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INTRODUCTION

This book is intended for all those engaged in legal education in university law schools, practical legal training courses, professional in-house education programs, and any other context in which law is taught. Teachers in practical training courses and in-house education do not need to be persuaded of the importance of skills teaching: this is usually the primary purpose of their courses. But teachers in university law schools may be less familiar with the role that skills and ethics teaching can play in their courses. And most of all, those learning the law at any stage of life—as a law student, graduate or new lawyer—are often a little surprised to realise that it's not just what they know about the law that matters, but also how they learn it and how they apply it.

The role of skills teaching in legal education

It is our view that the use of practical-skills exercises and simulations as a regular component in legal education makes for more effective and satisfying teaching and improves students' and lawyers' comprehension and retention of the substantive law they are learning or relearning. This book provides examples of these exercises and explains how they can assist the learning process in Australian law schools, practical training courses, and in-house education programs run by law societies and law firms.

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Legal educators have taken different routes in developing awareness of practical skills and legal ethics. In some law courses 'skills' and ethics are taught in discrete modules or, more commonly, there is some informal encouragement to include skills as at least a part of each substantive law subject—but rarely is there an overall plan or a formal expectation to teach both in this way. An even more adventurous process of so-called 'problem-based' learning has a considerable claim to the title of 'best law school teaching method'. In general terms, this technique aims to cover a number of different substantive law areas through a discrete problem or legal transaction, examined with the goal of solving a client's problem, from start to finish.¹ This technique is occasionally applied in simulated environments inside law degrees and more often as a part of practical training courses, whether online or face to face. But it is used most effectively of all when the clients are real and their problems are real: that is, as the basis of *clinical legal education*² inside law degrees and for newly practising lawyers when they apply problem-based techniques to their own clientele.

While we consider the integrated substantive law/skills/ethics approach to be more realistic in Australian educational terms, and easier for law schools to resource than problem-based learning, the choice of method at this level is not ours to make.³ Whatever the approach, the use of practice-based exercises and simulations, such as those presented here, will improve both teaching and learning.

Content and method

The pressure to fit substantive material into one- or two-hour presentation formats is unrelenting for those law schools that retain lecture/tutorial models of delivery. It is natural, therefore, for teachers to give priority to content before method. Yet, if the goal is learning comprehension, teaching method is as important as content.

Similarly, for law students, the prevailing expectation in too many law schools is still that they will simply *know* the law by the end of the course, rather than also understand how, why, and when to *implement* it. Law students who have participated in summer clerkships or clinical programs will of course see the connection between knowledge and practice, but if these experiences are unavailable, this book offers a way to bridge the gap.

In our view, use of this material will make both the teaching and learning tasks easier. Content will link naturally to method, while knowledge will link to practice. All four are in fact addressed simultaneously. Substantive law subjects that incorporate exercises and simulations into lecture and tutorial formats will of course cover slightly less ‘black letter’ law, but our experience is that the comprehension and retention of legal concepts is far better when the teaching/learning method is set in a social and realistic context. Judicious use of participant pairs, trios, and small groups—even within large lecture spaces—enlivens learning and stimulates criticism. A well-designed but simple practical exercise usually leads to a high-quality legal debate within a learning environment because the interest of participants, and therefore their inclination to speak up, is generated by the process of identification with the content and method of the exercise. This participation is the key to the comprehension and retention of the law.

The limitations of practical legal training

Postgraduate practical legal training—or PLT, as it is known—is a pragmatic process resulting from the historical division of legal education into three stages: law school, postgraduate, and continuing training. PLT overlays the three to five years of traditional (substantive law) legal education with practice-based exercises. Law graduates enrolled in a PLT course are often very impressed with its coverage of material ignored by law schools.⁴ However, because PLT is an overlay on, rather than an integration (from the beginning) of, theory and practice, it is not as efficient as a law school can be in delivering simulation learning or in linking real problems to theory through clinical methods. Nor is it a sufficiently early approach to the notion of a balanced legal education.

In our view, a ‘best practice’ approach to this balance between theory and practice requires, at the least, the coverage of ‘body-of-knowledge’ courses alongside practical skills, across all law school subject matter. If the goal in legal education is best practice, as it is in so many other areas of professional and industrial development, it is not enough to tackle the one substantially without the other. This objective is best achieved in clinical legal education, but when that methodology is not available, the simulations and exercises of this book are the next best. The fact that many graduates will not practise law is immaterial. Our goal is comprehension—if they then choose to practise, that is a bonus.

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Change in the mix of law school, PLT, and continuing legal education—as well as in the legal job market—makes the need for our approach even more acute. In many jurisdictions around Australia, articles of clerkship are being dispensed with and replaced by a combination of a short PLT course and a legal-office ‘placement’ or traineeship. Although conventional PLT remains available, it can also be delivered in shorter intensive formats inside individual law firms and undertaken by new lawyers at varying intervals during a period of restricted practice.

Simultaneously, the recession brought on by the global financial crisis of 2007 has reduced profits in law firms and reduced opportunities for employing new lawyers. Many more law graduates now seek fewer jobs. And, this shrinking employment market is coinciding with increasingly rapid changes in the way law is practised. We now see many new-lawyer roles, such as simple checking of documents for purposes of civil discovery, relocating to lower-wage environments such as India and other parts of Asia. The term for this is ‘legal process outsourcing’ or ‘LPO’. The internet makes this transition very simple, at least in principle. Except in regional and rural environments there is progressively less need for new Australian lawyers than was previously the case. The more important of these changes are still to have a major impact, but law societies are starting to notice ‘law providers’ who operate from home or the local café with Wi-Fi and deliver tailored legal documents to niche clients with almost no overhead expense and very fast turnaround times.⁵ Much more is on the way. Developments are predicted to include virtual courts, internet-based global legal businesses, Skyped interviewing, fully online document production and completely commoditised service.⁶

The combined effect of these trends—fewer articles of clerkship and traineeships, the high cost of PLT, the larger number of graduates across the country and the pressure for smarter, more innovative graduates—now mean that new Australian law graduates need something extra if they are to get jobs in capital cities.

If graduates can be predicted to ‘hit the ground running’ on first entering a law firm, with their undergraduate and PLT experience having given them strong practical skills, they will be in a better position to attract an employer, earn fees for the firm, and then stay in employment.

Enjoying law school

Australian law schools require intellectual sophistication from their students, and increasingly they are also requiring a year-round commitment to learning, rather than concentrated bursts in examination periods. Unfortunately, it is not yet the norm for law schools to place as much emphasis on expertise in teaching as they do on research and publication. Things are changing, but if the learning process is enjoyable, that is sometimes accidental rather than the result of course design.

The incorporation of participatory, practical skills into all subjects as a matter of design is likely to provide opportunities for enjoyment and therefore a better learning environment. This book seeks to maximise enjoyment from learning the law, because that aids the intellectual and emotional development of those learning, which, in turn, can help to develop them as effective, balanced, and above all, employable lawyers.

Skills and values

Why values?

If we were to stop at 'skills teaching' we could be criticised, despite everything said above, for being too mechanical or pedestrian in preparing people for legal practice. Increasingly, the demand from the community, from legal-profession regulators, and from statutory inquiries (but unfortunately not, as yet, from the profession as an organised entity) is that lawyers be not only skilled but also ethical in practice.⁷ No law firm yet makes a point of emphasising their ethics on their web pages. It is not insignificant that we may command respect as individual lawyers, but as a profession we command very little compared with earlier generations.⁸

The reservoir of community distrust, whether justified or not, is deep enough to require a fundamental shift not just in regulation but also in prevention. Law schools now have an even bigger preventive role than before because no one else has the opportunity or the resources to tackle the development of lawyers' values.⁹

While experienced practitioners recognise that there is a connection between good ethics and a stable income, this is hard to see in the early years of professional life because the temptation, for example to pressure a client to risk a trial (producing higher costs regardless of outcome) rather than settle in response to a reasonable

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but certain offer, is often compelling, particularly for employee solicitors.¹⁰ An experienced (and successful) lawyer will know that an explanation to their client of the pros and cons of the choice, including the lawyer's stake in the costs, will, over time, earn the sort of respect that ensures repeat work and recommendations from that client to their friends and acquaintances. This reality applies as much to online service delivery as to face-to-face retainers. However, the conflict of interest for the new lawyer in this situation may not even be obvious if the possibilities are not canvassed at an undergraduate level.

We think it valuable to affirm to all those learning the law that, with so many intelligent lawyers in legal practice, it is the skilled *and* ethical lawyer—rather than just the skilled one—who truly has a future.

The myth of skills without values

Our view is that practical legal skills cannot be taught in a value-neutral way, just as the 'casebook' method of teaching substantive law inevitably involves some policy discussion if the teaching exercise is to be more than a superficial process. Teaching skills, whether integrated with substantive law or not, is a value-laden endeavour: for example, client-centred interviewing places your client's interests first in a legal interview, and the value underlying this method of interviewing is respect for your client.¹¹ In contrast, traditional legal interviewing is a question-and-answer process that is similar to police interrogation. It is designed to discover facts alone: its goal is 'efficient' fact investigation. The values associated with it are disrespect for the client (a negative), or (as a positive) the primacy of objective, adversarial justice.

The values base of skills teaching can be moral or immoral.¹² If it is moral, it is understood by the law (and examined in this book in Chapter 2) as 'ethical'. If it is immoral, it is treated here as 'unethical'. An approach to skills teaching that is ethical in its content as well as in its process is used in this book because:

- Ethical practice is respected by all clients even if they disagree with your legal opinion.
- Ethical practice is respected by other lawyers because, for example, they know they can rely on your undertakings and can negotiate with you with confidence.
- Ethical practice fosters your intellectual growth and emotional health as a future lawyer.

- Ethical practice is essential to people retaining confidence in the justice system—that is, in the Rule of Law.
- The skills learned will operate as a ‘vaccine’ against some of the disenchanting aspects of legal practice.¹³

Skills teaching: The distinction between ethical content and process

Exercise design (that is, how a skills exercise is designed to work) is a complex process because it can manipulate or encourage a conclusion that is either moral or immoral, depending on the intentions of the law teacher. This is best illustrated by an example. It may be, for instance, that students or new lawyers are asked by the teacher to form a small discussion group to consider a problem they might encounter in practice. The issue to be discussed is ‘the best method and timing of withdrawal from a retainer when you discover that your client has lied to you in respect of significant issues involved in his current court case’. If the goal of the exercise is predefined in this way, as termination of the retainer, teachers are deciding that this is the only moral response—or ethical action—that the lawyer can take.

This approach is, at the least, thoughtless, and if group participants realise that a more fundamental question could have been posed but in fact is not part of the exercise, they would be entitled to consider the teaching method unethical. If, for example, participants had also been asked to consider the moral choices open to them, it may have been possible to debate such relevant considerations as the relationship between the lies and the likely outcome of the trial, and the motivation of the client (who may have been fearful and confused and somewhat less than totally culpable). If they discover the relevance of these issues during the exercise—in effect, realising that legal ethics has many shades of grey—they may conclude that the teacher has been less than candid. This would be unfortunate because it could undermine the participants’ respect for the teacher and for the notion of ethics.

We therefore assume, in this book, that every reader will not just wish to scrutinise the ethical issues around legal content, but will also want to participate in an open-ended discussion about what is really moral or immoral in any particular situation. We cannot forget that there are many among us, teachers and students

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alike, who hold dear the full implications of an adversarial justice system. There are respected lawyers who would wish to defend a client's right to sail very close to the line separating legality from illegality (or morality from immorality) on the ground that it is legitimate to do so up to the time that a court or tribunal determines otherwise. Within law schools we see it as important to have this debate, as a part of each substantive law subject, before any consideration of statutory rules of conduct and practice.¹⁴ For this reason we explore the issue of ethics in Chapter 2 as multifaceted: involving not just a consideration of professional conduct rules, but as more fundamentally involving a conscious choice between competing ethical *methods*. To do otherwise—to talk about the written rules of conduct first and, we regret, last—stifles real consideration of ethical issues. In a law school this is as manipulative of students' minds as is an exercise designed to pre-empt a particular conclusion.

At both undergraduate and PLT levels, the opportunity to tackle the ethical and moral development of future lawyers ought not to be frustrated by smothering—in the same way as a blanket smothers a fire—the discovery of ethical complexity with 'rules'.¹⁵ Rules tend to dominate practitioner thinking anyway: there is no need for law schools, PLT providers, and in-house law firm educators to contribute to this.

Teacher and mentor values

It is implicit in the above discussion that teachers' and mentors' personal values and opinions are regarded by those learning the law as important in making their own decisions about ethical issues. Teachers' and practitioners' 'reputations' will, of course, precede them everywhere. But it remains important for those with leadership responsibilities to be explicit about their own views and the reasons they hold them on any particular ethical issue (even if the view is equivocal). Leaders should express their views after the practical exercise is concluded and participants debriefed, rather than before or during its operation. As discussed above, teachers' and mentors' opinions (not to mention formal rules of professional conduct) can have a dampening effect on 'deep' learning, especially on those with low confidence levels.

If a challenge is offered to a teacher's view, this indicates that learning is going on. The challenger may be perceiving that a teacher is confident enough to debate

rather than terminate discussion. A good skills exercise may well reach the end of the allotted learning time with little agreement as to the best approach. It is the debate between a teacher and students, and among students, during and after a particular skills exercise, that begins a valuable experiential journey. All teachers and mentors have to do is recognise that when argument begins, they have succeeded in facilitating that journey. Indeed, healthy argument between participants is an objective that we can all enjoy.

Good ethics does not mean being squeamish

Our emphasis on the ethical practice of law is not intended to suggest that lawyers should become wimpish negotiators or nervous advocates. We think that the exercises in this book will develop confidence and assertiveness. Aggression is not on the list, but neither is submission to an adversary or a participant in a mediation. Ethics involves many subtleties, and participants need to draw their own lines in the sand, rather than others doing it for them. Students and lawyers must work out the balance between what is required of them by the duty of competence (to the client), and what is required of them by their duty to the court (or to the community, or to justice).¹⁶ We suggest that the task requires both courage and substantial experience of ethical dangers. The sooner future and new lawyers start to gather experience—beginning with these exercises—the better for all aspects of their professional life.

The body of this book is addressed to those who wish to learn and has been written on the assumption that all will have access to it. We cannot therefore include the ‘answers’ to the exercises. However, if you are a teacher who is inexperienced in teaching exercises such as these, the absence of ‘answers’ need not concern you. First, just as with most problems involving substantive law, there is no ‘right’ answer; in fact, because we are discussing the process of interviewing, negotiating, and so on, there is scope for personal style and approach at every stage (and the authors would probably adopt a slightly different style in each exercise).

Second, we hope that each chapter sets out the relevant process sufficiently clearly that all will be confident discussing with each other the success, or otherwise, of their attempts at each exercise. Your most important objectives, as a leader or learner, are to have everyone appreciate that each skill requires the conscious adoption of a structured approach, and to develop a clear sense of how to manage

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the combination of facts, rapport with clients, and careful use of language that the practice of law demands.

Incorporating the exercises into substantive law subjects

We have indicated above that, in our view, the integration of practical skills into substantive subjects greatly enhances understanding of the law being learned. You may choose to do this in lectures, seminars, tutorials, or law firm discussion groups, depending on your own circumstances.

As to subject matter, you will find that the areas of law involved in the exercises include torts, contract, criminal law, and family law, and most of the fact situations are fairly conventional. We emphasise that although we have not included many exercises taken from commercial or corporate law fields (because we are not commercial lawyers), the principles and concepts are completely transferrable. Once you have read this book you will be able to create your own fact situations from the topics you are learning or teaching, or from cases being discussed in your own field. You will probably find that certain skills fit most comfortably into particular subjects:

- negotiating fits into contract and torts, but there is much less scope for it in criminal law
- drafting arises most obviously in contract, including commercial contracts
- letter writing and interviewing can be used in any subject.

How to organise the exercises

We have assumed in most of the exercises that every member of each learning group will participate, either in pairs or in small groups. This method enables each person to derive the maximum benefit.

However, if this is not practicable in your environment, you may be able to select one or two groups to carry out the exercise, with the rest of the group acting as 'observers' and providing a constructive critique. In many cases, participants who are anxious about performing can provide very perceptive analysis.

Alternatively, you may set one or more exercises for participants to do outside formal teaching time (negotiating is particularly suitable for this format). If you do this, it is probably wise to require participants either to prepare and submit a brief

written analysis of their experience, or to report back on how they approached the exercise and how it progressed.

Learning with this book

For those of you who are learning rather than teaching, when you read this book you will see that it is addressed to you as learners. We hope that, regardless of how much you are able to use the book inside formal learning environments, you will be sufficiently interested to read through all the chapters and think about the processes and exercises contained in them. You might even be able to adapt the skills described to use in other aspects of your life.

A word about role-playing

Many of the exercises require you to role-play. It is important that you take this process seriously and do not sacrifice the opportunity to learn by indulging in too much frivolity. While the exercises should be fun, they should also provide you with a real opportunity to think about communication skills and to develop those skills yourself.

The primary benefit of role-playing is that it gives you an insight into the human side of legal skills. You practise these skills in the safety of a simulated environment before you are confronted with the far more intimidating challenge of applying them in real life.

When you are first required to role-play, your aim is to make the exercise as real as a simulated situation can get. You should take a moment to think about your role and its emotional content before the exercise begins. You do not have to limit yourself to the legal issues and personal characteristics outlined in the exercise. Put yourself in the position of the character you are asked to play: what information would he or she want to know? What emotions would he or she be feeling? Use your natural acting ability and improvisation skills and try to react in character to each other. It often helps to think of someone you know in real life who has been in a similar situation—think of your own car accident, your aunt's divorce, and so on. You can then adopt this character in your role-play and expand the facts given in the exercise by reference to the facts of the real situation.

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NOTES

- ¹ This technique is used, for example, at Wollongong University Law School.
- ² Clinical programs place students in a position of day-to-day responsibility for real clients' legal problems. See '*Strengthening Australian Legal Education...*', under Further resources. They represent the pure form of undergraduate 'learning by doing', as distinct from the more common 'learning by simulation', which (ideally) precedes clinical experience in law school curricula and is the focus of this book. Some writers, however, consider 'learning by doing' to be identical to simulated experiences. See R. Handley and D. Considine, 'Introducing a Client-Centered Focus into the Law School Curriculum' (1996) 7 *Legal Education Review* 193.
- ³ Problem-based/transactional learning methodologies require teachers to have extensive and sophisticated practice backgrounds if the courses are to avoid superficiality. While such individuals exist, it is financially difficult to attract them into law schools in any ongoing and substantive way. Those that can be attracted in this way tend to be relatively uninterested in, or unable to teach, the bodies of substantive knowledge that must go alongside practice issues in a transactional course. It also seems likely that many law schools in Australia would be reluctant to adopt a problem-based approach when up to half their graduates will not be in practice. A powerful exposition of the theory of the problem-solving teaching method is contained in S. Nathanson, *What Lawyers Do: A Problem Solving Approach to Legal Practice*, Sweet & Maxwell, London, 1997.
- ⁴ Students who undertake 'live client' clinical courses in law school are, however, often subsequently disappointed with the approach of PLT because its extensive use of simulated, rather than real, client interaction (for reasons of cost) is less engaging and probably therefore less effective than clinical programs in the same areas.
- ⁵ For example, the Law Institute of Victoria Future Focus Committee is well aware of these initiatives in legal services delivery.
- ⁶ See generally, R. Susskind, *Tomorrow's Lawyers*, Oxford University Press, Oxford, 2013.
- ⁷ A recent call comes from the Australian Law Reform Commission (ALRC) in its issues paper on legal education. The ALRC considers that the reshaping of ethics teaching may 'remedy some of the perceived deficiencies of the litigation system': ALRC, 'Review of the Adversarial System of Litigation: Rethinking Legal Education and Training', Issues Paper 21, August 1997, ALRC, Sydney, p. 76, para. 8.19.
- ⁸ The Watergate scandal in the USA represents the start of the modern era of Western cynicism about lawyers. See L. Sheinman, 'Looking for Legal Ethics' (1997) 4 *International Journal of the Legal Profession* 139–54.

- ⁹ In the UK, the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) published in its 'First Report on Legal Education and Training' in 1995, an unprecedented recommendation that undergraduate law schools tackle the development of legal values and ethical standards. The reality is that little work has been done in law schools on the development of lawyers' values, despite evidence that it is sorely needed. See A. Evans and J. Palermo, 'Zero Impact: Are Law Students' Values Affected by Law School?' (2005) 8(2) *Legal Ethics* 240–64. In Australia also, as in the UK, neither law societies nor PLT providers invested in basic ethical development, but rather produced detailed, descriptive restatements of statutory rules of conduct.
- ¹⁰ Advertising of legal services is allowed in Australia, but the prevailing wisdom seems to be that legal practices grow more from the word-of-mouth recommendations generated by a 'best-practice' approach, which must include best ethical practice. It is therefore little wonder that complaints about lawyers continue to focus on disregard for fair costing processes and a disrespect for clients. If ethics education were occurring at the law school level of fundamental concepts rather than the PLT level of 'rules', a confrontation, at law school, with prospective early workplace experiences would become a real possibility. See E.W. Myers, 'Simple Truths about Moral Education' (1996) 45 *American University Law Review* 823. Note that the word 'moral' is used in this article as a synonym for 'ethical' in American legal education.
- ¹¹ For a discussion of the view that skills teaching is a value-laden endeavour, see Handley and Considine, p. 204. The ALRC accepts this proposition completely. In its 1997 issues paper on legal education, it cited with approval Carrie Menkel-Meadow's assertion that 'law teachers cannot avoid some version of the "good lawyer": thus, they cannot avoid teaching ethics. By the very act of teaching, law teachers embody lawyering and the conduct of legal professionals. [They] ... create images of law and lawyering when [they] teach doctrine through cases and hypotheticals'. (C.J. Menkel-Meadow, 'Can a Law Teacher Avoid Teaching Legal Ethics?' (1991) 41 *Journal of Legal Education* 3 and 9, cited in ALRC, Review of the Adversarial System of Litigation). The term 'client-centred' was first used in D. Binder and C. Price, *Legal Interviewing and Counselling*, West Publishing Co., Minnesota, 1977.
- ¹² 'Immoral' is preferred here to 'amoral' because the latter is defined not as the absence of a moral (i.e. 'good') view but as simply being unconnected or unconcerned with distinctions between good and bad. See E. Partridge, *Usage and Abusage*, Penguin, Harmondsworth, Middlesex, 1979, p. 36. Some law teachers would assert that they teach in a 'value-neutral' manner and some may equate this with an 'amoral' viewpoint. As discussed in the previous note, 'value-neutrality' is a myth. An amoral viewpoint

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(in the sense defined above) may be held by a lawyer, but this is difficult to maintain when faced with the realities of everyday legal practice.

- ¹³ For detailed treatment of the view that skills teaching should be ethical in both its content and its process, see the following section: ‘Skills teaching: The distinction between ethical content and process’. In relation to the point that clients respect ethical practitioners, anecdotal evidence exists that practitioners who are willing to stand up to clients who suggest illegal actions will not necessarily lose those clients, but, in fact, may be appreciated the more for their courage.
- ¹⁴ Opinion is divided on whether ethical issues ought to be incorporated in this way into each subject, but we have no doubt that this view is correct, whether or not there are also discrete ethics subjects, clinical programs, or both. See Australian Law Reform Commission, ‘Review of the Adversarial System of Litigation’, para. 5.19, p. 54.
- ¹⁵ The need for undergraduate legal education to tackle the ethical and moral development of future practitioners is discussed in the ACLEC recommendations (see note 9 above). Moral philosophy is a large topic that intersects at many levels with legal ethics. A useful discussion of some of these intersections can be found in S. Bottomley and S. Parker, *Law in Context* (2nd edn), Federation Press, Sydney, 1997, pp. 148–59.
- ¹⁶ For a general discussion of these competing priorities, see C. Parker and A. Evans, *Inside Lawyers’ Ethics* (2nd edn), Cambridge University Press, Port Melbourne, 2014, Chs 1 and 2.

FURTHER RESOURCES

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