

## **Segregation in Canada and Other Western Democracies**

Author: Mark Addo

Several jurisdictions around the world use solitary confinement because of its long-standing history in prison administration. However, solitary confinement has adverse health and human rights effects on prisoners. The practice has led to several deaths and increased incidence of mental illness. This paper explores the international standard for solitary confinement and applies it to the various practice of segregation in Canada, the United States, the United Kingdom, New Zealand, Australia, Germany and France. It also helps to identify among the selected countries whether they meet the international standard for segregation in prison operations.

### **International Standard for Solitary Confinement**

The United Nations addressed solitary confinement in the UN Basic Principles for the Treatment of Prisons (1990).<sup>1</sup> In 2015, the principles were revised to the UN Standard Minimum Rules for the Treatment of Prisoners and adopted as the Nelson Mandela Rules.<sup>2</sup> The Nelson Mandela Rules are not legally binding, but they represent the current standard for human rights law and prison operation. Rule 43(1) states that “[i]n no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman, or degrading treatment or punishment.”<sup>3</sup> Rule 45 prohibits the use of solitary confinement except as an exceptional measure of last resort that shall be subjected to independent review. Rule 45 also prohibits placing prisoners with mental or physical disabilities in solitary confinement because it will worsen their condition.<sup>4</sup> These rules apply wherever solitary confinement is used in the world.

### **Administrative Segregation in Canada**

“Solitary confinement” in Canada existed in the form of administrative and disciplinary segregation. Both types of segregation entail locking an inmate in a cell for more than 22 hours a day. Administrative segregation was used to separate prisoners that were either at risk or posed a threat to the safety of prisoners or staff in penitentiaries.<sup>5</sup> Disciplinary segregation was used for punitive purposes and was highly regulated by law and policy. As a result of the heavy regulation of disciplinary segregation, most Canadian correctional officers preferred to rely heavily on administrative segregation to isolate prisoners creating abuses of its usage.

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<sup>1</sup> Sharon Shalev, "Monitoring and Evaluating Solitary Confinement," *ICPA Newsletter* (15 March 2019), online: <http://solitaryconfinement.org/uploads/MonitoringSolitaryICPAnewsletterMarch19set.pdf>.

<sup>2</sup> *Ibid.*

<sup>3</sup> Sharon Shalev, “Mandela Rules UN Standard Minimum Rules on the Treatment of Prisons (2015 Rev) (‘Nelson Mandela Rules’)” (2019), online: *Solitary Confinement* <<http://solitaryconfinement.org/mandela-rules>>.

<sup>4</sup> *Ibid.*

<sup>5</sup> Lyne Casavant & Maxime Charron-Tousignant, “Legislative Summary of Bill C-83: An Act to amend the Corrections and Conditional Release Act and Act” (2018), online: *Library of Parliament* <[https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/LegislativeSummaries/421C83E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C83E)> at 2-3.

## **Canada Amendment to the *Corrections and Conditional Release Act* – Bill C-83**

The Canadian Parliament enacted Bill C-83, an *Act to amend the Corrections and Conditional Release Act and another Act*.<sup>6</sup> The Bill eliminated the use of administrative segregation and disciplinary segregation and authorized the commissioner to designate a penitentiary or an area in prison as a structured intervention unit (“SIUs”) for the confinement of inmates who cannot be maintained in the mainstream inmate population for security or other reasons.<sup>7</sup> SIUs offer inmates with two hours of “meaningful human contact” outside their cell as well as two hours for recreational activities.<sup>8</sup> Most importantly, a transfer to an SIU must be the last resort; there must be no other alternative course of action available.

Segregation was replaced because of its damaging impact on the mental health of inmates.<sup>9</sup> In Canada, the suicide death of Ashley Smith, Christopher Roy, and Terry Baker all exemplify the severe effects of segregation for inmates.<sup>10</sup> Ashley Smith was a 19-year-old female inmate with a history of mental health illness. Smith was placed on a suicide watch. However, she was confined to solitary confinement, and she hanged herself in her cell on October 19, 2007, at the Grand Valley Institution (“GVI”) in Kitchener, Ontario.<sup>11</sup> Smith spent 11 months in administrative segregation until her death. Christopher Roy committed suicide by hanging himself after spending 60 days in isolation at the Matsqui Prison in Abbotsford, British Columbia, in 2015.<sup>12</sup> Terry Baker was found unresponsive in a segregation cell in 2016 at the GVI in Kitchener.<sup>13</sup> The deaths of the three inmates brought the effects of segregation to Canadians and led to an outcry for the government to end segregation for Canadian prisoners.

## **The Use of Segregation in Other Western Democracies**

### **The United States Super Max Prison**

The United States has 50 state jurisdictions, and each state is responsible for its prison operations. As a result, there is no central US legislative framework for solitary confinement.<sup>14</sup> Solitary confinement is identified in long-term solitary, supermax prisons, or wings known as

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<sup>6</sup> Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1<sup>st</sup> Sess, 42<sup>nd</sup> Parl, 2019, (Assented to 21 June 2019), SC 2019, c 27.

<sup>7</sup> Casavant & Charron-Tousignant, *supra* note 5.

<sup>8</sup> *Corrections and Conditional Release Act*, SC 1992, c 20, s 32 as amended by Bill C-83 and in effect 30 November 2019.

<sup>9</sup> Lisa Coleen Kerr, “The Chronic Failure to Control Prisoner Isolation in US and Canadian Law” (2015) 40 Queen’s L.J. 483 at 5 (WL Can).

<sup>10</sup> Debra Parkes, “Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic” (2017) 32 No. 2 Can. J.L. & Soc’y 165 at 2.

<sup>11</sup> *Ibid.*

<sup>12</sup> Angela Sterritt, “Coroners inquest into death of Christopher Roy reveals troubling details,” *CBC* (16 July 2016), online: < <https://www.cbc.ca/news/canada/british-columbia/coroners-inquest-into-death-in-custody-of-christopher-roy-1.3684623>>.

<sup>13</sup> Parkes, *supra* note 10 at 2.

<sup>14</sup> Kerr, *supra* note 9 at 10.

special housing units (SHUs).<sup>15</sup> Prison unions and administrators justify the use of solitary confinement as an effective way to control prison violence and disrupt gang hierarchies. There are approximately 80,000 US prisoners in long-term solitary, of which 25,000 are in supermax prisons and the remainder in SHUs.<sup>16</sup> The practice of solitary confinement does not have any independent oversight, and prison officials operate under flexible standards. Thus, inmates are frequently placed in solitary for minor disciplinary offences inside penitentiaries, and the environment has created the overuse of solitary confinement in the country.

However, the United States has undertaken steps to create better conditions for prisoners and limit the use of solitary confinement. President Barack Obama, in July 2015, asked the Attorney General to research the overuse of solitary confinement across American prisons.<sup>17</sup> The review led to a report to the President setting out Guiding Principles that would limit the use of restrictive housing at the federal and state level.<sup>18</sup> President Obama adopted the principles and directed relevant federal agencies also to adopt the principles. The principles included: housing inmates in the least restrictive setting necessary to ensure their safety; developing a clear plan for returning inmates to less stringent conditions as promptly as possible; clearly articulating the specific reason(s) for an inmate's placement and retention in restrictive housing; regularly reviewing an inmate's placement in restrictive housing, and periodically training correctional staff on restrictive housing policies.<sup>19</sup> Also, President Obama banned solitary confinement for juveniles and as a response to low-level infractions, extended treatment for the mentally ill, and increased the number of hours inmates in solitary can spend outside their cells.<sup>20</sup> These measures have not been implemented in many of the 50 States.

### **Segregation in the United Kingdom: England and Wales**

In England and Wales, confinement areas are known as segregation units. Prison administrators must follow regulations when placing inmates in segregation. Prisoners are removed from the main prison population and housed in a segregation unit or a close supervision centre (CSC) for their own protection, for temporary accommodation of a CSC prisoner, when awaiting an adjudication hearing, or when found guilty of an offence against prison discipline.<sup>21</sup>

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<sup>15</sup> Kerr, *supra* note 9 at 6.

<sup>16</sup> *Ibid.*

<sup>17</sup> Association of State Correctional Administrators (ASCA) and the Arthur Liman Program at Yale Law School, "Aiming to Reduce Time-In-Cell: Correctional Administrators and Yale Law School's Liman Program Release New Report on Efforts to Reduce the Use of Isolation in State and Federal Prisons" (2016) at 8, online (pdf): *Arthur Liman Program at Yale Law School* <<https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtoreducetic.pdf>>.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Sharon Shalev & Kimmet Edgar, "Deep Custody: Segregation Units and Close Supervision Centres in England and Wales" (2015) at 21, online (pdf): *Centre for Criminology University of Oxford & Prison Reform Trust* <<http://solitaryconfinement.org/uploads/DeepCustodyShalevAndEdgar.pdf>>.

Prisoners may be segregated for a maximum of 21 days.<sup>22</sup> Prisoners under the age of eighteen are forbidden to be held in segregation. Despite the regulations, Sharon Shalev identified in her study of segregation units and CSC in England and Wales that more needs to be done to uphold the standards set forth to make sure that inmates get treated with dignity, decency and compliance with international standards.<sup>23</sup>

## Segregation in New Zealand

New Zealand has a legislated framework governing solitary confinement and refers to it as seclusion. The *Corrections Act 2004* establishes New Zealand's corrections system.<sup>24</sup> The *Corrections Act* defines segregation as an event where a prisoner's association with other prisoners may be restricted or denied.<sup>25</sup> The *Corrections Act* authorizes the use of segregation of prisoners for security, good order or safety under protective custody, or medical oversight.<sup>26</sup> A segregated prisoner is required to know the reason for being confined and the chief executive of the Department of Corrections must be informed promptly. The chief executive or a visiting judge may revoke at any time a decision to segregate an inmate under section 58(3)(b) of the *Corrections Act*.<sup>27</sup> Despite the framework, New Zealand heavily relies on the use of seclusion in their prison facilities.<sup>28</sup> As a result, minorities are frequently secluded, along with women, who are more likely to be secluded for longer periods.<sup>29</sup>

## Segregation in Australia

Australia does not have a legal framework for the regulation of solitary confinement, which is referred to as segregated custody.<sup>30</sup> In Australia, there is a broad nature of legislative powers vested in prison officials. The senior prison administrator of state prisons has full discretion and decision-making powers regarding the application of solitary confinement.<sup>31</sup> Also, regulations that govern solitary confinement are not uniform. Each state applies its standards under its jurisdiction, and therefore, segregation orders are not subject to scrutiny or judicial review. Such an environment has led to the abuse of solitary confinement in correctional facilities. Australian

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<sup>22</sup> *Ibid* at 22.

<sup>23</sup> *Ibid* at 153.

<sup>24</sup> Sharon Shalev, "Thinking outside the box: A review of seclusion and restraint practices in New Zealand" (2017) at 80, online (pdf): *Dr. Sharon Shalev and New Zealand Human Right Commission* <[http://solitaryconfinement.org/uploads/Thinking\\_Outside\\_The\\_Box\\_PRINT.pdf](http://solitaryconfinement.org/uploads/Thinking_Outside_The_Box_PRINT.pdf)>.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid* at 11.

<sup>29</sup> *Ibid*.

<sup>30</sup> Alana Schetzer, "Could you cope with solitary confinement?" (11 July 2017), online: *SBS* <<https://www.sbs.com.au/topics/voices/culture/article/2017/07/11/could-you-cope-solitary-confinement>>.

<sup>31</sup> Kelsey Montgomery, "The legality of solitary confinement and the direction Australian policy should take" (18 March 2016), online: *Human Rights Law Centre* <https://www.hrlc.org.au/opinion/the-legality-of-solitary-confinement-and-the-direction-australian-policy-should-take>>.

prisoners have few legal rights and protection against solitary confinement.<sup>32</sup> For example, children are placed in solitary confinement in Australia at the Northern Territory Don Dale youth detention centre, despite International law prohibition of placing children in solitary confinement.<sup>33</sup> In some Australian prisons, inmates with disabilities get placed in segregated custody, which also contravenes international standards.<sup>34</sup> The Australian government needs to improve prison standards for inmates and prevent the abuse of solitary confinement in its correctional facilities.

## Segregation in France

France prisons have a legislative framework for the use of solitary confinement. The legislation safeguards prisoners and prevents them from arbitrarily being subjected to solitary confinement. The law is applied uniformly throughout the country. The rules and regulations are in Articles R.57-7-40, R.57-7-45 and R.57-7-62 of the *Code of criminal procedure*.<sup>35</sup> There are two types of solitary confinement in France: preventive and sanctions.

First, solitary confinement is preventative when it relates to the safety or the protection of the detainee. Solitary confinement for such purpose is commonly referred to as isolation. The prison authorities must factor the inmate's health, personality, vulnerability and dangerous nature when placed under solitary confinement.<sup>36</sup> Correctional officers and prison authorities may order the isolation, or the prisoner may request to be placed in isolation. The prison administration has the power to end the confinement at any time. In principle, an inmate placed in isolation should not be there for more than two years.<sup>37</sup> However, in practice, some inmates on isolation remain there continually for over six years to twelve years.<sup>38</sup> A doctor is also required to check on prisoners under solitary confinement twice per week.

Second, solitary confinement is used as a sanction where the form of confinement takes place in an inmate's cell or a disciplinary cell.<sup>39</sup> Prisoners are subjected to this form of confinement when they break the rules of the correctional facility. The duration of stay varies based on the type of

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<sup>32</sup> Schetzer, *supra* note 26.

<sup>33</sup> *Ibid*.

<sup>34</sup> Kriti Sharma & Amy Braunschweiger, "Interview: The Horror of Australia's Prisons, Prisoners with Disabilities Serving Time in Solitary, Face Physical, Sexual Abuse" (6 February 2018), online: *Human Rights Watch* <<https://www.hrw.org/news/2018/02/06/interview-horror-australias-prisons>>.

<sup>35</sup> François Desprez, "Criminal Detention in the EU – Conditions and Monitoring, Country Report France" (2018) at 14, online (pdf): European Union Agency for Fundamental Rights <[https://fra.europa.eu/sites/default/files/fra\\_uploads/france-criminal-detention-country-study\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/france-criminal-detention-country-study_en.pdf)>.

<sup>36</sup> *Ibid* at 13.

<sup>37</sup> Marie Crétenot & Barbara Liaras, "Prison conditions in France" (2014) at 18, online (pdf): *European Prison Observatory* <<http://www.prisonobservatory.org/upload/PrisonconditionsinFrance.pdf>>.

<sup>38</sup> *Ibid*.

<sup>39</sup> Desprez, *supra* note 31.

offence and the seriousness of the behaviour, but it cannot exceed 20 days.<sup>40</sup> Sanction confinement is used for punitive purposes.

## Segregation in Germany

The German prison system focuses on the rehabilitation of prisoners. Prisoners are treated with human dignity and are not maltreated. Cells have flat-screen televisions, video games, private enclosed bathrooms, wall lockers and beds. Prisoners even have keys to their cells and can wear civilian clothing.<sup>41</sup> Solitary confinement is rarely used in German prisons and, if used, is only done for a short period. The *Federal Prison Act* and *Model State Prison Act* allows the use of solitary confinement if it's necessary to avert threats of violence, jailbreak or suicidal tendencies.<sup>42</sup> Solitary confinement can also be ordered for disciplinary purposes.<sup>43</sup> For exceptional cases that require the use of solitary confinement, the prison administration is required to ask the head of the Justice Department for approval.<sup>44</sup> If an inmate is subject to solitary confinement, their stay will not exceed three months.<sup>45</sup> The average stay in confinement is three to five days.<sup>46</sup> In the rare case that solitary confinement is used, a prison director is responsible for the order, and a prison doctor must be consulted in advance.<sup>47</sup> The necessity of the order is assessed regularly, and the prisoner placed in solitary confinement must be observed with special attention.<sup>48</sup> If an inmate spends more than three days in confinement, it must be reported to the supervisory authority.<sup>49</sup> The supervisory authority must approve more than thirty days of confinement per year for an inmate.<sup>50</sup> These regulations ensure German correctional facilities rarely depend on the use of solitary confinement. The regulation and legislative framework protect inmates from the abuses of solitary confinement.

## Segregation in Japan

Japan's prisons are under the administration of the Japanese Diet (national legislature).<sup>51</sup> Prison laws were enacted in 1908, and under the law, the Japanese Diet is responsible for managing prisoners. The Diet regulates where prison inmates are sent and their daily treatment. Japan prisons

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<sup>40</sup> *Ibid.*

<sup>41</sup> Gary York, "What can US corrections learn from the German prison system?", *CorrectionsOne* (8 January 2019), online: < <https://www.correctionsone.com/correctional-healthcare/articles/what-can-us-corrections-learn-from-the-german-prison-system-Hgvc02nL77KqAjhG/>>.

<sup>42</sup> Eric Töpfer, "Criminal Detention in the EU – Conditions and Monitoring, Country Report Germany" (2018) at 8, online (pdf): *European Union Agency for Fundamental Rights* < [https://fra.europa.eu/sites/default/files/fra\\_uploads/germany-criminal-detention-country-study\\_en.pdf.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/germany-criminal-detention-country-study_en.pdf.pdf)>.

<sup>43</sup> *Ibid.*

<sup>44</sup> York, *supra* note 37.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Töpfer, *supra* note 38.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Joanna Weschler, "Prison Conditions in Japan" (1995) at 15, online (pdf): *Human Rights Watch* < <https://www.hrw.org/sites/default/files/reports/JAPAN953.PDF>>.

are strikingly clean, safe, orderly and quiet. Escapes are rare, and the rate of assault by prisoners on fellow inmates or prison staff is also low. Japan uses draconian tactics to maintain order throughout correctional facilities. The Minister of Justice passes down Standing Orders for all prisons to follow.<sup>52</sup> Prison administrators then proceed to regulate all aspects of prisoners' lives based on Orders and law. Prisoners have no room for personal choices in such a system because the rules are very detailed. The rules are strictly enforced with no exception. Any departure from the rules leads to punishment. The rules are also vague regarding punishment, and it leaves correctional officers and administrators with discretion to implement any type of punishment they deem fit.<sup>53</sup>

Solitary confinement in Japan is the most commonly used form of punishment and is strictly enforced without any contact with the outside world.<sup>54</sup> Solitary confinement as punishment entails no reading, no exercises, use of the toilet is restricted to specified times throughout the day, and prisoners are required to sit motionless throughout the day.<sup>55</sup> An inmate is placed in confinement for up to two months at a time. Correctional officers arbitrarily apply solitary confinement for any form of misbehaviour by an inmate, which has led to many outcries of human rights abuses in Japanese prisons. For instance, a chat with another prisoner while working leads to twenty days in solitary-cell; staring at a prison officer leads to ten days in solitary; and a bad word against an officer who warns an inmate of poor job performance leads to thirty days in solitary.<sup>56</sup> The result of these draconian practices has led Japanese prisons to be more controlled than those of any other democratic countries. Not surprisingly, they fall short in adhering to international standards or the Mandela Rules as it relates to the application of solitary confinement.

## Conclusion

The Nelson Mandela Rules likely applies to all the jurisdictions considered and sets international standards that protect prisoner human rights and prevent prisoners from being tortured under solitary confinement. Canada, the United Kingdom, New Zealand, France, Germany and Japan have legal frameworks that govern the use of solitary confinement. The United States and Australia lack such legal frameworks. Germany rarely applies solitary confinement. Canada, the United Kingdom, New Zealand, and France legislative frameworks attempt to adhere to the Mandela Rules. The legal frameworks attempt to safeguard the abuse of solitary confinement. However, these countries' prison administrations require careful oversight of prison officers to implement the rules and laws, in order to reduce the abuse of solitary confinement in their penitentiaries. The success of these jurisdictions in following the rules and regulations and adhering to the international standards vary.

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<sup>52</sup> *Ibid* at 15.

<sup>53</sup> *Ibid* at 16.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*.

<sup>56</sup> Bunji Sawanobori, "Reforming Administration of Prisons in Japan: Human Rights and Japanese Prison Law" (2006), 69 Sask L Rev 143 – 158 at para 19.



The German goal of rehabilitation ensures the humane treatment of prisoners and the rights of prisoners to dignity and decency. Germany considers jail terms and the absence of liberty for prisoners as punishment and does not seek to punish inmates further while in prison. On the other hand, the prison administration in Japan aims to punish inmates during their jail term. Additionally, prison regulations in Japan are not made public, and it gives correctional officers ample discretion to punish inmates for breach of rules. Japanese prison rules cover all aspects of a prisoner's life; common human expectations such as communication with one's cellmate's breach rules and can result in an inmate being subjected to days in solitary confinement. Thus, although the prison administration systems in both Germany and Japan are efficient, the approach as to how inmates are treated differ dramatically, with Germany rarely having to apply solitary confinement. Japan's approach enables prison administrators to abuse the use of solitary confinement and fail to meet the international standards by the Nelson Mandela Rules. Germany, however, meets the international standards by the Nelson Mandela Rules.

Canada, the United Kingdom, New Zealand and France prison administration should be commended for their efforts to adhere to the Mandela Rules. France, the UK, and Canada are slightly successful at limiting the application of segregation in their prisons than New Zealand. Canada did not regulate the use of administrative segregation as disciplinary segregation; thus, correctional officers had a broader discretion as to the use of administrative segregation and made it open to abuse. However, with the recent implementation of new laws in Canada, time is required to judge its success in limiting the use of segregation. The new legislation has some shortcomings. The new provisions do not ban SIUs for juveniles, pregnant women and the mentally ill. The new provisions also lack hard caps for the days' inmates spend in SIUs. These shortcomings make one question if the new provision would continue to resemble and replicates the inefficiency of administrative segregation. Also, Canada, the UK, New Zealand, and France legislative frameworks illustrate that they are making real efforts to adhere to the standards of the Mandela Rules. However, the heavy reliance of New Zealand prison officers on seclusion shows that correctional officers do not carefully adhere to the rules. Therefore, this may suggest that the penitentiaries require more trained correctional officers to vigorously watched over inmates and apply the legislative frameworks to reduce the use of solitary confinement.

The United States and Australia can do better to prevent the abuse of inmates in solitary confinement. Both countries have rampant abuse of solitary confinement in their prisons. The reason may relate to a lack of a legislative framework that governs prison administrations or a lack of concern and empathy for inmates' dignity. It may also be related to overcrowding in prisons. The United States is heavily reliant on supermax prisons, which consistently place prisoners in solitary cells. Due to the lack of rules and laws, correctional officers in both countries have the discretion to impose solitary confinement on inmates without consequences. The United States is on a path of improving the standard for prisoner rights and the limitation of segregation due to the progressive guiding policies adopted in 2015 by President Obama. The Australia government may benefit from the example of the United States in terms of learning to make concerted efforts to improve the prison standard for inmates. These countries have the financial means to improve conditions for inmates and reduce solitary confinement in their jails. Nonetheless, the verdict



remains inconclusive for the United States and Australia, regarding their efforts to adhere to international standards.

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