# Hermeneutics and Law

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## Part V. Philosophical Intersections

### Chapter 78. Hermeneutics and Law

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[1] I am grateful to Gregg Wager (McGeorge School of Law, 2013) for his expert assistance in preparing this chapter. Dr. Wager received his Ph.D. in Musicology from the Free University Berlin, and holds an M.F.A. from the California Institute of the Arts.

> Legal hermeneutics serves to remind us what the real procedure of the human sciences is. Here we have the model for the relationship between past and present that we are seeking.
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> . . . .
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> *In reality . . . legal hermeneutics is no special case but is, on the contrary, capable of restoring the hermeneutical problem to its full breadth and so re-establishing the former unity of hermeneutics, in which jurist and theologian meet the philologist.*
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> . . . .
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> We can, then, distinguish what is truly common to all forms of hermeneutics: the meaning to be understood is concretized and fully realized only in interpretation, but the interpretive activity considers itself wholly bound by the meaning of the text. Neither jurist nor theologian regards the work of application as making free with the text.
>
> – Hans-Georg Gadamer (1989a; 327-28, 332)

Legal practice exemplifies the activity of hermeneutical understanding. The judge deciding a case by interpreting a law in the rich factual context before her provides a particularly vivid touchstone for philosophical reflection on the nature of understanding generally. Hans-Georg Gadamer and Paul Ricoeur – the two leading post-Heideggerian hermeneutical philosophers – both regarded law as a central focus for developing their wide-ranging and differing approaches to philosophical hermeneutics (Gadamer 1989, 324-41; Ricoeur 2000). The deep connections between law and hermeneutical philosophy are longstanding, running parallel to the tradition of religious hermeneutics from the time that religion and law were first distinguished from each other.

The quintessential hermeneutical task – discerning the meaning of a text from the past to provide guidance in the present – has long defined both theology and jurisprudence. Legal hermeneutics is now preeminent because law provides the institutionalized bedrock of social cohesion in a multi-cultural environment within which multiple religious traditions co-exist. Contemporary legal hermeneutics in the West operates within constitutional democracies, which are devoted to ensuring due process and consistent treatment of similar cases by reference to preexisting norms. This core value in modern legal systems often is summarized as governments "of law and not of men," (see Dallmayr 1990, 1452) and "that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances" (von Hayek 1945, 54). The rule of law appears to be premised on legal texts that have a single, persistent meaning through time, but it is precisely this assumption that philosophical hermeneutics puts into question.

Legal texts are now central to the operation of the rule of law, but this is an historical development rather than a necessary feature of legality. The broad institutionalization of written

sources of law in the Roman Empire – culminating in the Code of Justinian in the sixth century to serve as a basis for governing a geographically dispersed and diverse set of situations and people – set the course for law in the Western world. Before the advent of codified law that required interpretation by later actors, law was more commonly identified with rhetorical performances. Greek laws were deeply rooted in custom and tradition, and cases were pleaded orally before large groups of citizens. This rhetorical tradition gave way to a textual focus.

> It is not so surprising that, in the shift to a more literate culture, rhetoric was more or less replaced by hermeneutics, that is, by an interest in interpreting texts. . . . The role of hermeneutics in jurisprudence was based on the realization that no general rule could ever cover all the particularities of legal experience and practice. Fitting a particular case under a general law is *always* an act of interpretation (Gadamer 1984, 56).

Notwithstanding this shift in emphasis, Gadamer recognizes the persistence of the rhetorical foundation of legal practice. He emphasizes that "the rhetorical and hermeneutical aspects of human linguisticality completely interpenetrate each other" (Gadamer 1976, 25), and concludes that "there is a deep inner convergence with rhetoric and hermeneutics" (Gadamer 1984, 54-55). Legal practice is a dialectic of hermeneutics and rhetoric, and so in this setting hermeneutical philosophy is inextricably yoked to rhetorical theory (see Jost and Hyde, 1997). Recovering this more expansive understanding of legal practice girds the insights of philosophical hermeneutics in criticizing the simplistic approaches to legal interpretation.

1. A Hermeneutical Phenomenology of Legal Practice.

Contemporary hermeneutical philosophy is rooted in Martin Heidegger's elaboration of the hermeneutical circle as feature of human existence, in which understanding is a disclosure of the existential forestructure of *Dasein* (Heidegger 1996, 134-44). Gadamer brought this insight to bear on textual interpretation by exploring the constitutive "history of effects" (*Wirkungsgeschichte*) of the text. One never reads a text for the first time, so to speak, because tradition has always already shaped the way the text speaks to the interpreter. The effective-history of the text "determines in advance both what seems to us worth inquiring about and what will appear as an object of investigation," and therefore "working out the hermeneutical situation means acquiring the right horizon of inquiry for the questions evoked by the encounter with tradition" (Gadamer 1989a, 300-302). Corresponding to the text's effective-history, the interpreter also is always already enmeshed in the world, bearing prejudgments (or, more provocatively interpreted, prejudices). As Heidegger emphasized, *Dasein* is always already primordially involved in a caring relationship (*Die Sorge*) with the world; indeed, *Dasein* is essentially care (Heidegger 1996, 178-83). It follows that texts do not contain bodies of knowledge that are available for dispassionate dissection in an intellectual morgue; rather, texts form part of the lived world of the interpreter.

The implications of this hermeneutical ontology for textual interpretation are profound. There is no text-in-itself that can be interpreted objectively so as to provide a fixed meaning

available for later use. Drawing from Aristotle's analysis of *phronesis*, Gadamer argues that understanding occurs only in application. Put more strongly, understanding *is* application (Gadamer 1989a, 312-15). This hermeneutical reality proves problematic for legal scholars, who insist that the rule of law requires judges first to interpret legal texts univocally, and then to apply this settled law to determine the results consistently in specific cases. Gadamer openly rebukes this "legally untenable fiction," and argues that the relative certainty of legal practice is located in the hermeneutical situation he describes (Gadamer 1989a, 326). Rather than causing angst among legal theorists, however, philosophical hermeneutics should be embraced for uncovering the genuine basis for the rule of law (Mootz 1993).

Philosophical hermeneutics illuminates legal practice in a manner that reveals the confusions and contradictions of contemporary competing schools of legal interpretation. Consider a court faced with a claim by two gay men who wish to marry in a state where the relevant statutes establish that marriage is available to two people of a certain age, but does not reference their gender. The court will strive to determine whether the law permits gay marriage by finding the meaning of the statute for this dispute, rather than merely exercising political power. This is the foundation of the rule of law. However, contemporary legal scholars have failed to provide a satisfactory theoretical defense of this judicial activity.

Many judges begin by considering the "plain meaning" of the statutory language, but this inquiry rarely is dispositive for questions of significance and always is subject to equitable moderation in light of other factors such as the legislature's (unexpressed) intention with regard to unforseen circumstances. Courts will claim to look to the "intent" of the drafter, engaging in an amateur archeological inquiry into motivations from a bygone era by drawing on incomplete and under-examined historical documents. Recently, courts have sought a more concrete source of meaning in the "original public meaning" of the words of the statute at the time of adoption, undertaking a philological inquiry that is deemed more plausible than locating legislative intent. Beyond these competing approaches to linguistic meaning, courts also strive to animate the normative core of the statute in the present case by referencing the underlying purpose of the enactment. At the highest level of generality, courts enter the age-old battle between positivists and natural lawyers, with the latter arguing that the law has legitimacy only if it accords with basic norms. Overlaying this welter of considerations is the principle of *stare decisis*, which compels the court to consider how the law has been interpreted in the past and to strive to maintain consistency in the articulation of legal rules over time.

Even this seemingly straightforward question of statutory interpretation generates a complex and indeterminate practice that is undertheorized, with the result that legal actors often misunderstand their activity. All persons would agree that the case should not be decided solely on the basis the judge's personal preference, but it would be foolish not to recognize that the judge inevitably brings her experience to bear in deciding the issue. The interpretive considerations available to the judge ensure that both sides can support their case with legitimate legal argumentation in any interesting case, undermining the pretense that the law is fixed and can be recovered for later application to the case at hand. Gadamer regards law as exemplary precisely because the rule of law requires rising above the subjective strategies of the

decisionmaker but without ignoring the contextual features of the case at hand. At a crucial juncture of *Truth and Method* he explains the significance of legal practice: "The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means merely for that reason an arbitrary revision. . . . [T]o understand and to interpret means to discover and recognize a valid meaning" (Gadamer 1989a, 328).

The dialectic between transcendence and practical engagement in the effort to do justice under law is a manifestation of the dialectical structure of all human understanding (see Barthold 2010). A practical decision about which course of action in the present case is better (should we interpret the state family code to permit gay marriage?) implicates our efforts to understand justice and the nature of the good (what is the nature of "family," and what is the appropriate role of law in promoting family structures?). Gadamer famously characterizes the dialectic as having the structure of "play," whereas Ricoeur more poetically compares it to a "dance" (Gadamer 1989a, 101-34; Ricoeur 1981, 186). We now explore this dialectic by discussing three key hermeneutical themes and their relationship to law.

2. Hermeneutical Themes.

We can best explore the dynamic of legal interpretation by focusing on key topics in the philosophical literature. First, we consider Gadamer's critical distinction between a legal historian writing about a law in the past and a judge deciding a case according to the law. Although arising out of the same phenomenology of understanding, it would be a mistake to equate legal decisionmaking with an historical inquiry into a meaning that supposedly has been fixed in the past. Second, we reanimate the natural law tradition against the reductive characteristics of legal positivism, reconfiguring the debate by construing man's nature as hermeneutical. Finally, we describe how philosophical hermeneutics grounds critical legal theory rather than serving as a quiescent acceptance of the status quo, drawing from the famous exchanges between Gadamer, Ricoeur and Habermas. These topics provide a point of entry for demonstrating the exemplary status of legal practice for hermeneutical theory.

A. Legal Practice and Legal History.

Gadamer argues for the unity of hermeneutical experience by considering how the general methodology of understanding a text from the past can fit with the practical bent of legal hermeneutics to resolve concrete questions of application in the present. Gadamer does not regard legal practice as an exception to the philological understanding of the hermeneutic method as a result of its dogmatic task. Instead, he argues that the task of the legal historian is also dogmatic, which is to say that it necessarily involves application. The legal historian

> is apparently concerned only with the original meaning of the law, the way in which it was meant, and the validity it had when it was first promulgated. But how can he know this? Can he know it without being aware of the change in circumstances that separates his own present time from that past time? Must he

> not then do exactly the same thing as the judge does – i.e., distinguish between the original meaning of the text of the law and the legal meaning which he as someone who lives in the present automatically assumes? The hermeneutical situation of both the historian and the jurist seems to me to be the same in that, when faced with any text, we have an immediate expectation of meaning [shaped by the effective-history of the text]. There can be no such thing as a direct access to the historical object that would objectively reveal its historical value. The historian has to undertake the same reflection as the jurist.
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> . . . Historical knowledge can be gained only by seeing the past in its continuity with the present–which is exactly what the jurist does in his practical, normative work of "ensuring the unbroken continuance of law and preserving the tradition of the legal idea" (Gadamer 1989a, 327 [quoting Betti 1988]).

This analysis completely undercuts neo-conservative efforts to constrain judicial decisionmaking by tethering it to a meaning fixed in the past, a strategy that essentially seeks to reduce the judge to a legal historian. The United States Supreme Court decision in *District of Columbia v. Heller* (2008) embraced this hermeneutical fantasy in the context of the Second Amendment right to bear arms, illustrating that Gadamer's insights have not yet been internalized by that court (Mootz 2010). The Court's romantic conception of historicized hermeneutics exhibits pre-Heideggerian understandings that dominated thought in the nineteenth century (see Lieber 1880). However, the decision in *Heller* is even more retrograde because it ignores the careful qualifications and equitable leavening made by the eighteenth century scholars who originally distinguished "interpretation" (the recovery of a fixed historical meaning) from "construction" (the present application of that meaning to a present case) (Mootz 2010, 605).

Our commitment to the rule of law leads us to look for unchanging meaning in historical texts, and yet it is the experience of legal hermeneutics that vividly demonstrates the nature of historical understanding as application. Gadamer's key insight is that we ground the rule of law on our unwavering commitment to the meaning of the governing text, but that this fidelity does not require that the textual meaning is static.

Gadamer characterizes interpretation as a playful encounter in which both the interpreter and the effective-history of the text are challenged and transformed in the process of applying the tradition in which they both participate. In the fusion of the indeterminate horizons of meaning there is an intimation of a conversation, which takes its own course and exposes the limitations of the interpreter's prejudices.

> The dialogical character of language . . . leaves behind it any starting point in the subjectivity of the subject, and especially in the meaning-direct intentions of the speaker. What we find happening in speaking is not a mere reification of intended meaning, but an endeavor that continually modifies itself, or better: a continually recurring temptation to engage oneself in something or to become involved with someone. But that means to expose oneself and to risk oneself (Gadamer 1989b, 26).

The "putting at risk" that occurs in exposing oneself to interpretation (*sich aussetzen*) is the core of what we describe as the rule of law. The rule of law requires judges to adhere to the truth of a written tradition rather than exercising political power as if they were insulated subjects, which is to say that it demands that they relinquish the pretense of subjectivity and suffer the act of interpretation.

Philosophical hermeneutics uncovers that genuine basis for the rule of law by moving beyond the pretense that texts can exhibit stable meaning that somehow constrains the interpreter. A text never has an incorrigible meaning that exists as an historical fact to be discovered. The "putting at risk" experienced by the judge in the application of the law to the case at hand is the basis of the rule of law, and so it is incumbent upon the legal system to facilitate and monitor the degree to which judges act accordingly, rather than manifesting their prejudices.

B. Hermeneutics and Natural Law.

The rule of law exists within the fluidity of hermeneutical practices, but it is also true that the natural law tradition has relevance after the hermeneutical turn. Most contemporary scholars assume that positivist theories have wholly superseded the natural law tradition, leaving natural law to a small group of theorists who primarily are motivated by religious commitments. Natural law foundations originally constructed in ecclesiastical venues have been abandoned in the hope that secular legal language can subordinate social conflict to questions of technical rationality in the absence of a shared metaphysical conception of the good life. It would appear to follow that contemporary hermeneutical philosophy participates in the rejection of natural law because it rejects universal and eternal principles in favor of historical contingency and evolving meaning. To the contrary, the interpretive turn in legal theory serves as a critique of sterile forms of positivism by reinvigorating (even if in dramatically new form) the natural law tradition. Although Gadamer fully embraces the antifoundationalist movement to radically situate all understand in the hermeneutical experience of finite, historical beings, he makes a somewhat surprising turn at a crucial juncture of *Truth and Method* when he endorses Aristotle's classical account of natural law as a dynamic feature of human existence (Gadamer 1989a, 318-22).

> For Aristotle, [the fact that natural law is not timeless and unchanging] is wholly compatible with the fact that it is "natural" law. . . . [Unlike, for example, traffic regulations, there are] things that do not admit of regulation by mere human convention because the "nature of the thing" constantly asserts itself. Thus it is quite legitimate to call such things "natural law." In that the nature of the thing still allows some room for play, natural law is still changeable. . . . [Aristotle] quite clearly explains that the best state "is everywhere one and the same," but it is the same in a different way than "fire burns everywhere in the same way, whether in Greece or in Persia."
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> . . . .

> . . . [Aristotle's natural laws are not norms to be found in the stars, nor do they have an unchanging place in a natural moral universe, so that all that would be necessary would be to perceive them. Nor are they mere conventions, but really do correspond to the nature of the thing–except that the latter is always itself determined in each case [contextually] (Gadamer 1989a, 319-20).

Gadamer connects this insight to his extensive analysis of *die Sache*, the persistent subject matter that stands as a provocation over and against the subjective aims of those engaged in dialogue. The dialectic between the case at hand and general principles is the genuine foundation of the rule of law. Without such "free play" in the application of law, Gadamer argues, law could not function. The experience of *die Sache* as something beyond our wanting and willing is the experience that classical natural law philosophy sought to explain.

Chaïm Perelman's rejuvenation of the rhetorical tradition coincided with the publication of *Truth and Method*, and Perelman also looked to classical natural law as an articulation of his rhetorical themes (Mootz 1999, 330-31). Gadamer and Perelman break with the absolutist tradition of natural law by locating the reality of moral action and deliberation in the rhetorical-hermeneutical engagement of finite and historical beings. Natural law is rendered "natural" once again by attending to the ontological features of human nature instead of theorizing about the rules established for all time by a deity, or the epistemological powers of human reason. Their recourse to classical natural law provides a rich point of reference for bringing legal thinkers into conversation with the interpretive and rhetorical turns in contemporary philosophy (Mootz 1999, 338-59). On this dynamic foundation we can construct the basis for genuine knowledge, which I have termed "rhetorical knowledge," about law. This is just one example of Gadamer's central theme that we can experience truth even if the experience is not the product of the scientific method.

The classical natural law orientation connects with Lon Fuller's efforts to avoid the reductive tendencies of positivism. Our human nature as communicative and historical beings guides the social project of the rule of law. Fuller writes:

> If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law–Natural Law with capital letters–I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire (Fuller 1969, 186).

Fuller's invocation of the hermeneutical character of human nature resonates with his earlier comparison of the common law system with a "discussion of two friends sharing a problem together," (Fuller 1956, 703) and best explains his sustained argument that law is deeply connected with the practices and conventions of the community in which it is situated (Postema 1994, 377). This is not natural law as a timeless rulebook, but rather a recognition that there is something in the nature of the thing in dispute (*Die Sache*) even though the "thing" can be understood only in the activity of interpretation within a given context at a point in time.

Lloyd Weinreb also articulates a classical natural law theory that is congenial to philosophical hermeneutics. Weinreb rejects the modern deontological conception of natural law as the capacity of human reason to deliver moral prescriptions in particular cases in favor of the classical ontological conception of natural law as the affirmation of the objective reality of morality in social life. "Natural law doesn't provide moral truths, it just rebuts skepticism and existentialism" (Weinreb 1996, 7). Morality is a brute given of our social existence, which must constantly be animated through rhetorical-hermeneutical exchanges but which cannot direct these exchanges in advance. Normativity is not a philosophical question to be resolved, but rather a social experience to be fostered. Together, Weinreb and Fuller provide important points of reference in contemporary legal literature for understanding the critique of positivism by philosophical hermeneutics.

C. Hermeneutics and Critical Legal Theory (*Kritik*).

The preceding analysis establishes that texts cannot insulate meaning from historical contingency and the interpreter's prejudiced forestructure of understanding, but also that a classical natural law account accords with the hermeneutical challenge to positivism. We now turn to the most important challenge to hermeneutics: the charge that it consigns us to replicating existing ideology because it eschews a firm foundation for critique. Jürgen Habermas has famously challenged Gadamer for relinquishing the Enlightenment ideal of critical theory that can unmask the operative ideology within existing practices. Habermas insists that law exists "between facts and norms," which is to say, between existing hermeneutical practices that can be reduced to sociological inquiry and rational-scientific dictates that are the province of philosophy (Habermas 1998). Habermas first articulated this approach in terms of "quasi-transcendental human interests," arguing that the practical cognitive interest embodied in hermeneutical and historical practices is supplemented by the "emancipatory interest" embodied in critical philosophy and self-reflection that permit us to gain perspective on existing practices (Habermas 1971). Habermas invokes Freud as a model of reconstructive science that yields self-knowledge and a critique of traditionary understandings.

Habermas contends that Gadamer's hermeneutical account of law as grounded in an artful development of a living tradition is dangerous because we no longer have recourse to a thick tradition of the substantive reason that is carefully developed through the rhetorical elaboration of shared *topoi* that are hermeneutically recovered from legal texts. Habermas underwrites the universal aspirations of law with "communicative reason," which operates as a "weak transcendental necessity" that generally orients us to validity claims even if it cannot specify applicable substantive norms in a particular legal dispute (Habermas 1998, 4-5). By reconstructing the operation of communicative reason in legal discourse, Habermas explains, philosophers can articulate a "critical standard, against which actual practices–the opaque and perplexing reality of the constitutional state–[can] be evaluated" (Habermas 1998, 5).

Gadamer steadfastly opposed Habermas's project to develop a basis for critical theory that was not subject to the universality of the hermeneutical situation (Mootz 1988, 584-96).

According to Gadamer, emancipatory reflection "is no less historically situated, context-dependent, than other modes of thought. In challenging a cultural heritage one presupposes and continues it" (McCarthy 1978, 188). Habermas was chastened by the work of Kuhn and Feyerabend, which demonstrated that the empirical-logical sciences are no less hermeneutically grounded than historical-humanist inquiry, but he continues to insist that we cannot subordinate all reason to hermeneutic conventionalism (Habermas 1982, 274; McCarthy 1978, 61). The question is whether philosophical hermeneutics can accommodate the necessity of critique without adopting Habermas's defense of a supervening critical theory.

The rhetorical character of philosophical hermeneutics preserves the critical element of understanding and is the basis for developing a critical hermeneutics. It is telling that Gadamer expressly emphasizes his alignment with the rhetorical model of truth as part of his vehement response to Habermas (Gadamer 1989a, 568). Gadamer acknowledges that the participatory immediacy of a rhetorical exchange between two persons permits room for critical inventiveness, but he argues that textual interpretation invites a critical appraisal to an even greater degree. By expressly equating the textual interpreter with a rhetorical actor rather than with a receptive audience, he emphasizes the space for critical reappraisal of the tradition that is opened by, not despite, the decentering dialogic structure of understanding (Gadamer 1976, 23-24). Ricoeur had sought to maintain a tensive relationship between explanation and understanding in his mediation of the Gadamer-Habermas debate (Ricoeur 1981, 90), even while accepting Gadamer's insistence that critique must emerge from, and return to, the hermeneutical situation in which it is deployed (Ricoeur 1983, 311). Ricoeur's mediation failed because he sought a philosophical answer to the role of explanation rather than a rhetorical account of the distantiating features of dialogue (Mootz 2011, 91). Ricoeur's lectures on ideology and utopia, less ponderously philosophical than his many books, provide more fertile ground for critical hermeneutics because they emphasize that both ideology and utopia are grounded in the rhetorical-hermeneutical realm of practice and cannot be supervised or directed by the philosopher standing outside the social arena (Ricoeur 1986; see Mootz 2011, 94-95).

In the decentering play of legal interpretation we find the rhetorical space for critique that is ubiquitous in hermeneutical encounters. There can be no methodology that ensures an appropriate level of critical assessment, but neither can ideology absolutely preclude such assessment. Legal practice exemplifies this dynamic, as lawyers continually reconfigure arguments in what amounts to an inventive use of *topoi*. Seen in this light, there is no reason to lament the lack of critical legal theory that can direct future developments of the practice; there is only the dialogic practice itself. And that is enough.

3. Conclusion.

"Putting at risk" is the guiding normative implication of critical hermeneutics, and this concept brings key issues in legal hermeneutics into focus. The rule of law is an institutionalized practice of putting oneself at risk before the evolving meaning of legal texts. The experience of putting at risk as a form of conversational play is part of human nature, which has been explored in the pre-Thomistic tradition of classical natural law thinking. Most important, the putting at

risk of rhetorical and hermeneutical practices is the wellspring of critical insight. As Gadamer emphasized, this is not a comforting message but rather a call to action.

> [H]ermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in a conversation. But this means: Always recognize in advance the possible correctness, even the superiority of the conversation partner's position. Is this too little? Indeed, this seems to me to be the kind of integrity one can demand only of a professor of philosophy. And one should demand as much (Gadamer 1985, 189).

We must demand as much of our legal professionals as well, if we are to flourish in the face of the multi-cultural demands of the global age.

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