Chapter 1
Between Nightmare and Noble Dream: Judicial Activism and Legal Theory

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1.1 The Judge and the Authority

Judges, I was taught in law school, are passive actors in the scene of law. They do not take the initiative, they relate to other parties' actions and claims. This is their status' main difference with respect to other branches of government, namely the executive power or the State administration, to be permanently active in providing services and protections to citizens, planning in advance policies and defining the best way of implementing laws aimed at the public good. In the legal process, parties and their legal representatives, attorneys and advocates, take the initiative, raise claims, sue other parties while the judge remains passive, silent, more or less at least till the final verdict.

That being so, an active judge seems to be either an oximoron or a bad judge. Apparently, activism is his more serious vice or fault. But "activism" regarding judicial competences and actions could mean not so much that the judge is becoming an actor in law—anticipating the advocates' moves or the government's usual business—, but rather an officer exercising his own constitutional powers not merely as an executioner of laws, but as a law-maker, albeit in more or less limited dimensions. In this sense more than of an "active" judge we should speak of a law-making judge, or of a political actor, of an actor that fills in the gaps in the law with pieces of jurisprudence or case-law with an authority comparable to legislation, even capable of altering and changing it through some kind of addition. *Auctoritas*

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comes from *augere*—as Hannah Arendt reminds us (Arendt 2006, 91ff.)—and this, improving the legislation, adding further rules to it, seems to be precisely the way the contemporary judge often conceives his role.

1.2 Constitution, Weak and Strong

I assume that in order to discuss and understand the judicial role and corresponding acts we should take into account three dimensions or point of views. (i) The first is how we conceive the constitution of a polity. (ii) The second is what we mean by judicial reasoning, that is, how we believe judges could and should reason in arriving at their decisions. (iii) And the third one is the more philosophical view of what law‘s nature is. We will get different results, we will assess judges' "activity" and "activism" in a different way, according to the stance we take on each of these three points.

We need first, I believe, to have a look at the notion of constitution. Here we are usually confronted with two different set of ideas, actually with two different traditions, that I would propose to call,—referring to the classic book by Charles McIlwain—constitutionalism of the Ancients and constitutionalism of the Moderns (see McIlwain 2008). In the former a constitution is a pact, a compact, between two main parties, one of which is an already existing power, a King usually, a full sovereign, that however accepts an agreement, striking a compromise with other subjects (the barons, the people), thus defining and limiting his own competences. The outcome will be a distinction between two areas, one circumscribed by public law in which the King is subject to common rules and one other, restricted, in which the original supreme power keeps sovereign prerogatives not subordinated as such to common laws. In this model a judge usually is a civil servant, or an officer, performing an adjudicating role in the proper application of common laws. He will cover the area subjected to rules that are valid for both parties. He will not however have any competence on the restricted prerogative area. Nonetheless, out of this restricted area of competence, and as a mark of the special prerogative, an original judicial power may arise.

In the constitutionalism of Moderns a constitution is much more than a pact, or a bilateral agreement, since it has to play the role of shaping the entire political structure. There is here no constituted power before the constitution. There is no original power that could eschew or dodge the efficacy of constitutional rules. No prerogative seems to be left. In such a landscape the judicial power is first of all submitted to the constitution. It cannot claim any constitution-making competence. However, once the constitution is considered to be a supreme rule, a ground-norm that is generally binding, and not just a framework regulation to which legislation contributes by addition and derogation at a parity level, such architectural ground-norm will also bind the legislator, and the issue of a super partes arbitrator that is able to check the legislation, that is, that reviewes legislation's possible unconstitutional outcomes, will be more or less unavoidable.

If the constitution is a rule with prescriptive, not just programmatic force, if it is a legal rule then, though a very special, but stronger one because of its superior dignity in the hierarchy of sources of law, there must be some remedy for its violation, and the need will arise to design a special jurisdiction able to ascertain whether or not that supreme rule has been followed by the inferior law-making instances, especially at the level of ordinary law-making agencies. This—it's well-known—was Justice Marshall's topical argument for judicial review of legislation, and this was again in short the rationale the European Court of Justice offered to ground its own wide and supreme reviewing powers vis-à-vis EEC Member States' national legislation in the Costa ruling.

A strong concept of constitution seems then to imply a strong, active judge that could abrogate, or declare invalid ordinary legislation because of its being unconstitutional. Ordinary legislation, parliaments nonetheless remain the place where the constitutional moment that produced the constitution continues to operate in less dramatic circumstances. Legislation in a sense is the normality and the perpetuation of constitution-making, a collective instance of public deliberation, that is no longer exercised on the fundamentals of collective existence, but nevertheless on the needs it manifests and claims to be met and satisfied through the representative participation of citizens.

Could such instance, this institutionalization of the constituent power, citizens' participation, be preempted by judiciary decision? Is this not doomed to replace the collective decision of the people by the will of a few more or less expert lawyers, once again a few Law-Lords? Could we conceive a formula such as "we the judges" as opposed or even corrective of "we the people"?

1.3 Judges as Kings? On Rules and Algorithms

Here we'll step into the second dimension I have said to be basic in our discussion, I mean, the practice and justification of judicial reasoning. In this area we are confronted with two extreme views, a "nightmare" and a "noble dream". The judge —says Plato—does not play a royal function. He's not a statesman, especially not a king, in spite of the ancient Greek meaning of "basileus"—as it's certified in Hesiodos' "Days and Works"—signifying a judge. Judges—we are told—do not decide independently, but merely repeat rules layed down by other people, kings in this case. The problem here immediately arises: is that saying of the rule just a cognitive function, which does not add any new force or meaning to it, or is it rather a task that somehow involves a new prescription, something that transforms the still inoperative rule into an effective command, and that in order to do so should be itself a prescription, some kind of rule, an individual rule in Kelsen's wording?

Plato hopes the individual rule to be a matter of acknowledgment or of cognition, that is, that it could be deduced from the more general and royal rule through some sort of logical inference without any semantic addition. This hope enduringly inspired the history of legal thought and jurisprudence, from its beginnings until its

great climax, the liberal codified State after the French revolution. This actually was —as we learn from Michelet's and Tocqueville's grand narratives—a revolution against judges, not only against the aristocracy and the King.

The law should recover its certainty and determinacy by being once again reserved to the sovereign, albeit this time a collective and turbulent entity, the people. Judicial abuses and strong powers were no longer to be tolerated in a legal system proclaimed as the triumph of the rule of law—of a law consecrated by the general will of citizens, not to be twisted by the particular discretion of a few lords in robe. In order to achieve this great aim the law had to be simplified, rationalised, made clear, so clear that interpretation had no special role to play. It also had to be complete, so complete that no gap remained to be filled in by doctrine or adjudication. Once these conditions were fulfilled, one could believe that the judge was nothing but an additional, operative "voice" given to statutes or just a "machine" for legal rulings.

However, this "noble dream" (or "nightmare"?) was immediately disclaimed by the way judges necessarily reason, which is far from being simply deductive. There may be a lot of deduction in a judicial decision, but, and this is the point, its main rationale is not deductive, but argumentative and interpretive. It is interpretive since the reasoning's premises are to be first understood and hermeneutically construed, and it is argumentative since some or several—perhaps all—arguments are to be assessed in terms of their weight or force. In other terms, an argument (or a reason) does not have an infinite weight; otherwise it would be an algorithm. And rules, standards and principles are not algorithms. Indeed, even rules are not algorithms, having a topical, semantycal and pragmatic dimension much more relevant than their syntactic structure. Rules are about something; algorithms are not about anything. The latter are symbols without meaning (cf. Searle 1991, 30–31).

Meanings have a history, algorithms have none. Meanings change in time, algorithms do not. Besides, through rules, you tell a story, through algorithms you tell none: two and two makes four is not a story. But to say that the one who intentionally kills a human being, shall be punished, is indeed a story, a fiction that anticipates reality. Meaning moreover is not to be made operational through computation and mathematics. The application of rules, since it is connected with their meaning, is a matter of understanding and deliberation, not of calculus, which is why—to repeat a formula layed down by Wittgenstein and then suggestively repeated by Hart—rules do not (fully) rule their application (Hart 1983, 106). Rules are defensible, algorithms are not.

1.4 Once Again: Natural Law Versus Legal Positivism

The third variable I have chosen to assess the force and necessity of judicial activism is the adopted concept of law. Here we are confronted, if not with a clash of civilizations, perhaps with a clash of worldviews. The fight is the long lasting one between legal positivism and natural law, or more accurately between (i) a view

of practical rationality and law as domains with which arguments and reason don't have much to do and thus in which either will or emotion and decision prevail, and (ii) a view according to which practical rationality does stand beyond strategic interests and theoretical efforts, this being much more a matter of justified assertability and endorsement than of will and discretion.

We could reformulate this clash in two further different ways. (a) We could conceive of it as a confrontation regarding the role facts play in legal deliberation and normativity. For the positivist view, facts are what matters most, these facts corresponding to commands, or conventions, or posited rules. What lies between and beyond facts, namely their semantic purport and their reasonableness, is less relevant. This belief can have a decisionist twist, since, once it is stressed that facts are not related through logic, laws being treated as mere facts, "there is no reason to assume—in Andrei Marmor's words—that entailed law is law, just in virtue of such entailment relation" (Marmor 2002, 124). Something of the kind is Hans Kelsen's final destination in his posthumous work on the theory of rules (Kelsen 1978) where he firmly declares the inapplicability of logic (especially inference and contradiction) to the domain of legal rules. These are said to be imperatives, which are facts, and two facts can be only opposed or causally connected but they cannot be logically contradictory nor can they be logically inferred the one from the other. The opposite view is defended by natural law: here facts are determinations or instantiations of previous rules or of practically transcendental principles that are well inferentially related.

For the legal positivist, normativity is made law by facts and facts only; this is sometimes called the "source thesis". Directive reasons are fully entrenched in facts, their meaning and their contents are rooted in these only. On the contrary, for a natural lawyer facts only play a subsidiary role, though it may happen that facticity itself is interpreted as a providential and somewhat blind condition for the basic goods to be realized. Under this light facticity is seen as "authority", as both the capacity of enforcing rule or commands, and the deference due to that which is given in the world (this being sometimes read as the outcome of some providential design), then nearly acquiring the dignity of a good itself.

(b) A different shape of that fight is the well-known dispute on the relationship between law and morality. For one camp morality is neatly severed from law, so that law can be ascertained without any reference whatsoever to morality. Such camp can nonetheless concede that for law to be followed or to be abode by a moral attitude, a strong normative justification is required. Law thus can be known, but not enforced (at least on the part of its addressees) without being considered as somehow moral or as meeting moral standards or as deserving some sort of moral endorsement. On the other side, law is said to be blind, at least to some extent, without reference to moral criteria, i.e., not sufficiently informative and able to direct decisions and conducts. Here law can neither be known nor be enforced or operationalised without incorporating a moral discourse.

The first practical consequence of this fight is the two camps' at least prima facie opposite way of conceiving judicial reasoning—and also of allowing for judicial activism, I would add. Legal positivism, in its very successful continental version

based on the fact of codifications, nurtured the hope, or rather the confidence, in being able to avoid any possible judicial discretion. Under codification, a judge could be assumed to be no more than a *Subsumptionsautomat*, and was even so declared by the German *Kronjurist* of late Nineteenth century, Paul Laband. The legal system, conceived as gapless, does not allow for any active or creative role of the judiciary. Something of the kind is still echoed by Kelsen, who however generally conceded for judicial discretion. When dealing in a thick treatise with the United Nations new law, Kelsen claims that international law is gapless and does not need to be applied with any further reference to legal principles; the international judge can solve any case through the positive law in force without looking for any other source.

A different view is the one presented by John Austin, the founding father of British legal theory. In his classical book *Province of Jurisprudence Determined* we find a phrase that is a sort of celebration of the activist judge: "I cannot understand how any person who has considered the subject can suppose that society could have possibly gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator" (Austin 1954, 191).

In Austin's view, a passive judge is no more than a childish fiction; adjudication is sovereignty delegated, but still sovereignty, law-making power, thus unavoidably discretional. We find then that legal positivists defend two apparently opposite claims about judicial initiative and reasoning. For the continental *Rechtswissenschaft*, the judge is a machine for legal deductions from the *Gesetz*, the statute; the judge's main virtue is a logical or even mathematical virtue, and not much more than a descriptive attitude towards the law is required. Once found and properly described the rule, its application will be more or less a matter of course, a matter of logic. No argumentation and no moral deliberation will be necessary. To the British analytical jurisprudent this picture does not render justice to real adjudication: a judge is rather a decider, though a subordinate one. Logic or knowledge are not sufficient for the decision; an exercise of will, strong discretion, is required. However, between such view and the one held by Continental positivists, there is something distinctive in common: once more no special argumentation is considered as the basis for legal decisions, morality being again out of the picture. The law that "ought to be" for the judge seems equivalent to the law that "is". Discretion, delegated sovereignty is a matter of the law that "is", not of a dreamy and fancy law that "ought to be".

The opposite camp, we know, is natural law. This has been defined in diverse ways and often, in modern times, used as a kind a recrimination, if not a true insult. According to Karl Bergbohm, probably the most typical Continental legal positivist, whoever claims to need more than statutes in force in a positive legal order for knowing what is valid law, is a natural lawyer, something—it's implicit in his argument—a lawyer should be very worried about. However, there is a misunderstanding to be set aside, when considering natural law doctrines. There isn't a single one, at least to my knowledge, that would deny the necessity of positive law.

Natural law does not claim to be able to regulate human conduct in and by itself; it needs to be enforced and to be concretised through posited ruling and effective authority. In this sense, it is less radical in its claims than positivist theories, since a positivist denies natural law's claim to existence, while a natural lawyer in the end bases its capacity of direction on the efficacy and force of positive law. This somehow explains why we find here again an ambiguous relation with judicial decision. Natural law theories do not conceive judges as machines for logical deduction: deliberation is required from them. However, such deliberation can be guided from more or less objective values or principles that are accessible through practical reason or moral intuition. One right answer is not always considered possible, depending on how basic goods are conceived and the role and justification given to authority. Room might be given to rational disagreement.

On the one side, we have views that believe in the incommensurability of values and their inevitable clash in Weberian terms, though a domain is singled out where a strong normative evidence dictates right legal rulings. Given incommensurability, and the openness of several values, and a pessimist political anthropology, authority plays a fundamental role in implementing basic values and offering them a chance of success in the social world. Authority itself is not here to be tested, or produced, but only to be justified. Its phenomenology, basically consisting of force, violence and discretion, is not pliable to a reformist, or a constructivist strategy; there is not in it too much to be reformed or reflected upon. And its justification is offered by its capacity or success. Strangely enough the natural lawyer nears those legal positivists who conceive law in an exclusivist way as founded just on the fact of authority. The difference between the two is only to be found is the additional normative source added to the fact of authority by the natural lawyer, at least when specific, most supreme basic goods are at stake.

On the other side, we have the defender of the one right answer, who is much less pessimistic about the unity of practical reason and political anthropology, so that one right answer is conceivable and moreover possible. This however does not pass by the fiction of a judge as a deductive machine, but by the reference to a scheme of normative coherence that is to be found in a reflective equilibrium between fit and justification, the facticity of past posited law, and the principles that can give a best moral account of it.

In this later view, the judge is *passive* by being *actively* involved in moral reasoning, while for the former type of natural lawyer passivity is an exception to be reserved to rulings on matters that impinge on the first moral principles and basic goods. In this second case a judge, beyond the threshold of a basic normative core, decides in a more or less discretionary way. For the one right answer believer, on the contrary, discretion as a ruling without decisive and conclusive reasons means to compromise the role of the judge and its constitutional capacity. His thesis is backed by the consideration of the phenomenolgy of the legal controversy, in which parties claiming their rights do also claim *to be right*, a fact that the "pluralist"—so to say—natural lawyer cannot easily explain from his half-positivist stance.

1.5 A Middle Course

I will try now to synthesize my argument. A fundamental virtue of a judge is passivity; his model is that of an arbitrator impartially giving everyone his due once it is claimed in a controversy between parties before him. He renders justice to parties, if asked to do so. A judge as a civil servant, who held some enforcement power and therefore couldn't or wouldn't remain passive, would be—as once said by Professor Cappelletti—more a policeman than a member of the judiciary. He is not to be active. Passivity is a merit to him. Nonetheless, he is not to remain so passive as to refuse justice once this is called or claimed for before him. The darkest nightmare of law would be, beside the crooked judge, a judge that decides not to decide. His passivity cannot overstep into silence, *non liquet*, judicial abdication. The prohibition of passivity becomes here the "state of necessity" that should first of all guide his official conduct (see Schmitt 1969). And yet we experience a contrary necessity that recommends filtering only those cases that are constitutionally relevant. Passivity here becomes a precondition for a better focussed activity.

I have said above that our issue, judicial activism, could be discussed by considering three fundamental variables: (i) the idea of a constitution, (ii) the theory of judicial reasoning, and (iii) the concept of law. I believe a most appropriate concept of law for legal practice is one able to combine the facticity of positive law and the normativity of claims for justice. A strong positivism, such as for instance the "exclusivist", should in the end give up the internal point of view, since this seems to imply a reference to moral standards. In the "exclusivist" perspective is the concept of law is a matter of a natural kind, it has an "essence" and as a consequence "practice", the way that "essence" is used or made manifest in social collective acts, is downplayed. Judicial or legal reasoning is separated from the nature of law, and the latter can be defined independently from the former. Now, such view would more likely than not make our issue trivial, undeserving of a theoretical or philosophical interest or beforehand solved once and for all. Either the judge's authority is more or less original (being positive law in his hands as holder of discretionary powers) or he doesn't have such central dignity, being called only to reformulate the dictates of a superior authority (in case positive law is equated with legislation, not with adjudication and past decisions).

A more appropriate concept of law would seem to be the one mentioned above as "inclusive" natural law. From this perspective law's moral invalidity is not yet a reason for declaring that the law is void, that it is not law (as it is stated by "exclusive" or strong natural law). It is rather a defective law. However, such defectiveness is not just an issue that could be ascertained through a contemplative consideration of the substantive properties of the law itself. We would need to consider and enter into its "practice". We would need to take an internal point of view. At stake is no "essence" without "existence", there being no "existence" without engaging in action, this implying a moment of public deliberation, where the moral point or the directive reasonableness that lays at the bottom of law is made explicit and elaborated in an intersubective and institutional form.

Stepping forward to the variable of judicial reasoning, we are as seen confronted with two main approaches, of which one tries to bind judicial deliberation to an objectivity external to the practice of reasoning itself, that through social or institutional arrangements. It's the noble dream of the judge as "bouche de la loi", or, somehow, of today's American originalists, or again of some French realist's sociological and political "constraints". The insurmountable problem, not to say the "tragedy", of such approach is however that laws as such are not "facts" that you can observe or that limit and constrain you by simple causality. Unfortunately, for laws to have an effect on you, you should first recognize them as being binding laws, and for that you have to understand them, i.e., to find and reconstruct their meaning. And the meaning of words and propositions won't have a practical consequence in the sense of a stone hitting you.

Moreover, words, propositions, and helas positive laws are much more, or much less, as you prefer, than intentional subjective preferences or assertions of will. What I mean by a word or a proposition, and a directive too, is first of all fixed by the independent (independent since social) meaning of words and sentences, as they are structured within a language, a linguistic and cultural context or "game", and within a form of life with its own values. "We must distinguish (Hart 1982, 154)—says Herbert Hart—between the meaning of what a man says and the way he intends what he says to be taken by those to whom he speaks". Humpty-Dumpty ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less'") would be a crazy and ineffective legislator, and much more so if he were put in charge of writing down a constitution for a community of citizens, drafted to be valid and last through generations. As a consequence the nobly dreamed bond to the law-giver's original intentions is not much more than wishful thinking doomed to be refuted by any interpretive practice. Meaning cannot be enacted. Humpty-Dumpty's "originalism" would only be possible—this is Hannah Arendt's argument—, once we "ceased to live in a common world where the words we have in common possess an unquestionable meaningfulness" (Arendt 2006, 95). Only then, could we take refuge and retreat in the armoured solitude of voluntaristic nominalism.

Mirroring somehow the "noble dream", at least in its imperativist philosophy of language, we face on the other side the nightmare of a solipsistic judge, the one for whom there is no normative reality beyond his discretion, the one for whom every and each ascription of meaning is a decision, the one that decides without any objective normative background through reasons that are such for himself alone, amounting then to more or less personal motives. If this were indeed the reality of adjudication, it would be idle for us to linger in law schools trying to teach students what is valid law and how to win a case trough good points of law. The case would be just as that which was made by one of the discussants in Cicero's *De natura deorum* on the job of priests and the nature of religion: their inconclusiveness is revealed—he says—in the look of complicity they exchange when they meet; they know they are all cheating. In this vein, lawyers would be nothing but accomplices of a huge show ultimately designed to ever delude citizens about their expectations of justice.

What we thus need is a middle course between noble dreams and nighmares, between the hope of strong objectivity and the despair of solipsistic self-complacency. Noble dreams are hopes of "fit", nightmares are desperations about "justification". Now, we need, I gather, to compromise and combine the two dimensions. However, the compromise I believe to be possible is not to be realized through the banal fact that judges "sometimes do the one and sometimes do the other" (Hart 1983, 144): this fact is as true as the fact that some people follow rules and some people don't, that not excluding the wrongness of the second alternative.

A more or less coherent and successful theory, and a plausible way out of too much hope and too much despair, could be found, I believe, in a sort of constructivist solution to what seems to be an insoluble issue. Paradoxically perhaps, "fit" needs "justification" to be objective, that is, an objective meaning given to positive rules has to refer to intersubjective reasons for actions. In the end hermeneutics must somehow be based on ethics, and "justification", to escape solipsism or self-complacency, needs a good dose of "fit", that is, we can have moral reasoning only once we have found a context of action defined by positive normative rules.

"Justification" would require that our lawyers were trained, educated, not only in hermeneutics or dialectics, but also in philosophy. Black-letter legal education tends to produce either clinical or moralist lawyers, or a strange combination of both. Legal theory must be backed by an appropriate legal pedagogy.

We reach finally the variable of constitution. I have said that the constitution of the Moderns is one that shapes the entire legal system and claims normative primacy. Could the judge through his activism preempt this superiority principle, replacing constitutional fundamental rules by his own decisions? If we share a strong sense and a rigid idea of what a constitution is, he could not. How is it then possible to have judicial review assessing the constitutional validity of statutes and official acts, if these flow from the valid constitution and indeed are an application of the constitution itself?

The constitution is a dramatic moment of public deliberation about the right and the good of the community of citizens and is shaped through basic overarching rules. This moment claims to be original and fundamental, a new beginning. However, the deliberative moment is not—so to say—consummated and exhausted once and for all by the laying down of constitutional norms. A constitution as foundational discourse and decision about the public sphere and its shape needs to be further feeded through a rehearsal and additional moments of public deliberation.

A constitution as a more or less dramatic act of self-government needs, to be maintained, to be reproduced through an on-going series of much less dramatic acts of self-government. In this perspective, a constitution does not preempt or, better said, does not make ordinary legislation less relevant. Ordinary law-giving is what gives a permanent new life to the constitution, simulating at each moment its deliberative drama, so to speak. The constitutional moment is reflected and continued in the parliamentary discussion and drafting of statutes. In this way a constitution is not first of all a limit to legislation, but a model to follow for the

legislator by shaping its deliberative and discoursive scheme, and the spring, the engine that maintains democracy in motion, a sort of institutional and normative "prime mover".

But a constitution is a scheme of fundamental rights too and these consist of individual legal rights, not just of rhetorical proclamations without legal effect. This strong legal character of constitutional rights means that, although ordinary legislation is justified as an enduring reproduction of the constitutional scheme of public deliberation, it is still bound to guarantee and implement constitutional rights. A judge may then be required to fuel and monitor the legal force of those rights. The "activity" of the constitutional judge should in the end only protect and focus on the permanent active force of the constitutional moment both in its scheme of collective public deliberation as granted to the legislator and in its catalogue of rights directly ascribed to citizens who may consequently claim to have them reassessed before a court of justice.

Courts' fundamental function in any case is to discuss and solve *cases*, that is individual claims of rights, a controversy between parties that ask for justice to be done, through the constitution's eyes. They judge about a past that is brought before them. In this sense they cannot but remain passive, something that is precluded to legislators that do not institutionally operate *ad personam*. Clearly, it is not enough, for the judge to replace the legislator, that they share the same values.

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