

That can't be right, can it?

Karl, Raimund

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## Debate

### That can't be right, can it?

#### Commercial foreign metal detecting tourism (not only) in England and Wales

Raimund Karl, Bangor University ([r.karl@bangor.ac.uk](mailto:r.karl@bangor.ac.uk))

A few weeks ago, news made the round in archaeological circles (in Britain and abroad) that a commercial provider ([MDH 2017](#)) had begun organising foreign metal detecting tourism in England and Wales (e.g. [HeritageDaily 2019](#)). In fact – perhaps quite shockingly for many an archaeologist – the core facts of the story are true: the provider offers, on its website, a 12-day package, including '10 days digging in prime locations', for £1,499 per person, or a long weekend or one-day 'tour' for £195 per person; transport to the UK not included ([MDH 2017](#)). Not just that: it also promises that 'Export Licenses' will be arranged for detecting tourists 'for finds over 50 years old'; that they will gain 'access to more than 200 historic fields covering over a thousand acres'; and that they offer an 'excellent track record of finds', as evident on their [gallery](#) and [Facebook page](#) ([MDH 2017](#)). Both from the fact that (when I checked on 11/2/2019) their Facebook page has 930 likes and is followed by 963 accounts, and from the 'Testimonials' on their website ([MDH 2017](#)), it is evident that there is at least some interest in their business, and that at least some metal detectorists have already holidayed with them.

Thanks to Facebook and other social media, the news about this business broken by HeritageDaily ([2019](#)) spread quickly in January 2019; and caused quite some consternation among many archaeologists, especially outside the UK. Most reactions from within the profession expressed shock and disbelief: "That can't be right, can it?", "How can that even be legal?", "Why do archaeologists in the UK even allow this?", "This must immediately be stopped!". That was the general tone of archaeologists' reactions, at least as far as I could see on those social media that I am on. Given those reactions, and since Roderick Salisbury twisted my arm to do so, I would like to offer some information and a few thoughts on the issue of commercial foreign metal detecting tourism, mainly, but not only, in England and Wales.

#### Is that even legal?

Let's start with the perhaps most pressing question on the mind of many archaeologists abroad: is that even legal? The simple answer to this question is – not having checked every single one of the activities of this provider – in principle, yes, it is legal.

For those who are not fully aware of the law where metal detecting in England and Wales is concerned: metal detecting is legal on most land in England and Wales, as long as the metal detectorist has permission by the landowner. Consent by any public (heritage management) authority is normally only required on specifically protected land, like *scheduled ancient monuments* (for England, under section 42, [AMAA 1979](#); for Wales, under section 17, [Historic Environment \(Wales\) Act 2016](#)), or comparable places (protected in other law). As such, as long as the provider of these 'detecting holidays' has access to sufficient amounts of their own land, or landowner permits

for land owned by others, and that land is not scheduled, letting anyone detect on that land is entirely legal.

Of course, it also, at least again in principle, is entirely legal to organise holidays for third parties as a business, whatever legal activity these people may want to undertake during their holidays. Thus, assuming the provider complies with all laws applying to the organising of holidays for third parties, pays any taxes due on their business activities, and does not encourage any of their customers to break applicable English and/or Welsh law, organising any such holidays on a commercial basis is also entirely legal.

Archaeologists in England and Wales, whatever they may think of these facts, can do very little about it, let alone prohibit this from happening. The only way for archaeologists who do not approve of this is to try to get Parliament (or in case of Wales, the Welsh Assembly) to change the law. Having been involved to some extent in the creation of the [Historic Environment \(Wales\) Act 2016](#), there is very little chance of success for any attempts at changing the law in a way that would prohibit this activity.

### **At least that can't happen in my country! ...(?)**

At this point, many an archaeologist, being shocked by how 'bad' English and Welsh law is regarding metal detecting, may be happy that, at least in their country, that would never, ever, be possible. If they are reasonably lucky, that might even be true. However, in many more countries than we believe, it might be at least partially, if not completely, false.

Just to illustrate that point, let's have a quick look at two countries who are believed to be part of the much more restrictive 'continental European tradition' of regulating metal detecting, Germany and Austria. In most of the 16 German states – each of which has their own heritage law, even though most of them are reasonably similar to each other – although the exact same business model would not be possible, an almost identical one would be.

In Bavaria, in fact, exactly the same business model would be possible, since Bavarian Monuments Protection Law ([BayDSchG](#)) only prohibits, in its Article 8 (1), excavations with the *intent*<sup>1</sup> to discover or the reasonable expectation that archaeological monuments ('*Bodendenkmäler*') will be discovered, without a permit from the Bavarian state heritage agency. Just a few days ago, it was determined in a court case that '*mass finds*', like gun cartridges, coins (including Roman ones), belt clasps, cloak pins, etc., are not '*Bodendenkmäler*' according to the legal definition of this term in Art. 1 BayDSchG (VG München, 30.1.2019, M 9 K 17.5432). Thus, metal detecting for extracting artefacts from the ground is effectively prohibited only on known and suspected monuments listed in the Bavarian monuments list; which contains c. 49,000 entries, covering c. 1.4% of the Bavarian landmass (pers. comm. M. Ullrich, BayLfD, 5/4/2018). Detecting holidays much like those offered in England and Wales ([MDH 2017](#)) could thus be offered in Bavaria, as long as the detecting did not happen on those c. 49,000 registered monuments and the provider had permission by the landowner.

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<sup>1</sup> n.b.: *intent*, as always in law, requires both the will to achieve a prohibited result and, at the very least, that any average person conducting the same action would have the reasonable expectation that the prohibited result will actually be achieved by that particular action (i.e., the acting person must at least act *negligently*). Thus, for *intent* in the legal sense to form, it must be predictable for the person conducting a particular activity with reasonable certainty that the prohibited result – the discovery of an archaeological monument without a state heritage agency permit – will actually be achieved by engaging in it. That can only be the case if there are already publicly known hints at the existence of monuments in the place where metal detecting takes place, which thus restricts the applicability of the law to, at the most, known archaeological sites (if all archaeological sites are considered to be protected monuments as per the legal definition of that term in the respective law).

In 14 German states (all others except Schleswig-Holstein), the business model could be used with only slight modifications. These 14 states, while prohibiting the *intentional* search for archaeological monuments with a metal detector (or other technical means) without a permit by the respective state's heritage agency (which would certainly not be issued to 'foreign detecting tourists'), freely allow metal detecting for any other reason except on known sites where the discovery of archaeological monuments is likely. Thus, a commercial provider could perhaps not promise '10 days digging in prime locations' ([MDH 2017](#)), but only 10 days of metal detecting anywhere where it is allowed because there is no reasonable expectation that monuments will be discovered. Nevertheless, it would entirely be possible to offer 'metal detecting championships' on fields where some 'first prize', 'second prize', etc. have been buried, and if these fields then happen to contain other unknown finds of actual archaeology, the archaeology there would of course also be dug up. And indeed, such 'championships' are being organised, as is evident from their open public Facebook group page ([DSM 2017](#)), which, incidentally, has had 2,618 members as of 11/2/2019.

In Austria, the situation in many ways is even worse than the one in England and Wales, despite the Austrian national heritage agency (BDA) having claimed for at least the last 3 decades that metal detecting is illegal and completely prohibited without a BDA permit. Because in fact, what is prohibited is, again, only the excavation or search with the *intent* to discover monuments ('*Denkmale*'), with the legal definition of what is a monument being even tighter than the one in Bavaria. As such, in Austria, there is currently only c. 1,100 scheduled archaeological monuments (out of c. 21,700 sites known to the BDA, pers. comm. B. Hebert, BDA, 22/5/2018) where metal detecting is certainly prohibited without a BDA permit. Even on the remaining c. 20,600 known archaeological sites in Austria, it is quite likely that metal detecting is freely permitted, provided the detectorist has landowner consent, given the rather narrow legal definition of the term monument in the Austrian Monuments Protection Law ([DMSG](#)). And everywhere else in the country, metal detecting is certainly freely permitted; making the same business model as eminently legally possible as it is in England and Wales ([DSM 2017](#)).

As these few examples should amply demonstrate, it is by no means only the 'liberal' English and Welsh legislation that make commercial metal detecting tourism possible. Even allegedly highly restrictive, or even allegedly prohibitive, legal regulations of metal detecting with the intent of discovering monuments allow for a similar, if not the very same, legal business model. While most archaeologists are fundamentally ideologically opposed to non-professional metal detecting, this does not mean that law can prohibit it.

I will return to the question of whether we can hope to significantly change our laws in ways that will fully prohibit non-professional metal detecting at the end of this paper, but before doing so, there is another question that ought to be considered:

#### **What kind of (foreign) metal detecting tourism is preferable?**

English and Welsh law, and indeed Austrian and most German laws, currently do not fully prohibit metal detecting, including metal detecting tourism, whether foreign or domestic and whether organised on a commercial basis or not. Thus, leaving aside that many an archaeologist doesn't want it to happen at all, the question still arises what kind of metal detecting tourism we would rather have, a commercially organised one like that offered in England and Wales ([DSM 2017](#)), or a less obviously organised, or purely individual, detecting tourism.

#### **'Self-organised' individual and 'mass' foreign metal detecting tourism**

It is an open secret, at least for anyone who has even only superficially looked into that matter, that both 'self-organised' individual and 'mass' metal detecting tourism is happening all the time. Whether it is individual metal detectorists taking their trusted detector with them on foreign holidays, or whole busloads of detectorists travelling for considerable distances to particularly

‘promising’ places they have heard of, at least some metal detectorists at least occasionally do detect in foreign countries.

The further away they travel from their home base to use their detector, the less they tend to know, or care about, the laws and regulations concerning detecting in these places, even if travelling alone. Most of the individual detecting tourists, from their own perspective, just want to have ‘a bit of harmless fun’ in their holidays, and since chances of being caught while engaging in it just a few times are virtually non-existent, they just go ahead with it. And since chances that one could be successfully prosecuted if doing this on a foreign holiday are even lower than getting caught, many think that they simply don’t need to care about the legal requirements in their holiday destination.

Pretty much the same applies to the self-organised ‘mass’ foreign detecting trips. At least in some places, whole coaches full of enthusiastic foreign ‘hobbyists’ will occasionally turn up at ‘promising’ sites, whether during daytime or at night. They swarm out and do what they do, ignoring not only the heritage law, but also the landowners and their rights, since their numbers provide them with added safety. And that’s even if they are not organised criminal gangs, who may come armed not just with detectors and spades, but with knives and baseball bats, if not guns.

Thus, neither individual foreign detecting tourists, nor busloads full of them, tend to comply with any laws or regulations regarding metal detecting in their ‘detecting tourism destination’.

That applies not only to any legal restrictions of or prohibitions against metal detecting – whether the sites they are targeting are specifically protected by scheduling or not – but equally to any other legal requirements which might have to be fulfilled if archaeology is discovered. For instance, both Austrian and all 16 German heritage laws include a compulsory finds reporting duty if portable antiquities (meeting certain legal criteria) are discovered, whether during fully legal or completely illegal detecting. These reporting duties are there, if for no other reasons, so that the archaeological authorities can learn of any as yet unknown sites which may merit protection. There also are various restrictions on the export of cultural property, including of finds of portable antiquities, in Austrian, German, and British law. These export restrictions are there, if for no other reasons, so that truly significant portable antiquities are not transported out of their country of origin.

Obviously, foreign metal detecting tourists, travelling individually or in self-organised groups, disregard these finds reporting duties and export restrictions as much as they disregard any existing restrictions of or prohibitions against metal detecting itself. Thus, no finds of significant artefacts are reported to the archaeological authorities, who therefore may miss out on learning of as yet unknown, but nonetheless significant, sites meriting protection; nor are these objects retained in their country of origins. Instead, in not inconsiderable numbers they ultimately end up on the black market.

This kind of detecting tourism almost certainly is illegal in one way or another, at least in most cases, even if it may happen to be fully legal under the locally applicable heritage laws. Such self-organised detecting tourists, after all, rarely know who owns the land they are detecting on, and have no way to find out. They consequently do not get their permission to dig and remove finds from the fields, and thus at least commit trespass. And obviously, they then take any finds they have made back home with them, breaking whatever applicable export restrictions, effectively smuggling their finds across any borders they cross. Therefore, in all likelihood, they commit at least some offences, if not outright crimes, even if they may not always be committing heritage crimes in the narrow legal sense of that term.

Thus, we archaeologists can quite rightly accuse them of acting illegally, at least recklessly, if not fully intentionally, breaking the law of the country in which they detect. But, to put it very bluntly, what good does that do us; and even more importantly, what good does that do the archaeology? The archaeology we are trying to protect is ripped out of the ground anyway, is not reported, and is smuggled out of the country and thus is lost. The law, as important as it is, only protects things on

paper. To actually protect anything, it is only the actions that are taken by those who ought to comply with laws that truly matter. Foreign detecting tourists in particular rarely comply with the law, because most of the time they simply don't know what the law is, and if they do know, they may not care. Or, as a detectorist I once met succinctly put it: "Yes, I know it's illegal. So what?"

### **Commercially organised 'mass' foreign metal detecting tourism in England and Wales**

In contrast, the 'detecting holiday package' offered on a commercial basis in England and Wales by the provider who made it into the news ([MDH 2017](#)) seems to be squeaky clean, at least where legal compliance with heritage and other relevant English and Welsh law is concerned.

Their 'package' includes detecting 'access to more than 200 historic fields covering over a thousand acres'; which may contain 'prime locations' for digging and have an 'excellent track record of finds' ([MDH 2017](#)). These over thousand acres of historic fields seem not to be scheduled or otherwise legally protected; and landowner consent seems to have been secured. That seems to be compliant with English and Welsh heritage law, and also not constitute trespass.

While only implied in the terms and conditions on their website, they also apparently ensure that any finds made which must be reported under the [Treasure Act 1996](#) are reported appropriately. They also state explicitly in their [terms and conditions](#) that finds made by tourists while detecting, 'if of greater importance', are 'taken into the local Finds Liaison Officer where experts will ID and record the item' after the end of their holiday, indicating compliance with the voluntary finds reporting system of the [Portable Antiquities Scheme](#) (PAS).

Also, their 'package' includes them arranging 'Export Licenses' for their customers 'for finds over 50 years old' ([MDH 2017](#)). Thus, they comply with [The Export of Objects of Cultural Interest \(Control\) Order 2003](#) and/or, if the artefacts in question are exported to a country outside the EU, [Council Regulation \(EC\) No 116/2009](#). Since [The Export of Objects of Cultural Interest \(Control\) Order 2003](#) makes it a requirement under its Schedule 1 to be granted an individual export license for legally exporting any archaeological find found in the ground and at least 50 years old, any finds to be exported will be assessed by an archaeological expert, usually the relevant curator at the British Museum, before they may leave the country.

Thus, as far as can be said, this commercial 'foreign detecting holidays' provider appears to not only be fully compliant with all relevant UK (and EU) legislation, but to also ensure that all of its customers fully comply with all relevant laws, whether they know or care about them or not. And nobody should be surprised they do, because as a commercial enterprise, they might be held liable if either they or their customers fail to comply with all applicable legislation. They have an immediate business interest in doing so, so they do. It is as simple as that.

So they cannot be faulted unless one is fundamentally ideologically opposed to non-professional metal detecting, or equally fundamentally ideologically opposed to anyone (but us) making money from the extraction of archaeology ex situ, even if conducted entirely within the confines of the law. Rather, they ensure compliance with all legal restrictions, prohibitions and duties put in place to protect archaeology from being extracted if its preservation is in the public interest (not just in the interest of us archaeologists, individually or collectively). Further, they ensure that it is legally extracted, is properly reported and not illegally exported from its country of origin, and do so much more effectively than any legislation prohibiting metal detecting with the intent to discover archaeology, or any administrative rules and regulations we may have come up with, which we neither can nor do police, for whatever reason.

Of course, we may be morally outraged about the fact that someone, anyone (other than us) dares to act within the confines of the law to earn a living from the extraction of archaeology ex situ, even if that is one of their fundamental human rights, guaranteed in Art. 23 (1 and 3) of the [Universal Declaration of Human Rights](#) (UN 1948). But if I am honest: for the archaeology, this way of organising foreign metal detecting tourism is certainly, at the very least, much better than the

alternative of self-organised individual or ‘mass’ metal detecting tourism; and arguably even better than how domestic metal detecting is organised.

Thus, however much we may dislike this as archaeologists, it is highly debateable whether it would in any imaginable way be preferable if the laws of England and Wales were changed in a way outlawing this way of ensuring legal compliance with heritage (and other applicable) law. Bluntly speaking, what we have here is a choice, if maybe an ugly one: do we want foreign metal detecting tourism to be commercially organised and compliant with the law; or do we want to prohibit it and have it anyway but without any legal compliance? If I had a vote in this, I know how I would choose. Not because I like it, but because it is the only sensible way; assuming that it is the protection of archaeology that we are concerned with, rather than enshrining our morals in ineffective law.

### **Could the law be changed to prohibit this?**

This leaves one final question to address: could the law imaginably be changed to actually prohibit this business model, whether such a change would be advisable or not? Sadly (or perhaps luckily, depending on your perspective), the answer is that this is extremely unlikely; for profound and almost insurmountable legal reasons.

Many archaeologists appear to mistakenly believe that national or state legislatures (that normally is, some kind of parliament which has jurisdiction) are entirely free in their choices of what to make into law. Yet in fact, in most countries, they are not: while legislatures usually have considerable political freedom to choose what they want to make law, in most (especially European) countries, they are by no means entirely free in their choices. Rather, even national, and even more so state legislatures, are themselves bound by, and thus restricted, by various barriers that derive from – most importantly – national constitutional law, supranational law (like EU laws and regulations), and, at least partly, international law (see e.g. Berka 1999, 140-172; Pieroth et al. 2015, 59-80). These ‘higher level’ laws must be respected, even by national legislatures, when creating ‘ordinary’ laws, secondary legislation, as well as by public administrations when creating administrative rules and regulations. In countries governed by the rule of law, that means that while many things can be made ordinary laws, many cannot. Anything which would directly or indirectly conflict with limitations derived from, e.g., the [UDHR](#),<sup>2</sup> cannot, or at least cannot easily, be made law.

Furthermore, while the aim parliament pursues with an ‘ordinary’ heritage law may well be to protect the archaeological (and/or other) heritage; the purpose of law – that is, the overall body of all laws, not just ‘ordinary’ laws to regulate particular specialised areas of life – is not. Rather, the overall purpose of the law is to balance the many variable and justified legal interests of all members of a society as fairly and equitably as possible. Thus, if different justified interests of different segments of the population come into conflict, parliament must try to balance them as evenly as possible, and to interfere with either’s groups interests as little, and proportionately, as possible. Respect for human dignity and rights, and every human’s right to be free to live life as one pleases, as unrestricted as possible by state interference, is the highest public good;<sup>3</sup> and thus much more in the public interest than ensuring archaeology is being protected from being dug up by anyone other than professional archaeologists.

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<sup>2</sup> Or its (legally binding) variant, the [International Covenant on Economic, Social and Cultural Rights](#) (UN 1966); the [European Convention on Human Rights](#) (CoE 1950); the [Charter of Fundamental Rights of the European Union](#) (EU 2000); national constitutional law like the Austrian [Staatsgrundgesetz](#) and the German [Grundgesetz](#); or the UK [Human Rights Act 1998](#).

<sup>3</sup> See e.g. for Germany, in Art. 1 [Grundgesetz](#); with the protection of Human dignity being the ‘supreme constitutional value’ (der ‘oberste Verfassungswert’) of the Federal Republic of Germany according to its Supreme Constitutional Court (BVerfGE 109, 279/311).

Whether we wish to accept this or not, there are quite a few rights in the higher-level laws referenced above that provide a justified interest in metal detecting. Whether it is the right to earn an income (Art. 23 (1 and 3) [UDHR](#)), to own (and do as they wish with their) property (Art. 17, [UDHR](#)), or the right to participate in the cultural life of the community (Art. 27 (1) [UDHR](#)), there are rights aplenty to fall back on. Indeed, even if the metal detecting is ‘only’ done as a hobby for leisure, even that is a protected right under Art. 24 ([UDHR](#)).

Thus, in the creation of heritage law, any legislature in any country governed by the rule of law must balance any interests we archaeologists (and a wider ‘public’) have in participating in the cultural life of the community in ways we prefer, and to share in scientific advancement and its benefits (Art. 27 (1) [UDHR](#)), against the justified legal interests of the metal detectorists. Where that balance lies, precisely, is up to the legislature to determine, but any restrictions of either side’s justified legal interests must at least be reasonably proportionate; and that makes it almost impossible to completely prohibit people from exercising their rights and satisfying their interests, so that we can get everything we want. And given the huge amounts of archaeology still in the ground,<sup>4</sup> and the fact that even under extremely optimistic estimates, we will ever only be able to professionally excavate a very small percentage of it before it is destroyed in situ,<sup>5</sup> this is a political argument we cannot win<sup>6</sup> (unless we blatantly lie).

That means that ultimately, by means of changing legislation, the most we could imaginably achieve is to shift the balance between the rights of foreign metal detecting tourists (or metal detectorists, whether foreign or domestic, more generally) a bit more in the direction we would like; but certainly not much. Believing that any such shift towards prohibiting the business model ([MDH 2017](#)) discussed in this paper could ever actually prohibit it fully, let alone be more beneficial to the preservation of archaeological data than the gains made through much greater – because business-enforced – compliance of foreign metal detecting tourists with the law, thus is folly.

### **Better than a kick in the teeth...**

Naturally, as archaeologists, we abhor the idea that anyone could make a profitable business out of foreign metal detecting tourism ([MDH 2017](#)). After all, it goes against two of our most dearly held disciplinary beliefs: that archaeology should ideally be preserved in situ, and be excavated only by professional archaeologists, and then only if absolutely necessary (Art. 3; [CoE 1992](#)); and that

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<sup>4</sup> Based on my recent best estimates: in Austria, one must assume at least c. 1 million archaeological sites; in Germany c. 4.5 million; and in England and Wales, c. 1.9 million (Karl forthc.). We therefore also must assume the existence in all these countries of at least a billion, if not tens of billions, of individual archaeological artefacts.

<sup>5</sup> Also based on my recent best estimates, at the most, professional archaeology will be able to professionally excavate hardly more than 5% ([Karl 2018](#), 28-32) of all that archaeology, and quite possibly actually even less than 1% (Karl forthc.), before it is destroyed in situ.

<sup>6</sup> If one combines the estimates mentioned in the previous two footnotes with the fact that most individual artefacts are, individually, of only very limited significance for gaining ‘important’ insights into the human past, any argument for completely annulling the human rights and civil liberties of metal detectorists becomes unsustainable. Most such artefacts, in fact, tell us little more about the past than that they existed and someone, at some time in the past, used and then lost or deposited them. It is difficult to sustain any argument that we need all archaeological finds, regardless of their individual (and in many cases, wider) significance, to be left untouched by anyone but professional archaeologists, if 95% or more of them will be lost completely. As either a political or legal argument for justifying the total abolition by law of many and significant human rights and civil liberties of a substantial number of people, a purely hypothetical argument about a possible future benefit that might be derived from any particular artefact if it happens to be professionally recovered before being destroyed in situ by mostly, if not entirely, uncontrollable other threats is a non-starter.

nobody should make any financial profit out of the extraction of archaeology ex situ (cf. rule 1.7; [CifA 2014](#), 4). And nobody says we have to like this business model; not at all.

However, for the protection of archaeology from wanton destruction by irresponsible foreign (and possibly even domestic) metal detectorists, this business model is definitely much better than self-organised foreign metal detecting tourism, as would happen anyway. Leaving aside that it appears to be not only completely legal, but actually legally squeaky clean, at least the plain business-sense of those who run it ([MDH 2017](#)) seems to ensure that archaeology which has been dug up legally is properly reported, and not smuggled out of the country illegally, but – if at all – only exported with a valid export license. While we may not like it, that's certainly better than if foreign metal detecting tourists simply come, whether individually or in busloads, rip stuff out of the ground, pocket it and smuggle it out of the country illegally, without anyone knowing. Thus, while it may well feel like one, it is still better than the actual kick in the teeth that its alternative is.

Whether we like it or not, other people – including metal detectorists – have rights, too, and we challenge them at our own peril if, instead of looking at the bigger picture, we go on a moral crusade that we can only lose. We can grind our teeth if we must; but the archaeology will most likely be better off if we, however grudgingly, accept this means of organising foreign metal detecting tourism, even if only as the – though at that, considerably – lesser of two evils.

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