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Job Security, Precarious Work, and Freedom of Contract

RESEARCH

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ABSTRACT

Modern labour markets appear segmented into good jobs for full-time employment and bad jobs, which are precarious and poorly remunerated. To achieve flexibility and save on labour costs, employers use strategies such as casualisation and outsourcing of work. Statutory employment law rights such as protection against redundancy and unfair dismissal generally apply only to good jobs. Using their freedom of contract to turn jobs into precarious work relations, employers can avoid legal protections for job security. Although the courts sometime challenge bogus contractual terms as shams that conceal a standard contract of employment, courts cannot in general override what the employer and worker have agreed. The segmented labour market and the growing degree of exclusion from statutory employment rights are forms of structural injustice. The remedy must lie in Parliamentary legislation that controls and replaces contractual arrangements for precarious work.

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THE PROBLEM OF PRECARIOUS WORK

Following the prolonged recession in the 1930s, the problem of employment insecurity was perceived as one caused by high and persistent levels of unemployment. As well as Keynesian measures to stimulate full employment, a partial solution to poverty caused by unemployment was constructed by Beveridge through the provision of income security through national insurance schemes that mutualised the risk of unemployment. At that time, trade unions concerned themselves with the nature of the jobs on offer, using their might to pressure employers to eliminate casual and insecure jobs. Their bargaining power was usually enough to ensure that jobs were reasonably permanent and usually full-time.

Today, the problem of job insecurity has changed. Even in a period of near-full employment, many jobs are precarious. Work may be intermittent, short-lived, unpredictable in occurrence and duration, and may even disappear without warning. In such jobs, employers make no commitment to any continuity of employment or regular hours of work. The worker is hired as and when required, which may be every day or never, but there will probably be something unpredictable in between. Many of these jobs are described as casual work, temporary agency work, or platform work, and they are often paid no more than the minimum wage. Although official statistics may register such workers as being in employment, in practice they experience radical uncertainty about their future income and job security. This uncertainty is not about their employment next month or next week, but as imminent as the next day. This variability and uncertainty in their income is not easy to compensate for through the social security system, which tends to assume that recipients of in-work benefits have a regular level of income each month.

In the following paper, it is assumed that most workers prefer job security to precarious employment. They seek job security in the sense of jobs that provide for a regular and reasonably stable income from wages, determined either by hours worked or piecework produced. The fundamental reason for seeking job security and a regular income is that it is a pre-condition for personal autonomy, in the sense of being able to construct one's own life and fulfil one's ambitions for personal fulfilment. Within some policy circles, there is a narrative that claims many people like precarious jobs [1]. This claim confuses the idea of workers having flexibility in the hours of work, which many people indeed value, with the different notion of being uncertain from one day to the next whether there will be any paid work at all [2]. Workers want flexible hours of work according to their convenience, not radical uncertainty about whether there will be any work or income from day to day. Any growth in precarious work is therefore unlikely to be the product of demands by workers on the supply side of the labour market but will be the consequence of other forces on the demand side, especially cost-saving measures implemented by employers.

It is sometimes assumed that any rise in the proportion of precarious work is linked to a growth in the size of the informal economy. A correlation between the absence of formal contractual arrangements and precarious work may be true for some self-employed workers. But, as we shall see below, much precarious work, such as agency work and platform work, is constructed through highly elaborate contractual arrangements. Indeed, my argument will be that the protection of job security sought by precarious workers can only be achieved by statutory interventions to overcome the way in which employers have used elaborate contracts to impose precarious work on a segment of their workforce.

The paper first acknowledges that broad economic forces have been channelling the types of jobs available into 'good jobs' and 'bad jobs'. Bad jobs tend to be precarious and poorly remunerated. There is evidence that companies and employers have sought to accelerate the expansion of this type of work within the labour market. Although the initial motivation of employers was to reduce wage costs and corollary costs like national insurance, the nature of the elaborate contracts now devised also helps employers avoid statutory employment rights, such as protection from unfair dismissal. Although the courts have sometimes resisted these cynical evasions of employment regulations, for the most part, avoidance by employers has been successful. The law has therefore contributed to the emerging greater inequality in society through the existence of good jobs and bad jobs. This is a structural injustice stemming from the inequalities in the market and the nature of contract law and contracting power. The

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solution to the problem of precarious work must therefore lie in instrumental statutes that override contractual arrangements in order to ensure that every worker enjoys basic rights to job security.

SEGMENTED LABOUR MARKETS

The polarisation or segmentation of jobs into 'good jobs' and 'bad jobs' has been examined and explained widely in the social sciences [3]. Good jobs are typically full-time, long-term, offer opportunities for promotion, enable the development of skills, create possibilities for personal fulfilment, provide salaries that are typically significantly above any national minimum wage, and include additional benefits such as contributions to pensions. Bad jobs are their antithesis. They are part-time or irregular-time, precarious, temporary, fixed-term, or seasonal; the job will offer no opportunities for advancement to higher grades with better remuneration; and the wages will usually be at best the statutory minimum wage. Of course, there have always been wide disparities in terms of the nature of jobs available, whether in terms of their remuneration, security, or other terms of employment. But there is now greater polarisation than ever, with labour market statistics revealing a clustering around the two poles of good jobs and bad jobs, with fewer workers occupying a middle ground [4].

Before the 1980s, the size of the pool of bad jobs and the scope of the 'secondary labour market' were relatively small. Large- and medium-sized firms and the public sector offered jobs that followed the model of good jobs. Those conditions were maintained in part because they helped employers recruit and retain staff, but also in part because trade unions could organise these groups of workers effectively and bargain for the maintenance of favourable terms of employment. Unions helped protect job security and bargain for a good package of benefits. During this period, the secondary labour market of insecure and badly paid jobs was primarily occupied by those who were unable to obtain access to the internal labour markets of large firms and organisations [5, 6].

From the 1980s onwards, however, the relative size of the secondary labour market, and with it, the number of bad jobs, has been growing. According to the theory of segmented labour markets, this expansion of the secondary labour market has been primarily driven by managerial strategies designed to reduce labour costs by outsourcing jobs, thus insulating companies and employers from paying the relatively high rates of salaries offered by the internal labour market of large firms and organisations [7]. Under the strategy of outsourcing, or vertical disintegration [8], private businesses and the public sector have exploited the possibility of exporting part of the workforce to external contractors, who then provide a service to the core business. For instance, cleaning or catering. Such a strategy circumvents trade unions and collective bargaining, as the external contractors typically operate in the secondary labour market, where the minimum wage, without any other fringe benefits like pensions, is the norm. This strategy of outsourcing led to the core and periphery model of the organisation, in which only key staff with firm-specific skills would be retained in the core workforce of the firm and most other jobs would be outsourced [9]. Such polarisation of the labour market into good and bad jobs, or in-house and out-sourced jobs, has increased inequalities in income and job quality [10].

Perhaps the most important managerial strategy driving segmentation of the labour market is the pursuit of flexibility, seeking to match the employer's demand for labour at any given moment. Instead of offering jobs based on a standard working week, employers can reduce labour costs by employing workers on an 'as and when' basis. Casual work on demand, zero-hours contracts, and the use of temporary agency workers enable employers to minimise labour costs by avoiding any payment of wages when work is not required. This use of precarious work first emerged in the 1980s and has continued ever since. For example, the number of workers on temporary contracts in the European Union (EU) grew by 15–20 percent annually in the 1980s and 1990s [11]. The technology used in platform work enables instantaneous matching of supply and demand.

STATUTORY REGULATION OF JOB SECURITY

The statutory regulation of job security in the UK since 1945 reveals a gradual switch from legal abstentionism to the conferral of extensive statutory employment law rights. In the post-war

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period, the law permitted and, to some extent, supported trade unions and their activities, including collective bargaining and some forms of industrial action, to back up claims for better terms and conditions. Collective agreements typically focused on wages, hours of work, and other working conditions, usually precluding employers from prioritising casual work and temporary employment. In accordance with the sectoral collective agreement, the terms of most contracts of employment had to be permanent jobs that produced a regular income in return for a working week.

Collective agreements rarely addressed the issue of dismissals explicitly. When dismissals of workers took place, whether for economic or disciplinary reasons, trade union officials and shop stewards would decide whether to contest the dismissal with the employer. If the employer insisted on dismissals despite objections from union representatives, the union would often call for industrial action. Such action became a marked feature of industrial relations in the 1960s and did much to enhance both job security and the collectively agreed terms of employment. Accordingly, the law largely abstained from intervention on the issue of job security and precarious work.

Indeed, it is arguable that the first legislation to regulate dismissals was designed to weaken rather than protect job security. The Redundancy Payments Act of 1965 was aimed at promoting productivity. The government subsidised payments by employers to dismissed employees if they were dismissed for redundancy. The government expected that these payments would encourage workers to give up their jobs without industrial action and that the subsidy would encourage employers to confront the union, risking industrial action for the sake of greater efficiency and productivity. Primarily, the aim was to promote dismissals to reduce 'over-manning' rather than to protect job security. Later, in the 1980s, during a period of high unemployment, the legislation was amended to remove subsidies to employers, and therefore it began to discourage economic dismissals because the employer had to bear the full cost of redundancy payments to dismissed employees.

In 1972, the law of unfair dismissal came into effect with the Industrial Relations Act of 1971. Although the legislation has since been amended in its details and is now contained in the Employment Rights Act of 1996, its broad thrust remains the same. Employees with the requisite qualifying period of employment have the legal right to bring a claim in an employment tribunal for unfair dismissal. If successful, the tribunal will normally award 'just and equitable' compensation or, in a few unusual cases, reinstatement. The presence of this law immediately enhances job security because employers will be more reluctant to dismiss employees if there is a risk that they will have to pay substantial compensation. The impact of the law was strengthened by the promulgation by ACAS of a code of practice for disciplinary procedures that employers should follow prior to making a dismissal [12]. The courts held that failure to comply with the code of practice would normally result in a finding that the dismissal was unfair [13].

What was (is) the purpose of the law of unfair dismissal? Its immediate purpose was to reduce the number of strikes over dismissal. The Donovan Commission, a 1968 inquiry into UK collective action labour law, recommended the legislation as part of its scheme to restore orderly industrial relations [14]. In a sense, one aim of the legislation was to reduce job security through discouraging strikes, with the legislation thought to undermine worker solidarity and enhance disciplinary powers [15]. If dismissed employees had the option of bringing a claim for substantial compensation before a tribunal, there would be fewer calls for strike action to resist dismissal. This expectation proved incorrect: during the 1970s and 1980s, stoppages of work in response to dismissals remained the reason for about 10% of strikes [16].

Another purpose of the law was to provide a means of attacking the closed shop, which, it was believed, substantially enhanced the bargaining power of trade unions. Here, the idea was that if dismissal for refusing to be a member of a trade union was automatically unfair, employers would not dismiss non-union members. Unions no longer threatened industrial action to force employers to dismiss non-union members because they would become jointly liable with the employer to compensate the employee for unfair dismissal. In its objective of ending the closed shop, the legislation was successful.

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But the foreseeable (if not wholly welcome to the government) consequence of the law of unfair dismissal was that it protected all employees' job security. The legal threat to bring a claim before a tribunal was not dependent on the existence of a strong trade union in the workplace, so the legislation simply promised that all workers would enjoy better job security. Yet, in the absence of any legal aid, not many dismissed employees would have the resources and necessary knowledge to bring a claim before a tribunal without the support of a union. For these reasons, employers tended to regard the legal risk of having to pay substantial compensation as low, though not a risk that could be ignored entirely. The main impact of the law on the conduct of employers seems to have been that larger employers created substantial human resources departments and formal disciplinary procedures for dismissal in accordance with the ACAS code of practice.

To minimise the legal threat to employers' disciplinary powers even further, the courts produced some odd interpretations of the legislation. Two should be highlighted. The first concerns the question of fairness: what is the test for deciding whether the dismissal was fair? The legislation has always said that the test is one of reasonableness: the tribunal must decide whether the employer's decision to dismiss an employee was reasonable in light of all the circumstances of the case. The courts interpreted this test in an unexpected way. They said that the correct test was whether the dismissal fell outside the range of reasonable responses of employers to the circumstances. This reformulation of the test has the consequence that a dismissal will only be unfair if no reasonable employer would have dismissed the employee in the circumstances. Given that many employers who are reasonable can also be harsh, it is entirely possible for dismissals to be 'harsh but fair' [17]. Consequently, it has become unusual for a dismissal to be found to be unfair, provided the disciplinary procedures set out by ACAS are followed.

The second interpretation of the courts that assisted employers was their view of what amounted to just and equitable compensation. They decided that the only basis for compensation should be the financial losses flowing from dismissal, such as the loss of income between dismissal and finding another job. There was no compensation for the harshness of the treatment, the affront to dignity, or the worry and psychological difficulties experienced by dismissed employees [18].

TECHNIQUES OF LEGAL AVOIDANCE

As the employers' search for measures designed to achieve flexibility by using precarious forms of work gathered pace in the 1980s, it looked as if the statutory law of unfair dismissal might obstruct this managerial strategy. Dismissing staff and rehiring them when needed would at least trigger the cost of a redundancy payment and risk a higher level of compensation for a finding of unfair dismissal. Consequently, Thatcher's Conservative government amended the legislation to reduce its impact. It introduced a two-year qualifying period of continuous employment, which had the effect of removing many precarious workers from statutory protection. Still unsatisfied, Cameron's Conservative government introduced high fees to bring a case before a tribunal, ostensibly to weed out unmeritorious cases but, in practice, to eliminate almost all claims [19]. On this occasion, the Supreme Court declared those fees to be contrary to the rule of law, precluding fair access to the courts, and they were abolished [20]. Although these various measures reduced the protection of job security provided by the law of unfair dismissal, they did not eliminate it entirely. That destruction of the statutory bulwark against the transformation of jobs into precarious work was conceived and enabled by the ordinary courts using the ordinary law of the market, and then seized upon by employers and their lawyers as a technique of avoidance of the statutory protections for job security.

With the benefit of hindsight, it is arguable that this destruction occurred first in a case decided by the Court of Appeal in 1983, though it took many years for the full implications of the decision to work their way through the system. The case was *O'Kelly v. Trusthouse Forte PLC* [21]. The claimant worked as a wine waiter at the Grosvenor House Hotel. He was not employed for a fixed number of hours each week but was on the list of regular casual workers who were hired to work at banquets. In practice, he worked year-round, apart from two weeks of holiday in August, invariably working more than 16 hours a week and often in excess of 40 hours. He was paid on a weekly basis, with tax and national insurance deducted. He was not part of the staff pension scheme, did not receive sick pay, and as there were no fixed hours, his pay varied

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from one week to the next. The tribunal found as a fact that O'Kelly was not bound to accept any work offered, nor was Trusthouse Forte obliged to offer him any work. In practice, of course, he was offered work every week except during the summer holiday, and he always accepted it because if he did not, he risked being dropped from the rota either temporarily or permanently. The claimant was a member of a trade union. With the support of other union members and officials, he asked Trusthouse Forte to recognise himself and other 'casuals' as 'employees' on contracts that would qualify for the benefits enjoyed by permanent staff, such as occupational pensions and sick pay. In other words, O'Kelly requested the conversion of his casual work into permanent, secure employment. The response of Trusthouse Forte was to drop him from the rota permanently. He had been dropped for attempting to exercise a right to participate in the activities of a trade union, a fundamental human right. But did he have any enforceable legal rights? The court held that he did not for two key reasons.

First, he was found to be an independent contractor rather than an employee of Trusthouse Forte. Since the legislation only protects employees, this finding was fatal to his legal claim for dismissal. The implication of this part of the decision, later upheld by the Court of Appeal, was that normally casual workers, who were not contractually obliged to work particular hours though were in practice expected to, would not be employees and would therefore not be entitled to statutory protections for job security.

Second, it was found that even if the claimant was an employee when he worked at banquets, in between the banquets he had no contract of any kind. As a consequence, at the moment he was dismissed in the sense of being dropped from the rota (if indeed that was a dismissal at all), he was not an employee or any kind of contractor. Furthermore, if he was not an employee between jobs, he could never acquire the necessary qualifying period of continuous employment, which by then had been set at two years for most cases of dismissal (though not cases of anti-union discrimination). In a later case, the courts confirmed that in the gaps between employment, there was no contract of any kind (no umbrella contract, as it was called) so that there could be no dismissal and no qualifying period of continuous employment [22]. It was evident from the decision in *O'Kelly* and from subsequent cases that it was probable that all workers who were treated as casual or 'on demand' would be excluded from protections for job security and most other employment law rights.

Another line of judicial decisions managed to achieve much the same result for agency workers. Although there is a complex contract between the worker and the agency, the job security of the worker really depends on the conduct of the client of the agency, the end-user of the work provided. The courts decided that there was no contract of any kind between the end-user and the agency worker [23], meaning that the worker would have no statutory legal claims against the end-user, such as claims for dismissal or discrimination. Consequently, if an employer needed to reduce the size of the workforce, the termination of the assignments of agency workers would be a convenient solution, since, without a contract of any kind with the end-user, they had no rights to redundancy payments or to consultation.

From the late 1980s to the present day, employers, no doubt on the advice of their lawyers, began to pursue this approach to the exclusion of statutory rights to job security. The main strategy was to make the workforce precarious workers by being either casual workers, agency workers, or even having no contract at all. Contract terms were changed to emphasise that the employer would not be obliged to offer any work and that the employee would not be obliged to accept any offer of work. Under orthodox contract law, 'zero-hour contracts' and similar arrangements do not qualify as binding contracts at all, so no employment rights are applicable to the relationship. Not only does precarious work produce possible savings in wages by matching labour supply more precisely to demand, but it also has the side effect of excluding the workforce from any legal protections for job security and other employment rights, such as discrimination law. Similarly, in the case of end-users of agency workers and the platforms that organise driver and delivery services, the arrangements were carefully structured to avoid any explicit contract between the workers and the end-user or platform. As Elias J perspicaciously remarked in a case, '[t]he concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship' [24].

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In reaching these decisions, the judges used the basic principles of the common law of contracts. These principles were devised in the 19th century to handle disputes between businesses. In cases concerning precarious work, the courts applied these basic principles, such as that for a contract to exist, both parties must agree to it, and there must be an exchange of promises to do something (known as 'consideration'). There was no judicial conspiracy to undermine the legal rights of precarious workers or to elevate the rights of the property-owning class, even though that was the effect.

It takes bold and senior judges to depart from this orthodox law of contract. That departure has happened on a few occasions in the Supreme Court. In *Autoclenz Ltd v. Belcher* [25], the claimants worked full-time at a hand car wash under the direction of the company, using the company's overalls and cleaning equipment. Although, in practice, their jobs had all the appearance of regular employment, their written contracts expressly stated the opposite. The contract insisted that the workers were independent contractors, responsible for their own taxes, and that (for the avoidance of doubt) the work was casual, as required, that suitably qualified substitutes were permitted, and that they would supply their own equipment. The Supreme Court held that these legal efforts to disguise the relationship were a sham and that the true legal relationship should be gleaned from actual practice and the expectations of the parties. Accordingly, the tribunal had been correct to accord the workers some statutory rights. Similarly, in the unanimous decision of the Supreme Court in the Uber case, the court invented a contract between the drivers and Uber London despite the written contractual documents insisting that Uber London had no legal connection to the drivers other than holding the necessary taxi license for them [26].

STRUCTURAL INJUSTICE

The injustice suffered by precarious workers is that they are effectively excluded from most statutory employment rights. In short, they either have no contract or not the right sort of contract to qualify for statutory employment rights because they are classified as independent contractors or self-employed.

This type of injustice is perhaps best understood as a kind of structural injustice, as described by Iris Marion Young [27–29]. The source of the exclusion of precarious workers from protection from job security lies in the general legal rules that constitute the market economy. As discussed above, the emergence of the ordinary rules of contract under the common law was designed at a different time in response to different issues. The failure of the courts to consistently acknowledge this has had the effect of excluding these workers from statutory rights. It is true that Parliament could be held responsible for the outcome because it has frequently, though not always, failed to address the problem or has even legislated to make the situation worse. Yet, holding the legislator morally responsible for an unintended side-effect of legislation and for an omission to act is likely to be controversial. And in so far as it might be possible to attribute such an intention to Parliament, as in the case of imposing a two-year qualifying period of continuous employment that was bound to exclude many precarious workers, the policy is usually regarded as one that is justifiable because it is said to promote employment. It is also true that it might be possible to blame employers for the problems faced by precarious workers, for in many instances they have deliberately used their lawyers to avoid statutory employment rights by making their workers casual or independent contracts. Yet, these employers and their lawyers are merely writing perfectly lawful contracts that serve their economic purposes. Such conduct is not usually regarded as unjust.

Does that conclusion mean that precarious workers are not the victims of injustice? No, but it is the kind of injustice that is structural, rather than having a particular malignant perpetrator [30]. To understand the nature of this injustice, we need to consider who the beneficiaries of the strategy of using precarious work to manage labour costs. One part of the answer is, of course, the owners of the firm, who increase or preserve competitiveness and profits by minimising labour costs. But an important group that also benefits are all those with stable jobs in the primary labour market. An employer can afford to pay higher wages and offer permanent jobs to staff precisely because it has managed to reduce labour costs elsewhere. In universities, for example, the high wages paid to senior administrative staff and professors in

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certain subjects, such as economics, finance, and management, can only be afforded because most of the teaching is being done by poorly paid workers on precarious contracts that last a few months or less.

What is so morally troubling about segmented labour markets is the understanding that those of us who benefit from permanent, reasonably well-paid jobs almost certainly do so at the expense of those trapped in the secondary labour market. Those who have 'decent work' and good jobs are, in an important sense, the people who are exploiting those in precarious work. A permanent, reasonably well-remunerated job with employment protection rights is only affordable if others have precarious, low-paid jobs. The group of workers with 'good jobs' can be regarded in some sense as exploiting those with 'bad jobs'. This is a structural injustice.

REFORM OF THE LAW

Given that a major source of the problem of precarious work lies in the ordinary law of contracts and the market, any substantial reform must come from Parliament, not the courts. Admittedly, we have noted some rare cases where the courts have been able to examine the facts to reveal bogus contracts or misleading schemes intended to avoid any direct contract. But the courts are unlikely to change the basic rules of contract law. At most, the courts can loosen existing rules, as, for example, in the USA, where two employers can be held jointly responsible for the breach of labour standards [31, 32]. But courts cannot normally rewrite contracts or invent them when they do not exist. For instance, the Court of Appeal was unable to help the Deliveroo drivers who sought to form a trade union for the purpose of collective bargaining because they were correctly classified as self-employed in accordance with the terms of their one-sided contracts [33].

In sharp contrast, Parliament has the power to impose terms in contracts, to confer rights notwithstanding the absence of a contract or the right sort of contract, or to insist that only certain kinds of contracts can be used in the labour market. Some legislation has done that. For example, the National Minimum Wage Act 1998 plugs most of the potential gaps with explicit provisions such as the inclusion of agency workers. But, in my view, this sticking plaster approach is inadequate. What is needed is, rather, the closure of the options in the general law of contracts to create precarious work. Here are some examples of legislation that might be proposed.

One possibility is to forbid the offer of jobs without a minimum guaranteed number of hours. In effect, this law would prohibit what are commonly described as zero-hour contracts. If there are guaranteed minimum hours, there is a binding contract (under ordinary law) to which labour rights will be attached.

Another possibility is to impose on the end-user of agency workers a contract with those agency workers so that they would have to be treated the same as directly employed staff. More generally, as in France, the law could impose a standard model contract for all agency work that would protect the workers' rights against both the agency and the client.

Finally, a draft European Directive proposes that there should be a strong presumption that all platform workers should benefit from the normal range of employment law rights [34]. Such a legal presumption would diminish the possibility of the avoidance of statutory employment rights through the clever drafting of terms by ingenious lawyers.

COMPETING INTERESTS

The author has no competing interests to declare.

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