

# TEETERING ON THE HIGH WIRE

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It is said that those who can, do; and those who can't, teach. To this I would add that those who can neither do nor teach, judge. I say this not out of an abundance of modesty—for which I am justly famous—but because it is true. In many ways judging is not only the most prestigious aspect of the legal profession—after all, students do not usually stand up when professors walk into the room or laugh uproariously at their stale jokes—but also the easiest.

Just think about it. No judge I know stays up nights worrying about having to go out and hustle for business. Judges of one court almost never raid another court's clients—though raiding clerkship applicants is quite another matter. There is no payroll to meet, no hard deadlines, no exams to grade, no tenure pieces to write. There is no need to be creative at all, as the lawyers generally present most of the arguments in their briefs. Imagine if you can: Instead of scouring law review articles and advance sheets for recent developments, instead of flogging your brain for ideas about what to write, instead of having to negotiate with wet-behind-the-ears law students for publication of your brain-child—instead of all that—a bunch of lawyers, paid handsomely by people you do not even know, do all the thinking and research for you, and present you with a rich choice of legal issues on which to expound your personal views, which then *have* to be published and distributed to every lawyer in the country. Best of all, the lawyers are then required to cite you next time they have a case involving a similar issue. Pretty neat, huh?

And what do you have to do for all these rights and privileges? Well, you have to wear a robe, put up with lawyers toadying up to you and—this is the hard part—you have to make decisions that will often have a major effect on other people's lives. It is this last aspect of my job that I want to talk about in this article. (I had considered talking about the toadying part, which is my personal favorite, but my law clerks pointed out that most

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of you having gone to law school were already familiar with the fine points of kissing up to authority figures.)

So, as a former commander-in-chief might have said, let's talk about the decisionmaking thing. I will admit right up front that I have no great theory about how judges can, or should, or do, go about resolving constitutional issues—or any other issues for that matter. Indeed, I am not sure that having such a theory would be useful or desirable in my job. What I want to speak about instead are some of the more personal aspects of deciding cases; ways in which my life experiences have influenced my decisions as a judge, and how they have affected my legal analysis and sometimes the outcome I reached. I will then suggest some modest conclusions for your consideration.

Let's start with Catherine Ponce, whom I first met the day she was supposed to go on trial for the possession and distribution of some five kilograms of cocaine. As I have done almost every year since I was appointed to the Ninth Circuit, I accepted an assignment to the district court, and Ms. Ponce's case was sent to me for trial. The morning of trial, I learned that Ponce copped a plea and all that was left to me was the chore of sentencing her. This was a pre-sentencing guidelines case and since she pled to possession and not distribution, the field was wide open to me from simple probation to life in prison.

Five kilograms of cocaine is no joking matter, and the prosecution was asking for ten years—not an unreasonable amount in such cases. Ponce asked for leniency based on the following story, which she sobbed out to me in open court. She was twenty-three years old and had never been in trouble with the law. While traveling by plane during a cross-country trip, she met a well-dressed man in his forties who wore a lot of expensive-looking jewelry and flashed a large wad of \$100 bills. This man promised to help her with her modeling career and also said he could get her a Mercedes cheap. In fact, if she could set up a cocaine deal, he would give her the Mercedes plus \$50,000. There were several subsequent telephone conversations with this man, who turned out to be a government informant, and she eventually agreed to arrange a deal. The buyers were undercover DEA agents, and Ms. Ponce and the seller of the drugs were in big trouble.

After listening to her story, I suggested that she might have a viable entrapment defense and offered to let her withdraw her guilty plea. The objection came not from the government but

from her own lawyer, who told me politely, but firmly, to mind my own business. The prospect of a ten-year mandatory minimum if she were found guilty of distribution made trial much too risky. I was not going to get out of a hard decision that easy.

I have always found sentencing among the most difficult of judicial responsibilities, and I found the decision in this case particularly troubling. On the one hand, what Ponce did was pretty bad, and strong public policies favored severe punishment. On the other side of the balance was a young life, a life I could help put back together or destroy.

As I sat there in that courtroom pondering how to reconcile these competing considerations, a thought crept into my mind—a thought with no obvious connection to what was going on before me. About a week earlier I had been at home absorbed in work when I heard the doorbell ring. When I went to the front door, I found it wide open, and a young couple was standing there holding a toddler—my young son Clayton. I was a little surprised as I thought Clayton was playing in the house. The young woman asked me whether the boy was mine, and I admitted he was. They were driving down my street, they told me, and found the child sitting in the middle of the road. Apparently, I forgot to close the door, and Clayton, who had just learned to walk, made his way outside and walked into traffic.

And here is the thought that crept into my mind as I sat pondering what to do about Catherine Ponce: No doubt about it, she had done wrong; she had done something that turned out to be a big mistake. But she was not the only one in that courtroom who had made a big mistake. Only a week earlier I, too, had made a big mistake and, as a consequence, put my young son's life in danger. I am not a deeply religious man, but in that instance I was convinced that God had taken pity on me and spared me and my family the tragic consequence of my error. Something inside me made a connection between the two events and told me that I would not go wrong if I, too, erred on the side of forgiveness. Somewhat to everyone's surprise, I sentenced Catherine to six months in jail, many hours of community service, and five years probation.

There is an interesting and satisfying postscript to this story. About three years later, I received a letter from Catherine Ponce's probation officer. He explained in some detail her progress since the time of sentencing. She served her time, completed her community work, married, and had a baby. In fact, the probation

officer noted, her adjustment was so complete, her conduct so exemplary, he was taking the highly unusual step of recommending that her probation be terminated early.

The story thus has a happy ending, but I have always wondered whether I did the right thing. My decision, after all, was influenced by something wholly extraneous to the case, something having no direct bearing on the facts and circumstance of Catherine Ponce's crime. And what if my experience had been much different? What if one of my sons had been addicted to drugs, or God forbid, died as a result of a drug overdose? Would it have been appropriate to take that experience into account in giving Catherine a much longer sentence?

What Catherine Ponce's case made me aware of is the degree to which my personal experiences, for better or for worse, have a bearing on many of the cases I decide. Take, as another example, the case of *McCalden v. California Library Association*,<sup>1</sup> decided by a panel of my court in 1990. The case involved a Holocaust revisionist—a man who claimed that the Holocaust was a big hoax, that it never happened.<sup>2</sup> McCalden secured the right to present his views at a meeting of the Library Association, and several Jewish groups succeeded in getting him kicked off the program.<sup>3</sup> McCalden sued, arguing that the Jewish groups violated his civil rights by threatening the Library Association.<sup>4</sup> The district court dismissed the case, but a panel of my court reversed, holding that McCalden stated a claim under 42 U.S.C. § 1983.<sup>5</sup>

After an unsuccessful effort to take the case en banc, I filed a somewhat strident dissent expressing the view that the Jewish groups' actions were protected by the First Amendment. While I believe that my dissent was well-supported by Supreme Court case law, there is little doubt that my view of the case was deeply colored by the fact that I am a child of Holocaust survivors. Having grown up with my parents' stories about the misery they suffered at the hands of the Nazis, having talked to many other concentration camp victims about the death and cruelty they saw and endured, I may well have had a greater understanding than

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1. 955 F.2d 1214 (9th Cir. 1990).

2. *See id.* at 1217.

3. *See id.*

4. *See id.*

5. *See id.* at 1223-24.

some of my colleagues for the anger and frustration felt by Holocaust survivors at the thought that the memories of those who perished would be defiled by McCalden's presentation. It was surely that sentiment, and not some abstract commitment to legal principles, that caused me to insert the following passage near the end of my dissent:

Those who carry the mark of Auschwitz tattooed on their forearms, or who survived Treblinka, Dachau or Buchenwald; who were hunted down like animals in the streets of Warsaw; who saw loved ones perish during Kristallnacht or in frozen boxcars on their way to the death camps that are the shame and horror of modern times—they cannot be expected to react calmly, with deliberation, with gentility to one who would tarnish the memory of those butchered in the Holocaust by pretending the whole thing never happened. Surely *their* anger, *their* disgust, *their* anguish also has a protected place in the wide-open arena of our public discourse.<sup>6</sup>

There are many other cases where my personal experiences have proved decisive. My position in the Gay Olympics case, where I strongly dissented from a ruling that allowed the United States Olympic Committee to deny the use of the word "Olympic" to gay and lesbian athletes,<sup>7</sup> was influenced by my many years of living under communism, where the government imposed very strict controls on what people could say, and how they could say it. More recently, in *Yniguez v. Arizonans for Official English*,<sup>8</sup> I dissented when my court held that an English-only rule for state employees violated the First Amendment. Similarly, in *Gutierrez v. Municipal Court*,<sup>9</sup> I dissented from a decision that an English-only rule for private employees violated Title VII. My approach in *Yniguez* and *Gutierrez* was deeply influenced by the ethnic strife and mistrust I saw growing up in Romania between the Romanian-speaking majority and the Hungarian-speaking minority. From this experience, I walked away with the firm conviction that differences in language lead to differences in

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6. *Id.* at 1230-31 (Kozinski, J., dissenting from denial of rehearing en banc) (citations omitted).

7. *International Olympic Comm. v. San Francisco Arts & Athletics*, 789 F.2d 1319, 1320 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc).

8. 69 F.3d 920, 960 (9th Cir. 1995) (en banc), *vacated*, 117 S. Ct. 1055 (1997).

9. 861 F.2d 1187, 1188 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing en banc).

thinking, which lead to mistrust and hatred and, eventually, to war. This experience convinced me that we are very lucky indeed to share a common language and made me most reluctant to strike down rules that ensure that everyone use that language.

In *United States v. Soyland*,<sup>10</sup> I dissented from affirmance of a conviction based on evidence of drugs seized at the Temecula immigration checkpoint, based on my suspicion that the checkpoint was being used to conduct general law enforcement searches. My concern, not shared by my American-born colleagues, was influenced in no small part by the déjà vu feeling I get every time I drive through an inspection checkpoint on my way from San Diego.

I could go on in this fashion for some time as I parse through the 300 or so opinions I have written as a federal judge, but I do not believe that is necessary to make my point. Nor am I unique in this respect. While it is difficult to know the motivations of others, comments from colleagues lead me to believe that we all draw heavily on our life experiences in carrying out our responsibilities, including deciding constitutional issues. Indeed, constitutional issues tend to make a particularly strong call on our personal experiences as a source of guidance and inspiration. The reason is two-fold. First, much of constitutional adjudication is highly amorphous, calling for the exercise of personal judgment. Second, constitutional issues do not generally come to us with prefabricated political judgments to which we are required to defer. Indeed, the Constitution is to a large extent an anti-democratic instrument, and our task often is to override judgments reached by the political branches. Judgments nevertheless must be made, and, in the absence of other authority, we make them. In making these judgments, our personal experiences serve as a useful and appropriate reference point.

It is easy to overstate the case, of course. While personal experiences do shape my approach to many cases, they are certainly not always dispositive. Rules of law do place significant constraints on judges, and there has been many a case where my personal predilection was to go one way but, as they say, I just couldn't find a way to get there. Of course, the more clear-cut the rule, the firmer the precedent, the less likely it is that I will be

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10. 3 F.3d 1312, 1315 (9th Cir. 1993), cert. dismissed, 115 S. Ct. 32 (1994).

able to act on the basis of my personal experiences or that such experiences will even be relevant.

Take Catherine Ponce's case, for instance. As I said, it was a pre-guidelines case and not covered by a mandatory minimum. As a district judge I was given the widest discretion in setting the sentence, an open invitation for drawing upon my life experiences. Congress has since made a policy judgment that it is not really a good idea for different judges to be imposing vastly different punishments for very similar conduct. In enacting the sentencing guidelines, Congress, through the Sentencing Commission, outlined precisely what factors I must consider and to what extent. I have checked closely and my life experiences with my sons are not among the relevant considerations; Clayton's name does not even appear in the index. To be sure, my experience might come in as a hidden factor, causing me to exercise my discretion to sentence a defendant at the low or high end of the narrow range allowed to me. But when all is said and done, under the guidelines, Ms. Ponce would have received close to the ten years in prison, of which she would have been required to serve some eight and a half years, assuming exemplary behavior.

Before you are too quick to condemn the sentencing guidelines, consider the fact that in a regime of broad judicial discretion Catherine Ponce might have done much worse than under the guidelines. A less empathetic—or perhaps a less gullible—judge might have given her the maximum allowed by the statute—life in prison, or close to it. Is justice really served by having Catherine Ponce get a slap on the wrist because her judge happens to have had a revelation, while an equally deserving (or undeserving) defendant in the next courtroom is given twenty years because her judge holds the sincere belief that drug dealers are the scourge of the earth? As Justice Scalia notes in his 1989 University of Chicago essay, even the most severe treatment is bearable so long as you know that everyone else is being treated more or less the same, but there is no injustice quite like the injustice of unequal treatment.<sup>11</sup>

The fact remains, however, that our current mode of constitutional analysis calls for a substantial degree of subjective evaluation on the part of judges. The judge's philosophy, life

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11. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

experiences, values, and blind spots tend to play a fairly significant role in shaping the outcome of particular cases and, consequently, the direction in which the law evolves. Whether you think this is a good thing or not might well depend on whether you think these decisions will be made by nifty guys like me, or by some ogre like . . . fill in the blank with whomever is your worst judicial nightmare.

The judicial ethos that is responsible for this relatively subjective approach to constitutional adjudication reflects a current discomfort with accepting the sometimes harsh consequences that flow from rules that are clear-cut. Let us say you are a very wise judge and you come up with the following rule of law: In the case where two women are claiming to be the mother of the same baby, the presiding magistrate shall pull out a sword and immediately proceed as if to cut the baby in half, leaving just enough time for one of the putative mothers to cry out, "Oh no! Don't kill my baby, I'd rather she get it." This outcry then will be taken as conclusive proof that she is the real mother, and the baby will be spared and given to the woman who cried out.

Now this seems to be a pretty good rule, and in the one known case in which it was applied, it is reported that a just result was reached. At another time and another place, the rule might be accepted for purposes of general application despite the fact that once in a while it might reach an unjust result. Perhaps, for example, the pretend mother is more clever than the real mother (or has better legal advice) and is the first one to cry out, while the real mother—thunderstruck by the prospect of having her baby cut in half—stands mute. Or take the case where one mother cries out first, but the second mother's cry—though belated—sounds ever so much more sincere. Or—and hopefully this would be very rare—the case arises where neither woman says much of anything, perhaps figuring that half a baby is better than none.

Now if you think the baby-cutting rule is a good one—and, in a case with the unlikely name of *United States ex rel. Balzer Pacific Equipment Co. v. Fidelity and Deposit Co.*, I am on the record as dissenting from King Solomon's decision<sup>12</sup>—you might well be willing to put up with unfortunate results once in a while because the rule works well enough, and perfection is, after all,

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12. 895 F.2d 546, 555 & n.5 (9th Cir. 1990) (Kozinski, J., dissenting in part).

impossible for mere mortals. This has surely not been our approach of late. Fearful of broad pronouncements that will keep them from reaching a just result in some unforeseen case down the road, judges have tended to craft rules of law—and constitutional rules in particular—in cautious and flexible terms, often subject to qualifiers such as “in the particular circumstance of this case,” or “in light of all the factors presented to us.” Well, as we all know, no case is exactly, *exactly* like any other case, so this leaves plenty of room for later judges—or the same judges later—to reach a different result in a very similar case.

For what it is worth, I am of the view that this fear of the horrible hypothetical—the future case no one has anticipated—is greatly overblown. We sacrifice much certainty and predictability in the law—themselves important values in reaching just results—by trying to duck the unknown and unknowable later cases. Among the important functions courts perform—this is certainly true of courts adjudicating constitutional issues—is giving parties fair notice of the law that will govern their conduct and save them from being hauled to court. The more elusive the standard, the more likely it will be that parties will have to resort to adjudication as a means for resolving their disputes.

But my view on this is neither here nor there because the current, somewhat subjective, process of constitutional adjudication is likely to outlive most of us. What I want to consider instead are the implications for those of us who toil in the judicial vineyards, and for those others who select, confirm, and appoint judges.

Living in an era of subjectivity adds a certain excitement to the job of judging. Precedents written in fluid terms allow a relatively wide berth for interpretation and application. It also becomes very difficult at times to draw the line between honestly exercising the discretion permitted by a particular standard, and bending the standard itself. As I noted in an article I published a few years ago in the *Loyola Law Review*,<sup>13</sup> this heightens the need for judicial self-restraint. While it is always appropriate to consult one’s gut feeling about the outcome of a case, it is also important to second-guess one’s instincts, to lean against one’s biases. When a judge is too comfortable with the outcome in a

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13. Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993).

particular case, that is when he most needs to scrutinize how he reached that result. Is it by means of a fair application of the existing law to the facts of the case, or is it an exercise of judicial self-indulgence? A judge who is comfortable with most of his results ought to wonder whether he is using the inherent fluidity of the process as a means of engrafting his own policy views onto the law.

The extent to which this is appropriate, of course, depends on where in the judicial process one operates. The higher the level, the more legitimate room there is for the exercise of personal judgment. But even at the highest levels of the state and federal judiciaries, limits must be observed. While, technically speaking, every new case in the U.S. Supreme Court presents an opportunity for reconsidering every precedent on the books—from *Marbury v. Madison*<sup>14</sup> forward—significant practical and prudential considerations militate against doing so.

One serious danger is that the public will come to see the courts as just another political institution, and will start treating judges as simply another set of players in the political arena—something that has already started to happen to an alarming degree. The battles over the confirmation of various judges and justices in the federal system over the last dozen years, the removal of state supreme court justices in California and elsewhere based entirely on their voting records, and the attempts to apply litmus tests in the selection of judicial candidates, in the hopes of influencing the outcome of particular issues—all of these are unwelcome encroachments of the political process into the realm of constitutional adjudication. While some political influence on judges may be unavoidable, perhaps even desirable, in the end, the Constitution is there to protect us precisely from those types of pressures.

That having been said, I think there is also a converse danger, and that is having a judiciary too far removed from contemporary life, too shielded from the everyday experiences and problems of the community in which they live. Consistent with current notions that judges should avoid even the appearance of impropriety, many of my judicial colleagues tend to cut themselves off from substantial contact with the world around them once they ascend to the bench. While avoiding conflicts of

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14. 5 U.S. (1 Cranch) 137 (1803).

interest is certainly a good thing, it is also important to encourage judges to continue living in the real world, rather than sequestering themselves in their chambers.

Let me give an example from my own experience. Some may be aware that among my non-judicial interests are video games—which, like skiing, are difficult to master if you started after you turned eight, as I did . . . and which is why I now only snowboard! Nevertheless, I have children in the house and I enjoy watching them play; in fact, I consider myself a bit of a video game maven and occasionally write a column in the *Wall Street Journal* commenting on trends in video games.

A couple of years back I prepared a column that was not entirely flattering to Nintendo, which at that time was the dominant producer of video games. I suggested that sales of Nintendo were dropping because of the way the company was doing business.<sup>15</sup> After I finished writing the column, my thoughts started turning to some important philosophical issues like: What if Nintendo gets ticked off and decides to sue me for libel? Particularly in mind was a case from the U.S. Supreme Court by the name of *Milkovich v. Lorain Journal Co.*,<sup>16</sup> which held that an opinion column may contain implicit statements of fact that may be actionable under state libel law. I gave a copy of my proposed column to an extern in my office, who himself had been a journalist, with the command: *Milkovich* this. And he did, taking out some of my favorite acerbic phrases. After he got done with it, the column was a pale reflection of its former self, but its main point was still intact and I sent it in.

I remember it like yesterday. The day the column appeared in the *Wall Street Journal*, I was in the office and got a call from someone who introduced himself as John Smith from Dallas, Texas. Mr. Smith explained that he worked for a brokerage house that made a market in the stock of a company called Acclaim. “Acclaim,” I asked, “Who are they?” “They are a software company whose only business is to make Nintendo games and I just wanted to let you know that its stock dropped ten points—eighteen million dollars—based on your column.” “Oh darn,” I thought to myself. I protected myself against the

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15. See Alex Kozinski, *Trouble in Super Marioland*, WALL. ST. J., July 27, 1990, A9.

16. 497 U.S. 1 (1990).

libel action, but did not even think about the class action securities lawsuit.

Everything turned out OK—I did not get sued (at least not yet)—but it was just a little bit scary. I told the story to a friend of mine who is a well-known First Amendment lawyer, and he had a hearty laugh. “I think,” he said, “you experienced what we in the business call a chilling effect.” And, to tell the truth, stepping out of the judicial role—and the cocoon of protection that comes with judicial immunity—was a sobering incident for me. I would be lying if I told you that the experience does not cross my mind when I deal with cases involving freedom of the press.

The fact that a judge’s background and personal experiences are highly relevant to the way he decides cases has not, of course, been lost on those who select judges. John Grisham may think people wait until their case is filed to change the composition of the court that will hear it,<sup>17</sup> but those in the business of appointing judges start much earlier, selecting judges with just the right backgrounds in the hope of building constitutional case law in their own image. While this is entirely understandable, it is ultimately misguided. As experience has shown, both sides of the political spectrum can play this game, with the net result that some of the best candidates for judicial office will be blocked or deterred based on their paper record.

A more farsighted approach is to search out candidates of rich and diverse backgrounds for appointment to the bench. Diversity, of course, means different things to different people. This was brought home to me a couple of years ago when I visited a Bay Area law school for an on-campus sitting, and found myself in the middle of a student protest. I asked one of the students what it was about and he said they were protesting the lack of diversity among their professors. “What kind of diversity are you talking about?” I asked. “Diversity of all kinds,” the young man replied, “Ethnic, cultural, philosophical.” “Oh I see,” I said, “So you’re looking to have someone appointed that’s much different from your current professors.” “That’s right,” the student beamed. “Well, how about Judge Bork? He’s not like any of your professors,” I said. The student was a little taken aback but admitted that it was not exactly what he had in mind. Neither did Justice

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17. See JOHN GRISHAM, *THE PELICAN BRIEF* (1992).

Thomas's diverse background cut much ice with those who saw him as just another conservative.

The fact is that everyone likes diversity, so long as it falls within a fairly narrow ideological range. We can do with a lot less of that type of diversity in our law schools—and in our courtrooms as well. So long as we have a jurisprudence in which the backgrounds and experiences of the judges count for a great deal, it would seem to be in the interest of the country to have judges with as wide a range of experiences as possible. With the dizzying array of problems presented to the courts nowadays, we would be far better served if those who select and appoint judges worried a whole lot less about how a particular individual will vote in certain cases, and a lot more about whether he has something unique and interesting in his background, something that is likely to provide a new perspective for his judicial colleagues to consider as they go about making their decisions.

The notion that you can change the Constitution if only you can get five votes on the Supreme Court for a particular position, and that you can change the direction of the law if only you stack the courts with people of the right political outlook, had its birth right here in academia. I know many of the people who are involved in selecting judges in this administration, as I knew those involved in the prior two administrations. Conservative or liberal they have one thing in common: They firmly believe what they were taught in law school, that there is no result you cannot reach if you pick the right people to make the decision. It is for that reason that we have had—and continue to have—so many highly charged battles about the appointment of judges and Justices. I think we can and could do a lot better, and the place to start is in the law schools. Students should be taught that, while ideology matters, a lot of other things matter as well, and that when we pick judges based on ideology alone, we rob ourselves, and we rob the country, of some of the most valuable and creative candidates for judicial office. Ultimately, we will all be the worse for it.

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