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Article Sub-Title		
Article CopyRight	Springer Science+Business Media Dordrecht (This will be the copyright line in the final PDF)	
Journal Name	Liverpool Law Review	
Corresponding Author	Family Name	**Shaw**
	Particle	
	Given Name	**Julia J. A.**
	Suffix	
	Division	Reader in Law and Literary Jurisprudence, School of Law
	Organization	De Montfort University
	Address	Leicester, LE1 9BH, UK
	Phone	
	Fax	
	Email	jshaw@dmu.ac.uk
	URL	
	ORCID	
Schedule	Received	
	Revised	
	Accepted	
Footnote Information		

Liverpool Law Rev
DOI 10.1007/s10991-017-9196-4

Introduction to the Special Issue on Reimagining Justice: Aesthetics and Law

Julia J. A. Shaw[1]

Aesthetics originates from the Greek word *aisthētikos* (sensation or perception by the senses as opposed to reason) which is derived from *aisthanesthai* (to perceive or feel) and, while implicated in the production of metaphors and substitution, it has analogic connections to ethics and acts upon the emotions. In *The Theory of Moral Sentiments* (1759), Adam Smith placed aesthetic perceptions and emotional reactions at the heart of moral judgment, and took the view that legal judgment is as much a property of feeling as of intellectual understanding or reason. To situate institutions such as slavery and destitution within a discourse of mercy, for example, comprises a form of sentimental jurisprudence which prioritises the synthesis of morality and compassion with social reality; but more importantly requires the ability to visualise, without self-interest, the circumstances in which the oppressed find themselves. Although, in general, aesthetic discourse allows a measure of flexibility that typically moral discourse often lacks, aesthetics and moral principles are not necessarily disparate notions. Just as Immanuel Kant concluded in his articulation of beauty as a distinct moral category in *Critique of Judgment*, similarly for Friedrich Schiller the adoption of an appropriately moral disposition (deemed essential for moral actions) depends on aesthetic sensitivity. This is because only an aesthetic sensibility was considered to have both a transformative and educative impact which enabled 'universally valid judgments and universally valid actions' to become 'an object of the heart's desire' (Schiller 1967, p. 33.5, 9.7). The cultivation of an inner sense of beauty or aesthetic attitude was also considered necessary in order to overcome the egoism of aesthetic taste, by increasing receptivity to the human condition and in so doing, internalising the rational call of conscience and moral duty.

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From particle physics to ecology and geodesy, the fundamental rules and laws of nature which govern the interdependence between natural systems are graceful and compelling: Galileo referred to the elegance of particular formulae and Einstein maintained that a sense of the beautiful contributed to the making of scientific discoveries. The latter further claimed that the frame of mind required for a successful scientific breakthrough was that of a 'lover', since only 'intuition resting on sympathetic understanding' can lead to the unearthing of universal elementary laws and the daily effort required in this endeavour comes 'straight from the heart' (Einstein 2009, p. 4, 5). For Karl Polanyi, this 'sense of intellectual beauty' is rooted in concepts such as organisation, transcendence and meaningfulness and influences our feeling towards certain values and a particular conception of reality (1962, p. 135). In Fyodor Dostoevsky's novel, *The Idiot*, the main character Prince Myshkin declares 'Beauty will save the world', because it has a profound effect on both the mind and soul (2001, p. 382). This was no ordinary definition of beauty; rather, he was moved by the poignancy of the vulnerability and suffering etched in the face of a picture of a young woman who had been cruelly abused as a child by a wealthy guardian, shown to him by his hostess Madame Yepanchin. Just as Prince Myshkin takes on the suffering of others almost as his own, by reading the story we also become a part of it. The often difficult coupling of ethics and aesthetics, via the medium of fiction, can provoke in the observer (as listener, reader or watcher) a feeling of sympathetic sorrow but, more importantly, a sense of ethical responsibility. In real life, the person recounting their story relives it, only now in an imaginary way, whilst their audience is able to fictionalise or aestheticise their primary emotional reaction which allows its communication via the aesthetic imaginative faculties. As Dostoevsky explained at greater length in *Notes from Underground*, 'suffering is the sole origin of consciousness'; it also alerts our senses to the one in need and signifies an aesthetic–ethical order where the ideal of beauty equates with sympathy, goodness and moral truth or purity (1960, p. 31).

Against the instrumentality of law, to understand something as beautiful is to stop asking 'what is it for?', since pure aesthetic judgment relies on the acknowledgment of an inner finality of form which is not defined by a fixed standard, neither is it concerned with the object's purpose. Rather, the potential redemptive and unifying power of a judgment of beauty lies in the bringing together of sense and reason; a combination which is considered essential to realising political and social cohesion. According to Schiller, it is possible to accomplish the transition from the spiritual ideal of 'beauty' to 'truth and duty' because 'beauty combines the two opposite conditions of perceiving and thinking… and thus removes the opposition', so that the resulting affective, meaningful and intellectual unity becomes an object for reflection towards the ultimate aim, namely, truth (1967, p. 32). Aesthetic judgments, as disinterested or impartial judgments, are arguably indispensable to legal judgment as they cannot be reduced to abstract propositions. They combine an individual emotional or sensual response together with the pre-existing parameters of legal sources and procedures, towards establishing not a literal 'truth' but a kind of authenticity which has its roots in the intersubjective nature of considered judgments. Slavoj Žižek suggests in *Welcome to the Desert of the Real* that the terms designated to democracy and freedom, human rights and the war on terror, for

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example, are anything but true. Rather, they have been co-opted by law and mask their origins. These 'false terms' only serve to mystify our 'perception of the situation instead of allowing us to think it. In this precise sense our "freedoms" themselves serve to mask and sustain our deeper unfreedom' (Žižek 2002, p. 2). Consequently, such reality-framing ugly untruths or partial truths being passed off as law's narratives of truth means we lack the language to fully articulate our 'unfreedom'.

The pursuit of objective truth or truth as justice, as opposed to the arbitrariness of law's truth, demands we interrogate the narratives behind simple acts of judgment and legal principle; because the business of law-making is not disconnected from the world of aesthetics in its liberal appropriation of symbolism and sensuous expression. In the case of partial truths about terror, for example, which serve to legitimate a series of intrusive laws curtailing personal freedom and—in many instances, unjustifiably help to promote a climate of fear—it is necessary to put on trial the so-called 'actual' facts as depicted in law, about those who commit 'terrorist acts' and those who 'fight' terrorism (Ben-Dor 2011, p. 22). Similarly in the case of American Indians and the cinematic portrayal of female victims of extreme sexual violence discussed in this special edition, aesthetic representation has the ability to alert our senses to injustice but, equally in the wrong hands, is a tool for legitimising savagery and constitutes an abuse of power against the displaced, the unwanted, the outsider and those otherwise categorised as *homo sacer* (a person designated outside the law who may be killed without consequence: Agamben 1998) and therefore unworthy of law's protection or even recognition.

As a social phenomenon, law is not an autonomous enterprise and cannot maintain a separate discourse because legal issues and disputes arise from the circumstances of human life. Its innate narrativity and literariness depends on a range of other expressive disciplines which lend law's edicts and precepts authority. Whether as word or image, the aesthetic brings together senses and symbols, and produces meaning through material sensation and belief through feeling. It is, therefore, incumbent on legal scholars to acknowledge and explore the emotive power and ethical utility of aesthetic expression as it occurs within the language of law. In addition, the use of narrative fictions for explicating the excluded individual's marginal position within society, while not truth-based, have their own value and significance in both enhancing our moral appreciation of the interests of others and supplementing our critical understanding of moral judgments and principles in relation to their application within the context of law. To this end, this special issue brings together a collection of papers which explore the connection between law and literature and the significance of the aesthetic turn in legal scholarship; most of which were presented at the recent annual Socio-Legal Studies Association Conference. Each article addresses a selection of aesthetic and literary forms, philosophies, theories and methodologies in relation to their intersection with law, legal practice and legal dogma.

Exploring the ways in which law can be connected to, and improved by, literature, Paul Gerwirtz explains in *Aeschylus' Law* that '[l]iterature makes its special claims upon us precisely because it nourishes the kind of human understanding not achievable through reason alone but often involving intuition

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and feeling as well' (1988, p. 1050). Not only are juridical-literary mechanisms useful for explicating difficult propositions such as the non-rational and contradictory elements of law, but cultural representations (and particularly the novel) are argued to shape the legal mindset or 'juridical imaginary' by helping to amplify jurisprudential arguments and elucidate socio-legal trends (MacNeil 2012, pp. 9–11). Furthermore, narrative accounts such as fantasy folklore and science fiction offer a device for 'othering' or defamilarising the present by creating a *utopos*, a 'no place' or 'good place', within which to conceptualise, for example, the transformative power of technology and consider the implications for human agency, social organisation and identity (Shaw and Shaw 2015, p. 249). The enduring relevance of literature as an elemental constituent of the legal imagination is illustrated in the richly evocative first essay by William P. MacNeil. He uses the allegorical war in heaven, at the core of Philip Pullman's acclaimed fantasy trilogy *His Dark Materials* (1995; 1997; 2000), to articulate an ideo-juridical space for consideration of the nexus of threats and opportunities created by unbounded and unruly new technologies in the battle for control over knowledge within the context of global capitalism.

The title phrase 'his dark materials' comes from a passage in John Milton's epic *Paradise Lost* and much of the central conceit of the collection is rooted in the psychomachian world of poet William Blake's *The Marriage of Heaven and Hell*, which depicts Heaven as a site of oppressive regulation and Hell as a hub of liberating revolutionary energy. Ultimately the trilogy tells a tale of the struggle between the forces of good and evil; and in common with Blake, characterises human life as gentle and loving when free but quickly becoming rebellious and violent when constrained. Though often categorised as fiction for young adults, Pullman's imaginatively potent work embraces a profusion of diverse philosophical, theological and scientific concepts in a narrative commingling which includes Judeo–Christian mythology, Greek philosophy, Chinese mysticism, Gnosticism, evolutionary theory, quantum physics and ecological conservationism. 'His Dark Legalities: Intellectual Property's Psychomachia in Philip Pullman's *His Dark Materials* Trilogy' provides an exuberant critique of this neo-Blakean vision of Heaven-as-Hell; a place where the rules of religion and holy scrolls are replaced by the regulations of computation and machine code. In this reimagination of the afterlife, with its foundations in human technologies instead of divine agencies, subjective moral directives are superseded by largely unrestrained virtual possibilities and the only gods and doctrines are manmade, so humans must take responsibility for themselves.

As a response to the lament by Herbert Marcuse over the inability of poetry and the imagination to have outcomes in the real world (and notwithstanding the wider creative and aesthetic dimensions of the end product), software is now considered to be a revolutionary, creative and literary technology which has consequences in everyday life. For Brooks, '[t]he programmer, like the poet, works only slightly removed from pure-thought stuff. He builds his castles in the air, from air, creating by exertion of the imagination' (1975: 57). Through the creative interpretation of a series of dense and fantastical metaphors, MacNeil provides a fascinating insight into the threat posed by the expansion of the iconoclastic free and open source

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software movement of virtual, cyber- or digital space to the more tangible and material frameworks of existing intellectual property law. While linking Open Source Initiative leader Eric Raymond's 'bazaar' versus 'cathedral' analogy with Pullman's critique of the Church, the moralistic image of freedom-fighting rebel angels and oppressive divinities is mapped on to the forces for good (free software) and agents of evil (proprietary software) allegory, beloved of the *Libre* Software movement. To paraphrase Schiller, the object of the hackivists' play is the beauty of the baud and its goal is software freedom (1967, p. 20). Although *inter alia* 'menacing dark lords and plucky hobbits' provide the backdrop for a thoroughly entertaining satire on the challenge to the authority of intellectual property law, the fundamental political issues surrounding ownership and power are clearly articulated. Having traversed an impressive variety of alternative concepts, theories and ideas drawn from this speculative landscape, the final question posed by the author becomes one of legitimacy; namely, not only *how* but, more appropriately, *who* will construct the democracy of digitality against intellectual property's imperialising 'dark legalities'?

Danish director, Lars von Trier, is considered to be one of the world's most significant, challenging and controversial filmmakers. Supposedly situated beyond the traditional categories of gendered identifications, the pleasure economy and outright misogyny, his deliberately provocative characterisation compels us to call into question our own troublesome psychic deficiencies, assumptions, projections and biases. Von Trier's portrayal of women as, *inter alia*, sadistic, dominant or masochistic and prone to self-abnegation, as with Bess in *Breaking the Waves* (1996), 'She' in *Antichrist* (2009) and Joe in *Nymphomaniac* (2013) is not aligned with any particular variety of feminist or indeed anti-feminist politics as they are currently configured. Nevertheless, in narrative, aesthetic and conceptual terms, the instrumentalised representation of explicit sexual violence and subjugation of women is argued in the second essay of this collection, to produce effects which are, in fact, anti-feminist. Even though such cinematic tactics can illuminate instances of social injustice, 'an appearance is never "merely an appearance", it profoundly affects the actual socio-symbolic position of those concerned' (Žižek 1997, p. 26). In 'The Continuing Problem of the Universal to Questions of Justice', Honni van Rijswijk offers a feminist reading of the first film in von Trier's *USA: Land of Opportunity* trilogy, *Dogville* (2003), which explores the relation of representational practices to questions of feminist justice.

Von Trier presents this cynical work of art as a kind of satire. Set in the eponymous fictional town, located in 1930s Depression era North America, Dogville is portrayed as a place that eulogises virtue and generosity while in reality practises neither. *Dogville* is used here as a case study in order to provide an aesthetic and affective critique of liberal law and liberal democracy, and to offer a critical account of the importance of representational practices to law's role in adjudicating violence and harm. A bleak Brechtian depiction of an unjust society, the film's narrative extends the framework of harm beyond the personal to include the violent histories, theories and contexts that have generated foundational legal concepts such as contract and sovereignty, and have even produced the law itself. The idea of 'contract, for example, is stated to go beyond the literal idea of

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exchange to become instead a legitimating metaphor for exploitative and sadistic social and legal relations. In common with other melodramatic epics in his oeuvre, the Danish director plays with the idea of inversion and the overturning of power relations and social conventions. From martyr to murderer, the chief protagonist, fugitive Grace Mulligan, uses her status as wronged victim (of extreme sexual and economic exploitation) to justify sanctioning the brutal massacre of the townspeople via mob hitmen in the final act. By recasting Grace as oppressed-*cum*-oppressor or victim-*cum*-villain, the film provides a critique of those narratives in which the 'other' is depicted as eventually defeating the subject with whom we are supposed to identify; thereby justifying revenge, retaliation and pre-emptive justice. As van Rijswijk further explains, such stories have historically been used to rationalise racist and colonialist projects.

This second essay advances a distinctive interpretation of *Dogville*—in terms of offering both a critique of existing legal and political constructs, and an exploration of the possibility of constituting alternative legal and political forms—by applying aesthetics and/affect as the main modes of inquiry. It also demonstrates the capability of the medium of film (even films which make uncomfortable viewing) and the imaginative capacities to articulate an effective rhetorical device for the oppressed and profoundly disenfranchised. For queer theorist Jack Halberstam, the imaginative capacities are an essential condition of hope, '[w]e have to be able to imagine violence, and our violence needs to be imaginable because the power of fantasy is not to represent but to destabilize the real' (2001, p. 263).

In 'Truth and Consequences: Law, Myth and Metaphor in American Indian Contested Adoption', Sarah Sargent illustrates how literature can be utilised not only to distinguish and explain the 'other', but can help to determine the bounds of legal discourse in originating positive 'categories of otherness'. The third essay also investigates the influence of myth and metaphor on law-making and adjudication in relation to the contested adoption of American Indian children. For much of American history, Indians have been reviled, misunderstood and often persecuted; as the imperialist founding myth of 'Manifest Destiny' has served to justify a culture of abuse and oppression, by suppressing cultural identity and restricting personal freedoms. From the Removal Act 1830 (which allowed the President to make 'land exchanges' and forcibly remove tribes from their ancestral homelands) to the 'Indian Termination Policy' of the 1940s–1960s (forced assimilation), the coercive power of American values and institutions has been used to not only impose the dominant European–American culture but to validate moral claims to hemispheric leadership. Consequently, due to a lack of recognised statehood, American Indian nations have possessed few rights and little authority over decisions affecting their own citizens, members and families. In the context of the current Dakota Access Pipeline proposals, which represent continuing government incursions on the tribal lands of the Standing Rock Sioux and earlier disputes over their rights to the land, the Native American struggle for recognition as sovereign nations is not merely an artefact of history but ongoing. Standing Rock Sioux Chairman David Archambault who, under the treaties and US law, is head of a domestic sovereign nation said recently in an interview with the *Washington Post* on 25 November 2016, 'This

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government honours international treaties like they are the Holy Grail, but within our own homeland, they find ways to break them'.

Although the 1970s 'Self-Determination Policy' recognised the right to tribal self-government and promoted economic revitalisation—demonstrating a more nuanced acknowledgement of the dynamic interdependence within colonial discourse between the coloniser and the colonised—more recently, the displacement of exclusive tribal authority to make citizenship decisions and controversial blood quantum determinations evidence a growing tendency by the US federal government towards extending control over the question of who or what constitutes an Indian. This, and other important questions relating to identity, cultural relativism, racial framing and human rights are explored via the recent US Supreme Court case *Adoptive Couple v Baby Girl* [570 US—(2013)] and Barbara Kingsolver's *Pigs in Heaven*. Both the legal case and novel concern the contested adoption of an indigenous Cherokee Nation child, but offer conflicting perspectives on a number of issues. These include the definition of American Indian identity also what is, and ought to be, in the 'best interests' of the child in the context of the Indian Child Welfare Act 1978, which governs the removal and out-of-home placement of American Indian children. While there may be some level of resistance to the idea of non-Indians such as Kingsolver telling the stories of (and interpreting the myths of) American Indians, this original exposition illustrates how literature serves an important function in articulating why the traditional frameworks used to explicate racial inequalities still fail to account for the idiosyncratic nature of relations between the US government and indigenous peoples.

To better understand the law and the quest for justice, it is usual to consult words in legal texts rather than turn to images for meaning and clarification. Yet legal principles are also effectively expressed by visual means which have the capacity to tell a story of their own. The fourth essay, 'Exploring Justitia through Éowyn and Niobe: on gender, race and the legal' explores the enduring allegorical personification of the moral influence of law; representing justice as equality and fairness in the form of a white-skinned blindfolded woman. The image of Lady Justice or Justitia invites multiple interpretations on the meaning of her three attributes, the scales, sword and blindfold; acknowledging, for example, the hermeneutic complexity of each part when considered alone and the interchangeability of each when juxtaposed with one another. Portrayed in many different ways outside the courthouses and civic areas of different countries and jurisdictions—from the City Hall in Manhattan to the Old Bailey in London—her iconic status is reflected in a long history as an artistic subject and medium for public commentary. Attracting a range of diverse depictions, Massachusetts artist and sculptor, Tom Otterness, created a recent public artwork representing Lady Justice as a crafty plump bird perched in a tree with her sword hidden behind her back (Sobieski 2011, p. 60). Undertaking a similarly contemporary, if less mischievous, reading of the image, in this essay Patricia Branco considers the difference and similarities between two fictional heroic 'warrior women' Éowyn (from J. R. R. Tolkien's *The Lord of the Rings*) and Niobe (from the Lana and Lilly Wachowskis's *The Matrix*); proposed as possible alternative modern-day symbols of justice. While Justitia is tasked with adjudicating disputes under the law, paradoxically her visual incarnation has created

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much disagreement; engendering broader questions about the rightful objectives of, and who is responsible for dispensing, justice. These and other important issues—relating to, for example, the evolution of societal values on race, class and the changing role of women on the legal stage—are interrogated by reference to Éowyn and Niobe along with a range of other significant influences within popular culture; towards moving from an abstract to a more concrete, accessible, impartial and inclusive emblem of justice.

The final addition to this collection by Julia Shaw blends literary theory, sociolinguistics and political thought, in addressing the continuing contribution of aesthetic and interpretive practices to maintaining the authority and legitimacy of law. It is claimed that, although relying predominantly on denotative interpretations of law, legal practitioners (particularly members of the judiciary) habitually employ imaginative literary devices to exploit and manipulate the latent potential of figurative language. Because it is synonymous with the symbolic order, law is described as being 'produced in the dialogue and discourse all about us: in all the things that we read and say, in the music we listen to, and in the art we grow up with' (Manderson 2003, p. 93). It comprises, therefore, an interdisciplinary, expressive and interpenetrating set of constitutive social conventions within which the performance of imagistic language in framing legal argument and dogma serves as a moral agent and instrument of justice. In 'Aesthetics of Law and Literary License: an anatomy of the legal imagination', the function of aesthetic figuration is explored in relation to the conceptualisation of new legal myths and the maintenance of existing legal truths. This requires explicating the impact of history, and rhetorical and aesthetic aspects of legal texts as well as the political context that affects their own reading (Shaw and Shaw 2015, p. 237). The deployment of the legal imagination in constructing novel offences is also discussed in relation to, for example, privacy, the 'war on terror' and detention. In the context of the current era of global instability and popular disenchantment, a new aesthetics of security is argued to exert a profound influence over the nature of all types of legal innovations; including, for example, the autocratic Investigatory Powers Act 2016 (dubbed the snoopers' charter) which sanctions extreme surveillance. Too often, these new legal incursions on a variety of individual and collective rights and freedoms impose an unacceptable level of restriction or punishment and function as structures of oppression.

The article proposes that the persistence of law's foundational myths and fictions is largely because of their reliance on the conceptualisation of abstract ideas and principles which appeal to an aestheticised ideal of community. As Peter Goodrich claims, '…the sense of communal identity is in large measure a product of the imaginary similitude of a disparate populus and its symbolic or iconic political representations… metaphor elicits the emotion necessary for political love and legal obedience' (1995, p. 77). Furthermore, the power of institutions such as law to incite, induce or seduce its subjects is only possible because social relations are always subject to sensory experience: consequently aesthetic responses trigger certain emotions which shape our personal and collective notions of beauty which, in turn, can motivate a greater concern for justice. Since objects are 'felt' to be either repellent or appealing, the emotions can be directed towards a feeling for right

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or wrong, justice or injustice. Consequently, the aesthetic turn in legal scholarship requires more than merely gliding past cruelty and injustice for dramatic effect; rather, it calls for a commitment to expose and submit to critical scrutiny the violent realities of power structures which continue to subjugate and oppress. In *Poetry and Commitment*, American poet, essayist and radical feminist, Adrienne Rich interprets the aesthetic influence as more than merely a 'privileged and sequestered rendering of human suffering', but as 'a resistance, which totalising systems want to quell: art reaching into us for what's still passionate, still unintimidated, still unquenched' (Rich 2007, p. 25). For this reason, it becomes imperative to reclaim 'the aesthetic' as a revolutionary ideal and seek out the human voices which are so often obscured by rules and legal categories, underscored by persuasive aesthetically charged articulations.

In conclusion, law is replete with the artful application of figures of speech and imagistic language; and legal institutions collude with other structures of power in the creation of myths and legal fictions on which the authority of law depends. Whilst ostensibly neither true nor false, lawmakers transmute and re-present those narrative constructions across a variety of configurations; as judicial opinions, in the general formation of legal principle, when creating legislation and interpreting constitutional provisions. Although we rarely question familiar narratives, it is imperative to understand the central role of aesthetic formulations in constructing law's foundational fantasies. Moreover, the myths and the stories told by the custodians of these sacred legal texts require constant vigilance as to their limitations and vigorous interrogation as to their truth.

Acknowledgements I would like to thank all the contributors and reviewers for their respective endeavours. With regard to the provision of useful suggestions, constructive criticism and general support, I would like to express my gratitude to Hillary Shaw, Bennett Capers, Thomas Giddens, Les Moran, Dermot Feenan, Valentina Vadi, Oren Ben-Dor, Olivia Barr, David Gurnham, Shulamit Almog, Yves Abrioux and Ginger Cat.

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