

International Migration and Human Rights

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(Forthcoming in Chris Brown and Robyn Eckersley eds. *Oxford Handbook of International Political Theory*. Oxford: Oxford University Press)

Liberalism, as a normative ideal, takes persons to be free and equal. Moral cosmopolitanism, also as a normative ideal, takes all persons, independent of citizenship, to be the ultimate units of moral concern. Once we bring these two ideals together, and apply them to the world in which we live, the fact that individuals cannot generally cross international borders and settle in the country of their choice becomes particularly troublesome. After all, a commitment to freedom for all sits uneasily with our practice of closed borders, while a commitment to equality for all sits uneasily with the fact that socio-economic opportunities are unevenly distributed around the globe.

Such tension between widely held moral commitments and the world as we find it, has led many scholars to question the moral right of the state to exclude immigrants as it sees fit (Carens, 1987; Cole, 2000; Oberman, 2013). Their main strategy has been to stress the value of personal autonomy and the importance of being able to migrate in order to meet one's basic needs or pursue projects and relationships that can be best or only pursued outside one's country of citizenship. The legal-institutional outcome of this view is that international borders should be fairly open, with restrictions on entry only justified if the arrival of immigrants would lead to social chaos and the breakdown of public order.

Not everyone agrees. Partly as a response to calls for open borders, a number of scholars have also defended the state's right to control its borders. This position has been justified primarily by appeals to the state's right to self-determination, grounded on more basic rights such as freedom of association (Wellman, 2008), collective ownership of public institutions (Pevnick, 2011) or socio-political autonomy (Miller,

2005). The core claim of this position is that some basic interest of the citizenry generally trumps the interest that prospective immigrants have in enjoying a greater degree of autonomy in their personal lives.

In this chapter, I approach the ethics of immigration from a different angle. I start with the assumption that liberal states have a right to control their borders (I take no stance on whether illiberal states also have this right) but explore what would be required of them were they to implement migration arrangements that conform with liberal-cosmopolitan principles. In particular, I argue that the obligations states have range from feasibility-insensitive (to be referred to as states' 'strong' duties of migration) to feasibility-sensitive. Moreover, I show that such duties can have as their content both inclusion and exclusion, and can be grounded on the requirements of liberal justice, mere capacity to assist as well as past or foreseeable contribution to harm. The account therefore aims to realize both theoretical and practical goals. The theoretical goal is to offer an account on the ethics of immigration that does not advocate for open borders, but is still compatible with liberal-cosmopolitanism. The practical goal is to map out a range of migration-related actions that states must perform under more and less ideal conditions.

The chapter is structured in three sections. In §I, I briefly explain what is wrong with the current international trends in migration. In §II, I discuss the strong duties states have with regards to their humanitarian, family reunification, and skilled-migration intake. In §III, I discuss the motivational and institutional constraints that currently prevent states from discharging their 'strong' migration duties, and propose one reasonably feasible strategy that can increase the likelihood that such duties might be discharged in the future.

I.

I started this discussion by briefly highlighting the tension between our normative ideals and the right of liberal states to exclude. But a less explored tension is that between our normative ideals and the specific ways liberal states *exercise* their right to exclude (once it is granted or assumed that they do in fact have such right).ⁱ This theoretical neglect has had important practical implications: it has kept most of the

debate on the ethics of immigration at a very abstract level, with proponents and critics of the right to exclude unable to offer existing states much guidance as to how to improve their migration arrangements. In what follows, I show that a shift in focus from whether there is a right to exclude to how this right should be exercised enables us to criticize states for implementation migration arrangements that both harm and fail to protect vulnerable persons without appealing to controversial normative and empirical claims about the desirability and feasibility of a world of open borders.

To see how current migration arrangements negatively affect the most vulnerable members of the human community, consider that in 2013 it was estimated that there were more than 232 million international immigrants, roughly 3,2 per cent of the global population (United Nations, 2013). From all the movers, only 16.7 million were refugees, and even less of them (556,000 or around 3,3 per cent) managed to seek asylum in the affluent countries of the OECD, the Organization for Economic Co-operation and Development (IOM, 2014; OECD, 2014). Such low numbers of successful migration by refugees is partly a result of liberal states' employment of carrier sanctions, visa requirements and tight border control, justified by appeals to the necessity of curbing unauthorized migration, but which have as a perverse (and no doubt intentional) effect the creation of significant hurdles for those who must migrate in order to seek assistance in the form of asylum (Betts, 2010). At the same time, however, liberal states have kept their borders quite open for those who possess desirable skills and a capacity for taxpaying. In 2011, the numbers of skilled-immigrants arriving in the OECD reached 27 million (UN, 2013b).

It is therefore no exaggeration to claim that there is an international race on the part of liberal states to attract the skilled and repel the needy, which becomes even more problematic once we recognize that the departure of skilled individuals from developing nations can have quite negative effects in the capacity of vulnerable populations to access essential services, such as health care and education—a phenomenon known in the literature as brain-drain.

But apart from not giving priority to those with the strongest need to immigrate, liberal states have also departed from liberal-cosmopolitanism by developing categories of inclusion that are problematically under-inclusive. First, the 1951 Convention Relating to the Status of Refugees (henceforth: Refugee

Convention) privileges the claims of those who suffer political persecution in the hands of their governments (or groups supported by their government) over the claims of those who are rendered vulnerable as a result of the inaction of their government. For instance, mere membership in a failed state does not qualify one for asylum even though it is extremely hard to secure one's fundamental human rights in states virtually devoid of the rule of law and other essential public institutions. Second, liberal states privilege the claims of spouses and family members, even though citizens might have a compelling interest in associating with an intimate they do not enjoy a formal relationship with.

In the next sections, I show that these migration trends do not do justice to the basic interests of the most vulnerable to cross international borders and of all citizens to associate with those they share a special relationship with. I also show that the way states exercise their right to include ignores the urgent interests of citizens in developing countries not to be harmed unduly by the negative effects associated with certain kinds of brain drain. This leads me to argue that states must endorse two stringent moral responsibilities in the area of immigration: a duty to include and a duty to exclude, so that the basic interests currently neglected in migration arrangements are better protected.

II.

In order to see which migration arrangements are morally desirable, we must first idealize the context under which states design and implement their migration arrangements. Let us therefore imagine a world where they are sufficiently motivated to bring their migration arrangements in line with what morality requires. Let us also imagine that they have the right sort of institutional apparatus to implement policies and programs that are geared towards the protection and promotion of fundamental human rights at the international level. In practice, this means that states will protect vulnerable persons from human rights violations by third parties, as well as refrain from contributing to any causal chain that foreseeable leads to human rights deficits abroad.

Now, the point about imagining such a world—and thereby partly engaging in so-called ideal theorizing—is not to deny that there are significant motivational and institutional constraints that prevent states from acting rightly within the domain of migration. Rather, the aim here is simply to isolate the morally relevant features of international migration by assuming away the fact that states are neither typically motivated to act on their moral obligations, nor typically capable of mobilizing their domestic and international institutions for the successful and widespread protection and promotion of fundamental human rights. Indeed, once we put aside feasibility concerns about moral action at the international level, we are in a better position to focus on the core human interests at stake, and well-placed to answer the following question: *in a world where states act legitimately when they retain some control over their immigration arrangements, which moral claims are sufficiently weighty so as to impose limits on the right of states to include and exclude?* In what follows, I argue that there are two classes of persons who impose limits on the right to exclude: refugees, broadly conceived, and intimates, broadly conceived. I also argue that the claims of vulnerable populations not to be harmed by some forms of brain drain impose moral limits on the right of states to include. Let me take each in turn.

Refugees

According to the Refugee Convention, refugees are persons who are living outside their country of citizenship or residence, who have a well-founded fear of suffering persecution at the hands of their government (or groups supported by their government) because of their race, religion, nationality, membership of a particular social group or political opinion (Art. 1A). The Convention thereby answers the conceptual question of who is a refugee by reference to one specific source of vulnerability: political persecution. However, given that much human displacement is a direct result of state failure, civil conflict, extreme poverty, environmental degradation and some of the negative effects associated with climate change, it becomes paramount for liberal states to acknowledge that there are different sources of vulnerability that push persons outside their country of citizenship (Betts, 2013).

Indeed, most scholars writing on the ethics of asylum have defended more inclusive definitions of who should count as a refugee. In a very influential 1985 article, Andrew E. Shacknove, already argued that refugees should be seen as “persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible” (1985: 277). Most recently, political theorists have followed suit and have re-defined the refugee as someone who cannot secure her most fundamental human rights without migration. David Miller, for instance, argues that the “justice claim of a refugee stems from the fact that his human rights are currently under threat,” (2015: 395) while Matthew Gibney defines the refugee as someone “who requires the substitute protection of a new state because their fundamental human rights cannot or will not be protected by their state of membership or usual residence” (2015: 452-453).

As becomes clear, scholars have focused on the following considerations when developing a more inclusive criterion for asylum: i. some persons cannot reliably count on their own state of citizenship for the protection or promotion of their fundamental human rights, ii. such human right deficits create a stringent duty of assistance on capable members of the international community, and iii. at times, states can only discharge their duty of assistance by way of inclusion. Taken together, these considerations give us a more inclusive definition of asylum as well as the broad content of the moral obligation that goes along with it. It also justifies the negotiation and ratification of a new Convention, one that does not focus on political persecution, but rather on the fact that some persons can only secure their fundamental human rights by becoming members of another political community (Ferracioli, 2014).

At this juncture two further questions arise with regards to the grounds and content of the duty of inclusion that correlates with the right to asylum: what is inclusion grounded on, and how long must it last for?

Recall that I started the discussion by assuming that states had a right to control their borders but that they were also willing and capable of bringing morality to bear on the design and implementation of migration arrangements. Moreover, I assumed that in such a world, states would be in the business of effectively promoting and protecting fundamental human rights abroad. Such idealizing assumptions were

not meant to convey that the background conditions of the international system would be just. On the contrary, I have assumed that the core aspects of international relations would remain the same. The only idealization here is that liberal states would be disposed and capable of discharging their moral obligations, and so in the business of securing fundamental human rights abroad.

If these assumptions hold, then inclusion will often be grounded on states' capacity to assist at moderate cost to their citizens. However, there would still be times when states would play a causal role in refugee flows by, for instance, engaging in humanitarian intervention, war or because of past contributing to climate change (Souter, 2014). In those instances, inclusion would be grounded on past contribution to harm, which would mean that states would be required to bear even higher costs—that is, include even more people—than if they were simply including refugees as a result of their capacity to assist at moderate costs to the citizenry.

Finally, let me add that under more ideal conditions, states would always include refugees on a permanent basis. This is because permanent inclusion is the most reliable way of ensuring that refugees have the resources they need to pursue the sorts of projects and relationships that give meaning to their lives. Indeed, when states only provide sanctuary until the situation in the refugee's country of origin has improved, she necessarily lacks knowledge of the site of her overall life plans, and so is not in an adequate epistemic position to pursue important life plans that require long-term planning. Because it is quite difficult to make decisions with regards to career, family and education without knowing where one's life will actually take place, there is a strong case for permanent migration under more ideal conditions (Ferracioli, 2014).

Before we discuss the next class of persons who impose moral limits on the right of states to exclude, let me respond to the concern that there are good expressive and practical reasons for tying asylum to political persecution since it allows liberal states to adequately respond to human rights deficits that arise in poor yet decent states—the so-called burdened societies (Rawls, 1999). The concern here is that when it comes to discharging their duties of assistance to citizens of burdened societies, liberal states can make use of foreign aid rather than asylum, and so can simultaneously communicate that burdened societies *are* able to secure the basic

interests of their citizens. As Matthew Price puts it, “citizens of burdened societies lack protection of their basic rights, but they retain their standing as members. The appropriate stance of outsiders to burdened societies is to lend assistance, not to condemn their failings” (2000: 73). Matthew Lister makes a related point by arguing that instead of expanding the definition of who counts as a refugee, the international community can and should instead adopt a broader reading of the current Refugee Convention (2013).

I certainly agree that liberal states can typically promote and protect the human rights of non-members without making use of migration and nothing I said above suggests otherwise. But we should not go as far as to assume that expanding the definition of refugeehood is not necessary to protect all those in need of protection. After all, there are all sorts of human rights violations that are not caused by political persecution but that cannot be adequately addressed without migration (Betts, 2013; Ferracioli, 2014). Moreover, while I certainly agree with Lister that employing a more generous reading of the current Refugee Convention is an appropriate response under non-ideal conditions, it still fails to secure the right of asylum in a robust way. As it stands, persons whose migration claims are not explicitly acknowledged by the Convention are at the mercy of judges and bureaucrats in a way that is not true of those who suffer political persecution (Ferracioli, 2014). This, however, must change if states are ever to protect all persons who cannot enjoy their fundamental human rights without migration.

Intimates

In the previous section, I have endorsed the position that liberal states have a duty to include persons who cannot protect her fundamental human rights without migration, if states can do so at moderate costs to their citizen (or at higher costs when states have contributed to their predicament). A second group that impose limits on the right of liberal states to exclude is what I will refer to as intimates. These are persons who are in an intimate relationship with a citizen of a liberal state, such as a parent, child, spouse, relative and friend.

To begin with, let me grant that liberal states already acknowledge that there are some kinds of relationships that trigger duties of inclusion. Indeed, liberal states typically accept that citizens should be able to invite their parents, children and spouse to join them as new members of the political community. Moreover, most political theorists writing on the ethics of immigration see such programs as legitimately grounded on the right to freedom of association of citizens, a fundamental canon of liberal justice (Lister, 2010; Wellman & Cole, 2011; Blake, 2013). Notwithstanding such theoretical agreements, current family migration schemes fall short of giving equal consideration to the interests of all citizens in a liberal state since they fail to pick out other human relationships that can be equally meaningful and central to people's lives (Ferracioli, forthcoming).

Consider friendships. There is no denying that, like many spouses and family members, many close friends care for each other deeply and see each other as irreplaceable. There is also no denying that, like spousal and familial relationships, friendships are deemed to be objectively valuable by citizens who affirm quite different conceptions of the good. So if we think that spouses and family members have a right to reside in the same territory due to the value of their relationship to themselves and to society at large, then we must think the same of close friends.

But if it is true that non-formal special relationships could in principle be as valuable for citizens as the relationships currently acknowledged by family migration schemes, how do we set them apart from other relationships that do not intuitively give rise to claims for inclusion, (like the relationship one might have with a neighbour or co-worker)? In other work, I have argued that the following conditions are true of valuable *tokens* of romantic and familial relationships: i. those who partake in the relationship find them quite valuable and so have an interest in enjoying relationship goods that are territorially located (i.e, living together, setting up a band, help each other with care obligations, and so and so forth), ii. those who partake in the relationship see the relationship as irreplaceable due to its historic-relational properties (that is to say, much of the value of the relationship springs from its shared history), iii. the relationship type is deemed valuable by society at large and so the imposition of immigration costs on the citizenry can be justified (Ferracioli, forthcoming).

If I am right that the conditions above give rise to a migration claim on the part of citizens, irrespective of whether or not there is a legal bond that they can appeal to (i.e., birth, adoption and marriage certificates), then a surprising result is that not all spouses and family members would have a legitimate claim for inclusion. This would be true, for instance, of spouses who are still legally married but no longer romantically involved, or of estranged sibling. On the other hand, other intimates whose relationships are not legally sanctioned by the state could meet all of the conditions above, and so would have a strong claim to enjoy relationship goods that are territorially located.

At this stage, a few concerns may arise. For one, it might be thought that unlike familial and romantic relationships, other kinds of special relationships can be easily pursued or enjoyed without persons actually finding themselves in the same territory. Another concern is that states are not in a position of looking “into the hearts of citizens” and so must instead pick out relationship *types* by employing the blunter tools of marriage, adoption and birth certificates (Lister, forthcoming).

In response to the first concern, there is in fact nothing that the liberal states can appeal to in order to justify the under-inclusion of family migration schemes without violating state neutrality. For appealing to any feature X traditionally connected to romantic or familial relationships (i.e., sex, procreative-parenting, biological connection, financial dependency, etc.), the liberal states will inevitably communicate that certain kinds of romantic and familial relationships are more valuable than others. This would grate against the basic requirement that the liberal state must remain sufficiently neutral among competing conceptions of the good (Ferracioli, forthcoming).

In response to the second concern, I would grant that the liberal state must, at times, make use of more objective criteria that might imperfectly track the morally relevant features in a particular case. However, in the case of family migration schemes, there are in fact feasible and permissible strategies that would allow bureaucrats to assess the existence of a special relationship without recourse to the blunter tools of legal certificates. What I have in mind are personal correspondence, interviews, testimony, photos, and any other evidence that can be gathered *with the explicit consent* of those making a migration claim. The important point here is that

any consented loss of privacy that would arise under more inclusive family migration schemes can be justified by the fact that they would be superior to current schemes in recognizing that an array of relationships give meaning to people's lives.

Vulnerable Populations

In the previous sections, we have examined the moral claims that limit the scope of the right of liberal states to exclude. In this section, we look at how the harmful effects of certain kinds of skill-based migration impose limits on the scope of the right to include. The idea here is that there will be persons who should be excluded if liberal states are to bring morality to fully bear on their migration arrangements.

To begin with, let me grant that much of skill-based migration referred to as brain drain is not problematic, all things considered. Often, the negative effects associated with the departure of skilled-immigrants are adequately compensated for, or outweighed by counter-veiling benefits typically associated with migration (i.e., lower unemployment rates, remittances, savings and knowledge transferal). However, at times, the departure of skilled-immigrants directly contributes to a state of affairs where vulnerable populations in developing countries find themselves unable to enjoy the protection and promotion of their fundamental human rights (Brock, 2009). This is because some professional skills are not only necessary for the provision of essential services such as health care and education, but also non-substitutable for other skills and resources and non-shareable across borders (Ferracioli, 2015).

In light of the distinction between skilled-based migration that contributes to human rights deficits (henceforth: harmful brain drain) and skilled-based migration that is either unproblematic or, all things considered, beneficial, we can now see why skill-based migration can, at times, impose moral limits on the scope of the right to include. After all, there are times where the emigration of high numbers of skilled-workers contributes to human rights deficits that cannot be adequately compensated for or mitigated by the benefits associated with skilled-based migration, no matter how great. Such scenario arises when educators, doctors and nurses departure from countries where the ratio of worker per population is already below or at the exact threshold required for the adequate provision of essential services.ii

So what follows from the fact that skill-based migration can, at times, make it harder for vulnerable persons to enjoy access to their fundamental human rights? Given that states should not contribute to (i.e., initiate, sustain or enable) any causal chain or process that will foreseeable lead to human deprivation at the international level, they should not include immigrants coming from countries where their skills are necessary for the provision of essential services.

More specifically, liberal states must exclude prospective immigrants when the following two conditions are met: (i) it is foreseen (or should be foreseen) that skill-based migration will bring about or exacerbate harm in the form of human rights deficits (when the ratios of professionals to the overall population are such that migration will render vulnerable populations less able to access an adequate level of essential services) and; (ii) when there are decently paid jobs that are sufficiently attractive to prospective skilled-immigrants so that they can adequately employ their professional skills if they do not emigrate.ⁱⁱⁱ

Let me now respond to a couple of objections. First, it could be argued that liberal states lack legitimacy to impose justice abroad and so should not expect skilled-immigrants to address human rights deficits in their countries of origin when liberal states themselves lack a sound record of acting effectively to secure the human rights of vulnerable populations. Second, it could be argued that liberal states lack the necessary knowledge to avoid enabling harmful brain drain and so cannot have a duty to exclude prospective immigrants when the above conditions are met. Let me take each in turn.

In an influential discussion of immigration restriction on brain drain grounds, Kieran Oberman has argued that whether or not affluent states have the right to exclude prospective skilled-immigrants in order to protect vulnerable populations depends on whether they have the legitimacy to impose justice abroad. As he puts it, “when rich states fail to fulfill their own duties towards the global poor, but nevertheless enforce the duties of skilled workers, they exhibit toward the skilled workers a form of disrespect: they are forcing others to act in a way that they are not prepared to act themselves” (2013: 449).

However, if my view is correct, Oberman’s way of stating the responsibility of recipient states misrepresents the morally salient features of the case. As I see it,

liberal states should exclude prospective immigrants on brain drain grounds not because they are trying to impose justice abroad, but because they have a moral responsibility not to contribute to a causal chain that foreseeably contributes to human rights deficits among vulnerable populations in the developing world (Barry & Øverland 2012). Oberman's legitimacy condition leads to the implausible result that states must assist vulnerable populations before they are morally entitled to refrain from harming them. (I take it that it would be equally implausible to claim that individuals must donate to charity before they are morally entitled to buy fair trade products).

As for the question of knowledge, there is sufficient evidence available for liberal states with regard to the consequences of conferring the benefit of immigration to skilled-workers on a large-scale when they bring with them skills that are urgently needed and could be effectively utilized in their countries of origin. It is therefore hard to deny that states know or at least should know that by ignoring inadequate ratios of worker per population in the developing world, they enable and therefore contribute to harm in those countries.

III.

In the previous section, I have argued that liberal states have strong duties of inclusion and exclusion. However, I have also granted that states are motivated primarily by prudential reasons when it comes to the design and implementation of their migration arrangements.

But why is it that states lack the motivation to ensure that their migration arrangements comply with the demands of liberal-cosmopolitanism? One plausible source of motivation is the state's commitment to the emerging international human rights regime. Here states differ on their level of commitment, but there are good reasons for thinking that human rights practice is becoming stronger and to remain optimistic that human rights discourse will be even more likely to motivate moral action by states in the future (Risse, Ropp & Sikkink, 1999). Another source of motivation within a certain domain is the existence and strength of the international institutional framework under which states operate (Finnemore, 1996).

In light of the fact that international arrangements can positively affect the level of motivation on the part of states when it comes to discharging their prior moral obligations, I believe that states have a stringent duty to create a new UN agency for migration so that they are more likely to discharge their strong duties of migration in the future. Indeed, a new, well-funded migration agency would play important expressive and practical roles.

With regards to its expressive role, such an agency would communicate to the international community that although states have a right to exclude, the exercise of that right is constrained by a number of stringent moral obligations (in the same way that the World Health Organization (WHO) enables the international community to communicate that although member-states are free to implement their own health care programs, some health concerns are global in scope and demand joint international action).

As for its practical role, this new agency could facilitate compliance with the duty to exclude by giving states clear guidance about the citizenship and skills of workers who should not be included until there is an adequate ratio of worker per population in their country of origin. Most importantly, this agency could encourage states to align their response to refugees with the broader human rights regime, by urging states to adopt a human-rights based interpretation of the current convention (at least, until there is sufficient political support for the ratification of a more inclusive one). And of course, such an agency would be well equipped to facilitate burden-sharing of refugees by states, as well as create the condition for a refugee trading scheme if states could show that such a scheme is both morally permissible and likely to be effective in significantly increasing the numbers of persons in receipt of protection.

I now want to conclude this section by showing that the creation of this agency is not only desirable, but also reasonably feasible. This is because there are already two international organisations that partly foster international cooperation in the domain of migration: the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM). While these agencies already enable some degree of international cooperation in migration, there are shortcomings in relying on them as they currently function.

The problem with the UNHCR is its scope. Its mandate has always been temporary (although recurring refugee flows have meant that the agency's mandate continues to be extended), and its focus is not on migration per se but on refugees as determined by the Refugee Convention. The problem with the IOM relates to its legal status, rather than the scope of its work. This intergovernmental organisation (which is not part of the United Nations system) is involved in a wide range of issues related to the global management of migration, but it lacks a legal mandate to enable proper collective action by states. This means that the agency's focus is limited to service provision, research and policy advice.

Given that we already have two well-structured, truly international agencies that either possesses some of the expertise needed for cooperation or the legitimacy to protect the vulnerable, the international community should merge the two organisations into a proper, well-funded UN agency. This agency could be labelled United Nations Organization for Migration (UNOM), entrusted with the appropriate legal mandate and institutional apparatus to ensure that the right of liberal states to pursue their own migration arrangements is properly constrained by their moral duties of inclusion and exclusion.

ⁱ Pevnivk, 2011; Carens, 2013 are exceptions.

ⁱⁱ For instance, the emigration of two thirds of South-African physicians has exacerbated the South-African HIV and the tuberculosis epidemics. See Chopra, et al., 2009. See also El-Khawas, 2004.

ⁱⁱⁱ Similar conditions are defended in Ferracioli, 2015. Let me grant that there may be genuine uncertainty in some domestic contexts, and that it will be appropriate for states to continue including workers until it becomes clear that they are indeed enabling harmful brain drain.

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