 that hit me immediately, I said these people are already being
13 compensated and I'm a little skeptical, frankly, of a lot of
14 the claims (indiscernible - away from microphone) but I mean,
15 frankly, a lot of these people made a lot of money during the
16 clean-up and then, you know -- and the environmental thing is
17 semi-debatable and I think there's a lots other larger bubble
18 things going that are going to hurt people probably more than
19 the spill did which, you know -- so it's kind of getting washed
20 out, but that's my opinion. But, anyway, I just -- as far as
21 punitive damages I really -- I'd feel a lot better about it if
22 something else was done with the money, I'd feel a lot more the
23 moral imperative, I think.

24 MR. OESTING: I don't -- you know, that is an
25 area of raging debate in the law at this point.

1 JAY: Okay, I just (indiscernible - away from
2 microphone)

3 MR. OESTING: The state of Alaska has a statue
4 for state punitive damages cases, it provides 50 percent goes
5 to the state coffers now. And so, you know, that issue is one
6 that has bothered people over the years. One of the things
7 that's happened is it's an evolutionary anomaly. Punitive
8 damages, historically, when we did business not as mega-
9 corporations who could affect 38,000 lives, that's how many
10 claimants we have and the environment the way Exxon did, but
11 rather it was the innkeeper that smashed somebody over the head
12 for not paying his bill-type deal is when punitive damages
13 originated. In fact, they go all the back to the Code of
14 Hammurabi, 2000 B.C., so they're not a new phenomena in law by
15 any stretch.

16 But whereas, one-on-one, the private attorney general
17 collecting the fine as his vengeance exacted by the state,
18 under the state control, was safer than letting the private
19 victim get out his knife and stab the guy back. And it was,
20 more or less -- that's why the fine got paid to the victim,
21 because that's what punitive damages are, it's a penal
22 extraction.

23 That is still not a illegitimate deal, it wasn't -- it's
24 fine to talk about this guy will get rich and that guy won't,
25 but you're not the one that lost your fishing enterprise and

1 \$400,000 and we may pay me back for that, but we can't pay you
2 for the emotional damage.

3 JAY: But that's part of the -- that's part of
4 pain and suffering.....

5 MR. OESTING: No, it isn't, no.

6 JAY: No?

7 MR. OESTING: No.

8 MR. McCONNELL: I'm going to move on there.

9 MR. OESTING: I'm sorry.

10 MR. McCONNELL: We have confirmed that you did
11 have an honor in the fight.....

12 JAY: Okay.

13 MR. McCONNELL:and I think we all do.
14 Okay. Let's move on to John.

15 MR. BLAINE: While you were talking at the end
16 about the appeal process I was struck with a parallel between
17 the hackers who get into E-Bay and Yahoo and so forth and just
18 muddle the system so it no longer worked and how parallel that
19 is to a big corporation having the power to simply flood the
20 legal system.....

21 MR. OESTING: Uh-huh.

22 MR. BLAINE:so it no longer works. And
23 sometimes don't you find the analogies make sense and help us
24 find someway to unclog the system?

25 MR. OESTING: I think that's an excellent

1 analogy myself, and I wish I had thought of it, but, you know,
2 the fact remains that what we have done there, there's two
3 parts of that in my mind. We have empowered an individual with
4 modern technology to create the kind of havoc it took a
5 corporation with a market capitalization of \$127,000,000,000 to
6 do with an oil tanker and create almost as much or more
7 economic dislocation. But, you see, we have anticipated that
8 kind of deviance and we criminalized it. And so the likelihood
9 of a punitive damages penalty being assessed to express
10 society's outrage at the deviant behavior is not nearly as
11 important or as much as an ingredient in the equation because
12 of the fact that we have criminalized it. There's deviance we
13 can foresee, we've seen it enough to do something about it.
14 But you're right, my thought about individuals can now flood a
15 system, like the E-Bay deal, and destroy it just as Exxon is
16 flooding the court system and essentially paralyzing them from
17 a functionality standpoint.

18 MR. McCONNELL: Seems to me before I go on,
19 didn't mean to interrupt you there, one of them is behavior
20 that's authorized, is legal under the law, I'm presume you're
21 not doing anything illegal by persevering under appeal, but
22 this is sort of not a legal act that is being done, so there's
23 an important distinction, I think, in that analysis.

24 MR. OESTING: Uh-huh. It's vandalism.

25 MR. McCONNELL: Yeah.

1 Francine.

2 FRANCINE: I'd like to respond to the punitive
3 damages Chenega and Tatitlek were brought up specifically on
4 the effects of the oil spill in terms of what can and what
5 can't (indiscernible - away from microphone) but the truth of
6 the matter is (indiscernible - away from microphone)

7 MR. McCONNELL: Ruth and Ruth.

8 MS. MOUTTON: She was first.

9 MR. McCONNELL: Oh, okay. Somebody -- I saw
10 another hand when Francine raised her hand.

11 (Indiscernible - multiple voices)

12 MR. McCONNELL: Ruth Sheridan, here first,
13 let's go for it.

14 MS. SHERIDAN: I wanted to comment if Exxon's
15 behavior is any different than that of the tobacco company's in
16 warning the law when trying to limit the number of
17 (indiscernible - away from microphone) tobacco or in making
18 tobacco companies pay for some of the damages (indiscernible -
19 away from microphone) I don't think Exxon is acting any
20 differently than any large corporation would (indiscernible -
21 away from microphone)

22 MR. OESTING: I think you're absolutely right.
23 And I hate to speak in Exxon's defense, period, it galls me,
24 but I'll do it. Simply put, Exxon's view and thesis is that
25 punitive damages are an anachronism and they ought not to be

1 allowed, and we will fight within the law and in the system
2 until there's nowhere else left to go in the war to have
3 punitive damages abolished as a remedy available to private
4 victims, even of our own wrongdoing. And they're willing to
5 spend any amount of money on that principle alone.

6 On the tobacco litigation fund, and it's interesting you
7 should raise, there is a unconcealed, and everyone knows it, an
8 industry consortium of major corporations who firmly believe
9 what Exxon believes about punitive damages, that they are
10 simply wrong and ought not to be available to our citizens.
11 And that, not the economics, drives Exxon's tenacity and
12 continued, I'll call it, recalcitrance in the court system as
13 much as anything, and the tobacco companies and all major other
14 corporations are lined up right there behind them, financing
15 the law review articles and mounting the battlements. But it's
16 a free society, you know, they're entitled to pursue how they
17 think the world jurisprudentially ought to be ordered and to
18 attack these remedies. And the tobacco companies are a part of
19 that consortium.

20 MR. McCONNELL: Ruth.

21 MS. MOUTTON: I'm kind of interested in the
22 question of morality in law and I just -- you know, you brought
23 up prohibition (indiscernible - away from microphone) maybe by
24 51 percent.....

25 MR. OESTING: Uh-huh.

1 MS. MOUTTON: (indiscernible - away from
2 microphone) how strong do you think a society would be, if you
3 want to put a percentage on it, before the law issue can be
4 (indiscernible - away from microphone)

5 MR. OESTING: Eighty-five percent of the
6 population must voluntarily comply with the law because all
7 law, in the final analysis, requires voluntary compliance. If
8 55 percent of us chose not to pay our income taxes next year
9 there's not a damn anybody can do about it, regardless of the
10 fact that we would all be subject to criminal penalty. And,
11 frankly, the statistic used in jurisprudence is that if --
12 you're always going to have a nine to 15 percent deviant
13 component within society with respect to legal rules and
14 behavior and, you know, you can look back as far in history as
15 you want and those statistics remain the same. And now we can
16 agonize about reducing crime, we can agonize about all those
17 things, but I'm a real pessimist, frankly, I've watched the
18 species from the courtroom for 30 years and there are always
19 going to be deviants and scofflaws.

20 Now, some of them are murderers, some of them are robbers,
21 many of them are nothing but hoodlum kids out having a good
22 time on Saturday night, and I was one of those for all through
23 my teenage years and some say later.

24 (Laughter)

25 MR. OESTING: But, be that as it may, if that

1 85 percent don't voluntarily comply you can't put a law
2 enforcement together, at least not under a democracy, that's
3 going to coerce their behavior into compliance and that's the
4 line between moral and legal, as I see it.

5 MR. McCONNELL: Sir.

6 RANDY: I guess what I was wondering about is
7 the way the law views corporations. If it's obvious that
8 corporations (indiscernible - away from microphone) tax on the
9 tobacco companies because they can outlast, they can outlive
10 the plaintiffs, they outlive judges and attorneys involved in
11 cases. That under the law they're considered individuals just
12 like citizens, but with a corporation you really have a body
13 that is, in some way, immortal, because it can live, you know,
14 for generations. Why can't the supreme court or some other
15 court -- didn't the supreme court just recently make a decision
16 that you cannot -- in case of a capital crime you can't appeal
17 beyond a certain number of steps or during a certain time
18 period. Can't they apply a similar rule to corporations
19 because of the nature of corporations in the way that they're
20 really different from the individual.

21 MR. OESTING: That is a very insightful comment
22 and an age old jurisprudential problem, mostly from the 20th
23 and now we're into the 21st century, and that is, when you have
24 no body to shackle and no soul to condemn, how do you deal with
25 a citizen with unlimited resources and infinite life from a

1 legal perspective?

2 And, more importantly, in a democratic structure, how do
3 we assure that real live, thinking, breathing people,
4 collectively under the social contract set the rules for these
5 artificial juristic entities. That anti-trust laws were the
6 first example and trust buster, Teddy Roosevelt, at the very
7 beginning of the 20th century was the first wild political
8 rebellion, if you will, spawned by that very phenomena that you
9 observed. Here's a corporation that has no body and no soul
10 and all this capital and power. And they set about to break up
11 the Rockerfeller Trust and the beef trust and the sugar trust
12 and the tobacco trust. We have done tobacco before in this
13 country, this is the third round actually.

14 At some point the supreme court can do that, but remember
15 that was the legislature speaking through the democratically
16 elected representatives that put the shackles on habeas corpus
17 death row repetitive, duplicative appeals, it wasn't the
18 courts. And that's the solution and that's our vehicle as
19 citizens for getting the ring in the nose of the corporate
20 monsters. And if one studies the economic political history it
21 waxes and wanes, you have the center of power or the commanding
22 heights as Jurge Yorkamen (ph), Yale professor, has just
23 written about how much does the elective government control
24 economic allocation power and decision-making and structures
25 and how much do we leave to the private corporate board rooms

1 with regard to all of those types of decisions, resource
2 allocation decisions, that affect each one of us as human
3 beings. And the pendulum swings this way regularly, we're way
4 over to the right where there's an awful lot of board room
5 power and darn little elective representative power. But I
6 don't know if I'll live long enough to see it, but I'll bet you
7 in 2050, especially with the electronic power that we see in
8 globalization, you're going to see that pendulum start back the
9 other way. The WTO riots in Seattle were a good example of
10 people beginning to react to what we see as a fit of imbalance
11 there.

12 But the short answer is that Congress enacted those laws
13 to put a stop to it through the representative, the supreme
14 court just enforces them.

15 MR. McCONNELL: So there's a gut feeling that
16 the corporations are exceeding the statutes of litigation?

17 MR. OESTING: Yes, I like it.

18 UNIDENTIFIED MALE VOICE: It's sort of
19 repetitive, I guess, but the question I was going to ask is
20 with the coming of globalization where -- our manufacturing our
21 energy control, everything is falling into the hands of a few
22 companies that are stronger and have bigger budgets than the
23 majority of the countries in which they operate. And if the
24 United States, supposedly the strongest, if you will, cannot
25 manage a company, what kind of a world do you envision when all

1 of this is globalized?

2 MR. OESTING: It's kind of frightening, you
3 know. It's interesting that you should make the comparison of
4 the size of these companies. When we won the verdict against
5 Exxon their annual revenues made them the eighth largest
6 economic entity in the world, including nations. I mean that's
7 how big they are, and now they got Mobil with the
8 globalization.

9 I think that the United States is going to have to stand
10 up and do something about that. And one of the examples, and
11 we all should watch it very closely, is just how tough are they
12 willing to be with MicroSoft because there's a funny balance
13 there, you know, you can reach the point of huge economic
14 inefficiency by excessive government intervention in the
15 regulatory process -- through a regulatory processes in
16 resource allocation and the general lifting of the tide in
17 everyone's boat from an economic well-being standpoint.

18 This last decade -- and our economy is a good illustration
19 of deregulation, Reaganomics, in my view, trickling down and
20 everyone has come up. I mean, nobody can deny the statistics
21 on that. But are we willing to let it go so far that we
22 absolutely simply lose control of oil and the people who manage
23 oil. And one of the things that was very, very intriguing to
24 me from the standpoint of the Exxon trial was to learn Exxon's
25 personality. Exxon thinks of itself as a sovereign nation, not

1 as a corporate American company subject to the laws of America.
2 And that's not particularly surprising, they consider
3 themselves equal with the United States government and only
4 through the most severe cudgeling, if you will, by the
5 government and regulators, will they conform their conduct to
6 what we expect of them under the law. That's what the fight in
7 the court is all about. And the prolonged warfare in the
8 appeal process.

9 To understand them really, their board directors when we
10 had them on the witness stand, didn't really even comprehend
11 the process we were involved in is the sense I had. They think
12 of themselves as a sovereign power, 80 percent of their
13 business is outside the United States, only their headquarters
14 is here for all practical purposes. And they almost need to,
15 in the globalization context, because they, not the United
16 States government, deals with one of our very precious
17 commodities from the government of Iran and the sovereign
18 nation of Venezuela and the sovereign nation of Mexico. So at
19 some point in that globalization process it may be that these
20 other countries will disappear, but right now they're still
21 sovereign nations, not beholding to U.S. law. And Exxon has to
22 bring that oil home so we can drive our cars to this meeting
23 this morning.

24 And so that balance will constantly bear watching, but
25 it's a very interesting equation from a jurisprudential and

1 social political standpoint.

2 MR. McCONNELL: Can't help but thinking that if
3 BP and Amoco had owned that tanker that everybody would be
4 willing to take (indiscernible - away from microphone)

5 (Laughter)

6 UNIDENTIFIED MALE VOICE: Where corporate
7 (indiscernible - away from microphone) one of the things that
8 (indiscernible - away from microphone) simply it seems like,
9 you know, when we look at what is troubling (indiscernible -
10 away from microphone) to be moral or be a good guy, obviously
11 they're going follow the rules. (indiscernible - away from
12 microphone) it almost seems like that's going be perfectly
13 predictable behavior from the point of any corporation whether
14 it's Exxon or Phillip Morris or anybody else, you know, that
15 they're trying to make maximum amount of money for its
16 shareholders over a period of time, why not simply stall as
17 long as they possibly can (indiscernible - away from
18 microphone) the amount of money they have to pay out is finite,
19 you know, the longer they go before they pay it out, the less
20 painful it's going to be for them and their shareholders to do
21 that.

22 MR. OESTING: No disagreement, and that's a
23 constant tension, but there arrives -- a corporate entity
24 arrives at a point where in pursuing its own ends it can so
25 touch and concern so many other living, breathing homo sapiens

1 that it either has to be morally persuaded or economically
2 embarrassed, boycotts, things like that. Market forces, image
3 -- corporate image, and they spend a lot of money on it, into
4 pursuing its ends in a way where the touch and concern aspect
5 of it are not detrimental to us. And if it won't yield to
6 moral assuagion and/or consumer pressure and what have you,
7 then you crack out the statute book and you hit them over the
8 head. That's what pollution laws are all about.

9 MR. McCONNELL: Okay, Tim, then Jay, then Ruth.
10 My comment would be -- I'm Tim. My comment would be you seen
11 it in the health care where they would like to interpose
12 between the doctor and the provider and yet not be on the line
13 to be sued, they're trying to get that legislation through.
14 They're trying to get limitations on this punitive damage,
15 they're trying to put limits on all industries on there. The
16 only thing is a good example of Phillip Morris, all of those
17 huge payoffs with the tobacco companies, they're also into
18 food, so that just goes into overhead and that shuffled into
19 the cost and so we end up paying that as consumers and also, I
20 don't know if they get a tax break on it anyway, but that's
21 sort of the overall great thing..

22 And then one last comment, and that was that, you know,
23 the founding fathers and mothers, I guess, we can use that term
24 for them, the founding fathers they defeated the church, they
25 defeated the instruments of oppression, government was

1 described as not -- the people served government and we turned
2 that triangle upside down. We dealt the canopy religion, we
3 dealt the aristocracy, but this new entity which has
4 international -- we have not dealt with legally and they've got
5 the money and the wherewithal to sort of hold we, the people,
6 at bay and (indiscernible - away from microphone) so I glad
7 that came up in our discussion.

8 Yes, I think we had Jay next.

9 JAY: Just kind of a vague comment. It seems
10 to me that part of the problem is the idea of group morality
11 and psychology versus individual morality and psychology. In
12 other words, you have this corporation like, the fellow back
13 there was saying that they have, you know, one primary goal --
14 one goal, period, that would be to make money for their
15 shareholders and everything else is subservient to that. And
16 you get all these people and they reinforce each other's
17 psychology and their sense of outrage. And the same on your
18 side of the equation, you have your group of plaintiffs and
19 lawyers and you all reinforce each other. It's like a divorce
20 where you have, you know, two people and they have their
21 lawyers and their lawyers kind of build up their outrage and
22 build each other up. You know, it seems like you could get,
23 you know, two countries with good people that would never get
24 into a fight with each other individually, and yet the two
25 countries will go to war because -- you know what I mean?

1 So that's part of the problem, so I wonder if the solution
2 somehow could be to humanize about 20 persons to represent
3 Exxon, and say -- for instance, and say "okay, you make all the
4 decisions, everything is on you, you don't consult with
5 anybody, it's your decision, your morality, you're the judge."
6 And then you do the same on the other -- at some point some
7 judge does that, take two people and say work it out. Okay,
8 we'll work it out. You two I'll moderate as individuals, maybe
9 -- you know, it just seems like it's dehumanizing -- that's the
10 problem with corporations. You know what I'm saying?

11 MR. OESTING: Sure.

12 JAY: It's just reinforcement that kind of
13 makes it apart from kind of coming back down and looking at the
14 human side of the whole thing.

15 MR. McCONNELL: Ruth, you want to stand?

16 MS. MOUTTON: You know, I thought I brought
17 this aspect up before, it's almost necessary sometimes
18 (indiscernible - away from microphone) BP Amoco [sic] proposed
19 merger and that's moral indignation on the part of
20 (indiscernible - away from microphone) the public hearing was
21 basically a farce and yet there seems to be no outrage on the
22 part of the public and I mean the thing with (indiscernible -
23 away from microphone) which took care of all newspaper and TV
24 coverage (indiscernible - away from microphone) I don't know
25 how you generate that and I don't know where it is. And I

1 don't know -- I guess I'm interested in your point of view and
2 people you talked to that -- have just just given up, you know,
3 do they seem overwhelmed by corporations?

4 MR. OESTING: I think that fact in -- and I'm
5 trying to recall which one it was, it had the lowest voter turn
6 out in the presidential election, second lowest in the history
7 of the country, 1924 I think was the lowest when Buchanan was
8 elected. Not Buchanan, I'm forgetting the president's name
9 now, but in any event very few people are motivated by
10 reflective thought perspective thinking and unless they
11 perceive that it is going to touch and concern or affect them,
12 it isn't their problem. I think there's a big element of that.
13 And I think you combine that with a real lack of understanding
14 of the structure of the oil industry at the upstream end and at
15 the downstream end, most people don't quite comprehend how
16 those are connected together in such ways that it's going to
17 affect them and they're not interested enough to go look
18 because they don't have a perception of what BP and ARCO
19 actually do, and comprehend it. And I think it's a combination
20 of those two things that the moral indignation at the fact that
21 they may control the Alaskan economy in the form of the state's
22 income doesn't really too much affect them as long as they get
23 their dividend checks.

24 MR. McCONNELL: Stan and then Ruth Sheridan.

25 STAN: Two questions. The first, how much

1 longer do you project it will take to get a final decision from
2 (indiscernible - away from microphone) and, secondly, what kind
3 of assurances are in place that you will be able to collect
4 once that event does occur, you know?

5 MR. OESTING: The second one is very easy, I
6 have, by court order, because we litigated that as everything
7 else in the case, a \$6.75 billion letter of credit supported by
8 probably the 60 largest banks in the world as a bond, security,
9 and I simply need to submit a copy of the final judgment to
10 draw on it and we'll have our money, assuming the judgment's
11 for.

12 On the other point, I am predicting, at risk always, 2001,
13 the middle of 2001. And that's because I -- you know, one of
14 the really intolerable aspects of the system, frankly, is that
15 all of the briefing -- our arguments, written arguments to the
16 court in the Ninth Circuit, were submitted. The last one,
17 which was ours, was on November 11, 1997, and we didn't even
18 get an oral argument date until May 3 of 1999 and I am told,
19 strictly rumor, nobody knows, but, you know, April -- 11 months
20 later for a decision. Then Exxon has the option, they have 14
21 days in which to do it, to petition our panel, three-judge
22 panel who hear it, for reconsideration. The panel.....

23 (End Side A - Tape 1 of 1)

24 (Begin Side B - Tape 1 of 1)

25in deciding whether the panel made a mistake or not.

1 They have to vote and at least eight of them have to vote in
2 favor of redoing what the panel did because they see something
3 they didn't like or at least have the 15 look at it and then
4 you wait six months to a year for argument. And now we're
5 getting outside 2001 into 2002.

6 Let's assume that after 90 days they all look at it and
7 decide, no, the panel did it right, we don't want to touch it,
8 now it goes back to the panel and then Exxon petitions for
9 cert, they have 30 days to ask the supreme court to review it.
10 The get an automatic stay of the judgment for 90 days from that
11 point and now I'm in December of this year already. And who
12 knows how long the supreme court might take, generally they'll
13 get it done in 60 days, but they could take four months to
14 decide whether they're going to hear it or not. If they deny,
15 I'm in 2001, if they grant it, I'm starting to look at January
16 2002. That's my guess.

17 MR. McCONNELL: Well, it'll be Ruth and then
18 John.

19 MS. SHERIDAN: I wanted to correct you on your
20 impression of the WTO. You said -- you were referring to WTO
21 riots, and I was there, the only ones who were rioting were the
22 police. There (indiscernible - away from microphone) and I
23 mean violent, too. One's who attack them with tear gas, with
24 rubber bullets, with billy clubs. The violence was on the part
25 of the police, they really didn't know how to contain it if

1 they used (indiscernible - away from microphone) there were at
2 least 80,000 people and they had the media that is protecting
3 the government, you know. And it took a long time for them to
4 even notice (indiscernible - away from microphone) you know, to
5 notice the different levels of (indiscernible - away from
6 microphone) I think that that is one of the more hopeful things
7 that people from all over the country are continuing to wake
8 up. And bring back (indiscernible - away from microphone) that
9 there is something (indiscernible - away from microphone)

10 MR. OESTING: Well, I noticed here, that's why
11 I cited it as an example. To me what we saw in Seattle tells
12 us that the corporate governance -- private corporate
13 governance system in the globalization process is getting out
14 from our human being thumb. And those people are the first
15 spokesmen for saying that it's time to rein them in a bit.

16 MS. SHERIDAN: And they were not going
17 (indiscernible - away from microphone)

18 MR. OESTING: Well, I can get a lot of
19 merchants to come as witnesses who have broken store windows in
20 downtown Seattle to testify on the other side, but we don't
21 know need to argue about who rioted or why, but we did have an
22 outpouring of human people type concern over corporate economic
23 power. That's the important part of the WTO event in Seattle,
24 I think.

25 MS. SHERIDAN: And the other point of mine is

1 how did (indiscernible - away from microphone)

2 MR. OESTING: Uh-huh.

3 MR. McCONNELL: John

4 MR. BLAINE: You mentioned that Alaska just
5 passed a law regarding giving advantages. Is that law in
6 effect (indiscernible - away from microphone)

7 MR. OESTING: No. You have to understand that
8 we have a dual sovereignty system in this country. Maritime
9 law and maritime events, seagoing affairs, are specifically
10 reserved under the Constitution to the federal sovereign and
11 the federal legal enclave and to federal law and it's that law
12 that governs the Exxon Valdez litigation. Alaska state
13 sovereign laws govern land side tortious and wrongful behavior
14 and criminal things. There's obviously overlap there, but this
15 one's on the federal side of the blotter, if you will, and so
16 the Alaska state statute doesn't affect it.

17 MR. BLAINE: If there were income taxes would
18 it effect (indiscernible - away from microphone)

19 MR. OESTING: Very definitely, punitive
20 damages, interestingly enough, are not deductible of the
21 wrongdoer who pays them and are taxable to the recipient, which
22 is appropriate. I mean there's no point in letting the general
23 citizenries' coffers pay for half of the punitive award, it's
24 intended to be a fine. But there's no point in the individual
25 recipient not receiving -- I mean, not paying their dues, you

1 know. That's federal tax law, by the way, is what I'm talking
2 about, but most states would treat it the same way, I suspect.

3 MR. McCONNELL: Any other questions? Yes,
4 ma'am.

5 MS. PORTER: I was curious, how much tax are
6 you going to (indiscernible - away from microphone) side at
7 this time, and how do you (indiscernible - away from
8 microphone)

9 MR. OESTING: By working very, very hard on
10 lots of other projects and having lots of partners who do so as
11 well, who are willing to finance the effort on behalf of the
12 plaintiffs and the cost has been an investment of attorneys'
13 time of about \$155,000,000 on a wit analysis and about
14 26,000,000 in out-of-pocket costs. And if we lose that will be
15 the investment.

16 MS. PORTER: And you've read "Civil Action"?

17 MR. OESTING: I haven't. You know, I really
18 must. Many people have said that I ought to but, you know,
19 quite frankly, I've been there and done that, and I don't know
20 many doctors that watch Dr. Kildare on television and I kind of
21 feel the same way about lawyers.....

22 MS. PORTER: Yeah, I guess.

23 MR. OESTING: If you want to read a really good
24 criminal jurisprudence lawyer's story, it's one of the very
25 finest it's Vince Buaglioso's -- you know he's the one that

1 prosecuted "Helter Skelter" Manson crime people. This was his
2 first criminal defense case after he stopped being a prosecutor
3 and went into private practice and if "Anatomy of a Murder" was
4 a classic for some of our generations, but this one, to me,
5 it's called "And the Sea Will Tell" and it's a magnificent, 100
6 percent accurate, wonderfully done novel, real story, true
7 story, from top to bottom about a murder defense.

8 UNIDENTIFIED FEMALE VOICE: What's the title?

9 MR. OESTING: "And the Sea" S-E-A "Will Tell"
10 it's about a murder of a couple in the South Sea islands.

11 UNIDENTIFIED MALE VOICE: It's a novel or is
12 the story true to life?

13 MR. OESTING: It's a novel true to life. I
14 mean, it reads like a novel, but it's all legal.

15 MR. McCONNELL: It's a true story.

16 MR. OESTING: It's wonderful deal. The
17 defendant, his client, ultimately is acquitted. And what's
18 wonderful about it and you'll really enjoy it is aside from the
19 lessons in criminal jurisprudence, you walk away from the case
20 with the same perspective that real people do and that is, you
21 really don't know if she's innocent or not, because it isn't
22 the classic murder novel where they reveal the truth "at the
23 end" it's more like real life and real law, we don't really
24 know what happened, we're all archaeologists trying to
25 reconstruct it and persuade a jury on 51 percent preponderance

1 of the evidence or beyond a reasonable doubt basis to find a
2 fact did occur or didn't occur, and in this case you never get
3 that answered, but is a wonderful travail or trek through the
4 process, it really is.

5 MR. McCONNELL: Francine.

6 FRANCINE: Who's going to write the book on
7 this?

8 MR. OESTING: There's been two or three of them
9 written already.

10 FRANCINE: Are you going to do it?

11 MR. OESTING: People keep telling me I should.

12 FRANCINE: I would love to assist you.

13 MR. OESTING: But, you know, the difficulty,
14 and perhaps it's my impetuosity, I'm not one that looks back
15 very often and the idea of going back and reconstructing all of
16 this war that I wrote. You know, I've written the book, let
17 somebody else put it to paper, I'd rather go on and do other
18 things in my life.

19 FRANCINE: But who out there is looking at it?
20 I mean is somebody interested?

21 MR. OESTING: There are several that have been
22 published already, they're pretty punk, in my view, but.....

23 FRANCINE: Yeah, but you have the facts.

24 MR. OESTING: Yeah, and they didn't and that's
25 part of the reason they're punk, I think. But, as I said,

1 somebody will get to it, I suppose. The problem is I don't
2 know if I want to sit down long enough and invest the time to
3 get them educated to do it right because I have -- you know, I
4 like to do things. I like chasing dragons, not looking back at
5 the ones I've gotten.

6 MR. McCONNELL: But if you win this one you'll
7 have a little bit of time on your hands potentially.

8 MR. OESTING: Well, I would have if I chose to
9 use it. I do now.

10 MR. McCONNELL: Let's see, Francine would like
11 probably the screenplay rights on that (indiscernible - away
12 from microphone) maybe the guy that picked up the bottle of
13 Jack Daniels that was thrown overboard, maybe he'd be the
14 one.....

15 UNIDENTIFIED FEMALE VOICE: (Indiscernible -
16 away from microphone)

17 MR. OESTING: Yeah, there's a story there.

18 FRANCINE: (Indiscernible - away from
19 microphone) little side bar.

20 MR. OESTING: Oh, there are loads of -- I mean
21 absolutely amazingly funny stories that have come out of this
22 thing that nobody will ever hear.

23 UNIDENTIFIED FEMALE VOICE: You have a duty to
24 the rest of us.

25 MR. OESTING: To share the anecdotes?

1 UNIDENTIFIED FEMALE VOICE: I want to hear
2 them.

3 MR. McCONNELL: Well, let's see.

4 MS. ZAPPA: Are we at that (indiscernible -
5 interrupted)

6 MR. McCONNELL: I think we are, we're -- go
7 ahead make your.....

8 MS. ZAPPA: Yes, I just want to remind those of
9 you (indiscernible - away from microphone) John shall be strong
10 (indiscernible - away from microphone) everything was going
11 along well until the advertisement began and the local
12 Unitarian Church clergy protested so strongly that the minister
13 (indiscernible - away from microphone) and so I just want to
14 say (indiscernible - away from microphone) gathering here
15 (indiscernible - away from microphone) having Reverend Gay come
16 along with us and that would have to do with Universalism. The
17 time (indiscernible - away from microphone) he will be speaking
18 at the later service today. (indiscernible - away from
19 microphone)

20 MR. McCONNELL: But not so odd as those that
21 choose Jewish God yet spurn the Jews.

22 (Indiscernible - multiple voices away from microphone)

23 MR. McCONNELL: That was told to me -- excuse
24 me, I interrupted your notes, but I.....

25 MS. ZAPPA: I just wanted to conclude by saying

1 that Sylvia Short has brought in roses for the funeral of her
2 husband and if those of you who are not continuing on wish to
3 have some as remembrance of him I will give you some on the way
4 out, otherwise (indiscernible - away from microphone)

5 MR. McCONNELL: Reverend Gay, is that next
6 week?

7 MS. ZAPPA: Yeah.

8 MR. McCONNELL: Yeah.

9 MS. ZAPPA: We will be having him, as had been
10 planned, next week, yes, the way he works. However, he will be
11 doing the 10:30 (indiscernible - away from microphone)

12 UNIDENTIFIED FEMALE VOICE: So that you'll know
13 what next week is about or I think it is, I called Reverend
14 Gay, someone had told me -- Tim told me -- I said I was a
15 Unitarian but not Universalist. At which point Tim said
16 (indiscernible - away from microphone)

17 (Laughter)

18 UNIDENTIFIED FEMALE VOICE: At any rate I had
19 asked Dick Gay to come and speak on the fact that I'm not a
20 (indiscernible - away from microphone) so I think that that is
21 what he will be addressing next week (indiscernible - away from
22 microphone)

23 MR. McCONNELL: Everything about you intrigues
24 me, Ruth.

25 (Laughter)

1 MR. McCONNELL: The good news -- I don't know
2 if he's going to use this, but don't you imagine that, how odd
3 of God to choose the Jews, but not so odd as those who choose
4 the Jewish God yet spurn the Jews. I first heard that as a
5 teenager. My friend who was Jewish lost a father and son in
6 Bergen-Belson, his mother spent time there, too, horrible. And
7 he used to say that sort of whimsically when we get into our
8 philosophical. I was raised a Catholic (indiscernible) he
9 wasn't bitter about it, but he just sort of say, hey, you know,
10 no one thinks about that very much.

11 Well, we got ahead of this week, but I would want to say
12 one thing. This topic that we touched on today, and I
13 mentioned it last week, we, the people, very important in our
14 government and I think this is all part of the challenge of
15 making sure that we don't come wee, W-E-E, the people. And we
16 do appreciate you coming up this morning and wish.....

17 MR. OESTING: It was a pleasure.

18 MR. McCONNELL:you luck and.....

19 (Applause)

20 (Indiscernible - multiple voices)

21 (Off record)

22 (END OF PROCEEDINGS)

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I, Joseph P. Kolasinski, Notary Public in and for the state of Alaska, and reporter for Computer Matrix, do hereby certify:

THAT the forgoing tape was then transcribed by myself to the best of my knowledge and ability from the audiotape provided by the Restoration Office of the EVOS Trustee Council;

THAT the Transcript as heretofore annexed is a true and correct transcription of said tape requested to be transcribed.

IN WITNESS WHEREOF, I have hereunto set my hand and
affixed my seal this 7th day of March 2000.

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