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Francis A. Allen--The Gainesville Years

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FRANCIS A. ALLEN—THE GAINESVILLE YEARS

If the legal academy had a Hall of Fame, Frank Allen would surely be a first ballot, unanimous selection.¹ His nominators need only recite the bare-bones record of his career—his publications, his public service, his years of accomplished teaching, and the many honors he received. That record is neatly capsulized in an obituary, published in the Gainesville Sun, largely written by Frank and June's son, Neil (Neil was also Franks's co-author on Frank's last publication²). In a concise, precise fashion, reminiscent of Frank's own writings, the obituary not only describes Frank's many accomplishments, but also touches upon his character and significance. Because it says so much in so few words, I take the liberty of reprinting an excerpt:

Francis A. Allen, a leading legal educator and thinker, died April 6, [2007] . . . in Gainesville, Florida. Allen taught criminal law for over 40 years and was a principal architect of the provision of legal counsel to indigent defendants, both through his scholarly writings and his chairmanship of the Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice, which led to the Criminal Justice Act of 1964 and the Bail Reform Act of 1966.

Allen helped write the Model Penal Code of the American Law Institute and was the principal architect of the Illinois Criminal Code of 1961, which among other things decriminalized sexual acts between consenting adults of the same sex.

1. I am not the first to place Frank in such elite company. Consider, for example, the remarks of Norval Morris in introducing Frank as the 1991 recipient of the Research Award of the Fellows of the American Bar Foundation:

In the hegemony of scholars of the common law of crime over the past century, three names dominate—one in England, two in this country: Glanville Williams, Herbert Wechsler, and Francis Allen. So by this enumeration have I offended numerous other scholars of the criminal law, living and dead? Oddly enough, I think I have not. Only the most purblind and self-centered would disagree.

Program of the Annual Awards of the Fellows of the American Bar Foundation, 35th Annual Meeting, Feb. 9, 1991, at 5.

2. FRANCIS A. ALLEN & NEIL WALSH ALLEN, A SKETCH OF CHIEF JUSTICE FRED M. VINSON (2005).

As a scholar, Allen focused on the punishment of offenders and the workings of agencies such as police, prosecutors and penal institutions, examining these in the light of constitutional law and fundamental legal principles of fairness, an approach that established a new agenda for legal research. He also upheld legal education as a humanistic discipline, showing how, in Justice Holmes's words, the law was "a path to the world."

Allen wrote numerous articles and reviews and delivered guest lectures at many law schools. Allen's books include "The Borderland of Criminal Justice", "The Crimes of Politics" (originally delivered as the Holmes lectures at Harvard), "Law, Intellect and Education", "The Decline of the Rehabilitative Ideal" (Storrs Lectures, Yale), and "Habits of Legality" (Cooley Lectures, Michigan).

Allen was born in Kansas City, Kansas, in 1919, the son of a Methodist minister. After high school in Aurora, Illinois he was educated at Cornell College in Mount Vernon, Iowa and Northwestern University law school. After serving as clerk to Chief Justice Fred Vinson, he began his teaching career at Northwestern in 1948. He subsequently taught at Harvard (1953-1956), the University of Chicago (1956-1962 and 1963-1966) and the University of Michigan (1962-1963 and 1966-1986), serving as dean of the Michigan law school from 1966-1971. On his retirement from Michigan as Edson R. Sunderland Professor Emeritus, Allen was named Huber C. Hurst Eminent Scholar at the University of Florida, where he remained as an emeritus professor after he ceased teaching in 1994. He was elected President of the Association of American Law Schools in 1976.

Allen was a visiting professor at Northwestern, Boston College and the University of Chicago, a scholar in residence at the Rockefeller Foundation in Bellagio, Italy, twice was in residence at the Salzburg Seminar of American Studies and was a visiting expert at UNAFEI, a United Nations agency concerned with the problems of criminal corrections, located in Japan.

Allen was a Guggenheim Fellow in 1971 and 1973. He received honorary degrees from Cornell College, the University of Victoria (British Columbia) and the University of Chicago and the Fellows Research Award of the American

Bar Foundation. He was elected to the American Academy of Arts and Sciences in 1975.³

While the distinction of the honors noted in the obituary will be obvious to anybody familiar with the legal academy, the special quality of Frank's writings and public service might escape those who are unfamiliar with the field of criminal justice. Thus, I am tempted to expound on the somewhat understated obituary, and explain the full significance of the "Allen Report" in providing the intellectual foundation for a variety of legislative reforms relating to indigent defendants,⁴ the extraordinary staying power of the essays in Frank's first book, *The Borderland of Criminal Justice*, and the importance of the themes Frank stressed throughout his writings to the interrelated fields of criminal law, criminal justice administration, and juvenile justice. I resist that temptation in large part because such amplification (and more) is provided in a series of articles published in the *Michigan Law Review*.⁵ Those articles discuss the significance of Frank's work on various law reform projects,⁶ the character and influence of his publications,⁷ and his masterful teaching.⁸ What has not been discussed in print is Frank's contributions to the University of Florida's College of Law.⁹

3. GAINESVILLE SUN, Apr. 11, 2007, at 4B.

4. THE REPORT OF ATTORNEY GENERAL COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963), is commonly called the "Allen Report," as the chairman's prose and analysis are evident throughout the report. See 1 WAYNE F. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 1.5 at n.404 (2d ed.1999). As noted in the obituary, the recommendations in the report led to the enactment of two extremely important pieces of federal legislation, the Criminal Justice Act of 1964, 78 Stat. 552 (1964), and the Bail Reform Act of 1966, 80 Stat. 217 (1966). Those Acts, in turn, led to similar state legislation, bringing changes to the legal landscape as significant as any of the more prominent Warren Court rulings of that era. See 3 LAFAVE, ISRAEL & KING, *supra*, § 11.2 at nn.194-197, § 12.1 at n.1.

5. The December 1986 issue of the *Michigan Law Review* is dedicated to Frank Allen, on the occasion of his retirement from that school. It includes a selected bibliography, tributes from Terrence Sandalow; Robert A. Burt; Franklin E. Zimring; Norval Morris; Sanford H. Kadish; and Yale Kamisar; and articles by Wayne R. LaFave, Franklin E. Zimring & Gordon Hawkins; Albert W. Alschuler; Frank J. Remington; and Philip B. Kurland—a truly all-star cast.

6. See Norval Morris, *Francis A. Allen*, 85 MICH. L. REV. 399 (1986); Yale Kamisar, *Francis A. Allen: "Confronting] the Most Explosive Problems" and "Plumbing All Issues to Their Full Depth Without Fear or Prejudice,"* 85 MICH. L. REV. 406 (1986).

7. See Sanford H. Kadish, *Francis A. Allen—An Appreciation*, 85 MICH. L. REV. 401 (1986); Kamisar, *supra* note 6; Wayne R. LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases,"* 85 MICH. L. REV. 427 (1986).

8. See Morris, *supra* note 6; Terrence Sandalow, *Francis A. Allen*, 85 MICH. L. REV. 385 (1986).

9. Those contributions were, of course, explored in a memorial service celebrating Frank's life, held at the Levin College of Law, on April 20, 2007. At that service, former University President Marshall Criser also spoke of Frank's contributions to the University as one of the

Frank Allen came to Florida in 1986. He was an active member of the faculty until 1994, when he took emeritus status. Throughout almost all of the years of his retirement, from 1994 until roughly 2006, he continued to participate in various law school activities, and thus was an active member of the law school community for approximately twenty years.

Frank's move to our law school can be traced back to a very wise decision he made while dean at the University of Michigan Law School. Frank was dean during the height of the student unrest associated with what we now describe simply as "the Sixties."¹⁰ Student militancy reached every corner of the Michigan campus, including the law school. Every other week seemed to bring new "demands" from angry students, often accompanied by demonstrations (with one actually becoming so violent it shut down classes). Frank recognized that he could not serve the broader and more enduring needs of the institution if he was constantly playing the role of firefighter, as opposed to intellectual leader. He needed a partner who would respond to student belligerence with patience, calm panicky faculty, and negotiate truces between the law school community's several warring constituencies.

Frank convinced Dick Julin, his former student and then Michigan colleague, to take on these thankless tasks as the Associate Dean. Dick proved to be an absolutely extraordinary problem solver and a natural leader.¹¹ It was not long before other law schools were knocking on Dick's door, and in 1971, Dick joined the Florida faculty as its dean. Dick and

University's first Eminent Scholars and as a source of advice on the University's entry into the Association of American Universities.

Two other speakers at the memorial service, Professors Walter Weyrauch and Frances McCoy, two of Frank's contemporaries, spoke warmly of their friendship with Frank. Many other friends at the law school (myself included) would have expressed similar sentiments. My comments here, as at the memorial (where I also spoke), concentrate upon the institutional relationship rather than the personal.

10. Frank's exemplary service to the Michigan Law School as its dean during this difficult period is fully described in Sandalow, *supra* note 8. As noted there, Frank was under such constant pressure as dean that he often described his five year term as feeling like it lasted fifteen years.

Frank's willingness to take on the burden of deaning had an impact on his younger colleagues who later became deans at Michigan and at several other schools, including Florida, Duke, and Cornell. As noted by Lee Bollinger, now President at Columbia (and a former dean and President at Michigan):

It was once said of Frank Allen, who was dean of the [Michigan] law school . . . and one of the foremost scholars of criminal law of his time, that the greatest crime he personally committed was to become a dean, thereby making a dean seem to others like a desirable goal in life.

Lee C. Bollinger, Inaugural Address (Sept. 19, 1997), in MICH. UNIV. RECORD, Sept. 24, 1997, at 15.

11. See Francis A. Allen, *Joseph Richard Julin, 1926-1993*, 45 FLA. L. REV. viii (1993).

Frank kept in contact, and in 1986, Dick was instrumental in achieving what the appointments committee initially viewed as truly a “long shot”—convincing Frank Allen to join the Florida faculty.¹²

When Frank joined the Florida faculty in 1986, he had been a member of one law school faculty or another for almost forty years,¹³ but he made clear to his colleagues at Michigan that he was not going to Florida to become a semi-retired “trophy hire.”¹⁴ He had no intention of slowing down. Indeed, one advantage that Florida offered at the time was an escape

12. Winston Nagan, in an email to the faculty relating to the memorial service for Frank, noted that he was a member of the appointments committee when “Dick Julin mentioned off-handedly, to Tom [Hurst] and I, that we might have a shot at bringing Frank Allen here.” Email from Winston Nagan, Samuel T. Dell Research Scholar Professor of Law, University of Florida, Levin College of Law, to Jerold H. Israel, Ed Rood Eminent Scholar in Trial Advocacy & Procedure, University of Florida, Levin College of Law (Apr. 19, 2007) (on file with author). Being somewhat skeptical, Winston “went to see Julin again . . . [and] he gave me some sage advice. Never presume that we don’t have an opportunity of getting a person of distinction.” *Id.* What Dick had predicted came to pass, in large part due to the efforts of Dick and his wife Dorothy and (then) Dean Frank Read.

13. Frank made several moves in his career. He started teaching at Northwestern and then moved from Northwestern to Harvard, from Harvard to Chicago, from Chicago to Michigan, from Michigan back to Chicago, from Chicago back to Michigan, and, finally, from Michigan to Florida. Even for our profession, the number of moves was exceptional, leading Wayne LaFave to facetiously add to Frank’s list of honors “the prestigious Mayflower Award for his enthusiastic and assiduous support of the moving and storage business.” LaFave, *supra* note 7, at 428 n.2.

Although I was not in academia at the time, I later was told that the move from Harvard created quite a stir in law school circles. As it was explained to me, Harvard in the 1950s, under the leadership of Dean Erwin Griswold, had the bad habit of treating every other law school as a “minor league farm team.” When Harvard had an opening in a particular field, Dean Griswold would simply “call up” a star from some other faculty, including such distinguished faculties as Northwestern, Pennsylvania, and Michigan, and he invariably “got his player.” Frank Allen was one of those young stars drafted by Harvard, but finding that Harvard, notwithstanding its prestige, was not such a wonderful place after all, he did the unthinkable, leaving a tenured position at Harvard to go to another school—a move that delighted not only his new colleagues at Chicago, but many deans (and faculty members) at other schools as well.

14. Although Frank probably would disagree, I believe that such a hire might well be justified in the current academic climate—with so much emphasis placed on law school rankings and improving a school’s national reputation. Though it was in his case an incidental benefit, rather than the basis for the hire, Frank certainly enhanced the school’s image by linking the school to academic honors of great distinction. While he was at Florida, Frank delivered both the Cooley lectures at Michigan and the Carl Vinson lecture at Mercer. He received honorary degrees at the University of Chicago and Capital University. He also received the American Bar Foundation’s Career Research Award, *see supra* note 1, and was the National President of the Order of the Coif. All of these honors were duly noted by the media as awarded to a person who was a Professor of Law and Huber C. Eminent Scholar at the University of Florida.

It seems likely that in many of these settings (and in other settings as well), Frank was asked, as he was at Michigan, to comment on his experience at Gainesville. His response at Michigan (and I am certain his response elsewhere as well) was to speak highly of the College of Law, praising its faculty, students, and administration.

from Michigan's mandatory retirement at age 70. At Florida, Frank intended to do what he had always done as an active member of a law school faculty, and he did exactly that—and perhaps more.

While at Florida, Frank continued to be a prolific writer.¹⁵ His last publication came in 2005,¹⁶ well into his retirement, and a full sixty-four years after his first publication—a student note published in 1941.¹⁷ Publications during Frank's Gainesville years included two books,¹⁸ several law review articles,¹⁹ several tribute essays,²⁰ numerous book reviews,²¹ and several miscellaneous pieces.²² All of this initially drafted on an old fashioned non-electric typewriter!

15. For a listing of Frank's publications through 1985, see 85 MICH. L. REV. 381 (1986). Unfortunately this "selective bibliography" (which lists seventy-five publications) omits some thirty-five book reviews; Frank's reviews often went far beyond merely describing the content of the book reviewed. Footnotes 18-22 *infra* attempt to list all of Frank's later publications, including book reviews. However, that listing also may be selective as the search engines I used are hardly infallible. Frank himself did not keep such a list. His vitae simply notes that he had published "numerous articles."

16. *See supra* note 1.

17. Note, *Confinement of the Sexually Irresponsible*, 32 J. CRIM. L. & CRIMINOLOGY 196 (1941).

18. THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW (1996); A SKETCH OF CHIEF JUSTICE FRED M. VINSON (2005).

19. *The Scholarship of Kenneth Pye*, 49 SMUL. REV. 439 (1996); *A Crisis of Legality in the Criminal Law? Reflections on the Rule of Law*, 52 MERCER L. REV. 2 (1991); *Remembering Shelley v. Kraemer: Of Public and Private Worlds*, 67 WASH. U. L.Q. 709 (1989); *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987); *Commentary on Baldwin*, 39 FLA. L. REV. 39 (1987); *see also Criminal Sentencing in the United States: A Survey in Aid of Comparative Study*, in CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TODAY 439 (Inst. Comparative Law of Chuo Univ. ed., 1989).

20. *Yale Kamisar: Warrior Scholar*, 102 MICH. L. REV. 1689 (2004); *Terry Sandlow: Mind and Man*, 99 MICH. L. REV. 1817 (2001); *Joseph Richard Julin, 1926-93*, *supra* note 11; *In Memoriam: Waller V. Schaeffer*, 80 NW. U. L. REV. 1141 (1986).

21. *Review of Death in the Dark and Death at Midnight*, 19 LAW & HIST. REV. 227 (2001) (reviewing JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* (1997) and DONALD A. CABANA, *DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER* (1996)); *Law and the Waning of Democratic Values Paul D. Carrington Stewards of Democracy: Law as a Public Profession*, 4 GREEN BAG 2D 85 (2001); *The Poignant Paradoxes of Criminal Justice: A Review*, 48 FLA. L. REV. 539 (1996) (reviewing MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS* (1996)); *Louis P. Masur's Rites of Execution*, 34 AM. J. LEGAL HIST. 317 (1990) (book review); *Of Literature, Politics, and Crime*, 88 MICH. L. REV. 1440 (1990) (reviewing JACK KATZ, *SEDUCTIONS OF CRIME* (1988)).

22. *A Matter of Proportion*, 4 GREEN BAG 2D 343 (2001); *Foreward to The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court*, edited by Jeffrey Fagan & Franklin E. Zimring (2000); *On Coming of Age: Twenty-Five Years of the University of Michigan Journal of Law Reform*, 25 U. MICH. J.L. REFORM 1 (1991); *What Provisions Should Govern Deans' Tenure*, 19 SYLLABUS (no. 4) 5 (1988).

As he had done throughout his career, Frank provided students at Florida with a wonderful learning experience. Though Frank taught various courses over his career, his favorite was the first year criminal law course, and the highlight of that course was the several days he spent on *Dudley & Stephens*,²³ the famous English case involving cannibalism among shipwrecked sailors floating in a lifeboat on the high seas. I am certain that the Florida students who attended these classes still remember them. I know that I attended Frank's classes on *Dudley & Stephens* over 30 years ago,²⁴ and I still remember those classes, particularly Frank's masterful use of the socratic method to bring forth, through that one case, most of the critical issues that lie at the core of a determination of criminality.

One didn't have to attend Frank's classes, or read his publications, to appreciate the special qualities of his analysis and articulation of ideas. Even after retirement, Frank often attended the faculty's mid-morning kaffee-klatsch (which at Florida is called "tea time," as its initiator, Chris Slobogin, modeled the event after the practice of Australia's Monash Law School). These informal discussion sessions produced conversation on every subject under the sun (preferably not law), but their range could not escape Frank's breadth of knowledge. Whether the subject was legal education, classic literature, detective novels, Japanese art, or a humorous story relating to some current or past event, Frank's contributions were always thoughtful and exceptionally articulate. Speaking to the latter quality, my co-author Wayne LaFave nicely captured the universal view of Frank as a conversationalist. Said Wayne: "I often wished that my writings, after 15 revisions could approach in quality Frank's extemporaneous comments."²⁵

23. *The Queen v. Dudley & Stephens*, 14 Q.B.D. 275 (1984); see also Sandalow, *supra* note 8 (describing the impact of these classes on Michigan students, including the students' custom of celebrating Frank's birthday each year with some mock gifts featuring the *Dudley & Stephens* motif).

24. At the time, I had just started teaching criminal law, and hoped to come away with some material I could use in my course. I was not the first colleague to "sit in" on Frank's criminal law classes. Norval Morris notes that, "like a few other ambitious professors," he did so (not once, but twice). See Morris, *supra* note 1. He also notes that the venture didn't help him that much in his own classes. Although he adhered to Frank's very words, in his mouth, "the phrases were limp and the witticisms attracted stares of incomprehension." Morris, *supra* note 6. I was more successful, as I simply stole Frank's many hypotheticals and they worked very well.

25. This was part of an email sent in response to my email informing Wayne of Frank's death. Email from Wayne LaFave, David C. Baum Professor of Law Emeritus and Center for Advanced Study Professor Emeritus, University of Illinois College of Law, to Jerold H. Israel, Ed Rood Eminent Scholar in Trial Advocacy & Procedure, University of Florida, Levin College of Law (Apr. 6, 2007) (on file with author). Wayne first noted: "Sad news indeed! Frank was truly an extraordinary individual—one of a kind." *Id.*

Frank Allen also participated actively in faculty activities of far greater substance and significance than our “tea time” discussions. One of the most important of these activities was being a mentor to younger faculty. This was not a new role for Frank.²⁶ Indeed, I had been a beneficiary of his mentoring in 1963, when he steered me away from a potential disaster in the writing of my first article.²⁷

At Florida, Frank made himself readily available to young colleagues to discuss teaching, writing, and even the delicate act of balancing professional and family responsibilities. He read manuscripts and responded with encouragement, praise, and when needed, constructive criticism. He didn’t push his ideas, but offered suggestions (often in the form of a question). As Chris Slobogin has noted, “[H]e could be critical without being nasty or humbling.”²⁸ His efforts were very much appreciated. I recall Liz Lear once describing him as an academic “lifesaver.” Charles Collier has dedicated a forthcoming article to “the

26. See Robert A. Burt, *What Frank Allen Teaches*, 85 MICH. L. REV. 391 (1986); Franklin E. Zimring, *E.F. Hutton Goes South*, 85 MICH. L. REV. 397 (1985). Robert (“Bo”) Burt, now at Yale, was a younger colleague of Frank’s at Michigan. Frank Zimring, now at Berkeley, came to know Frank as a young member of the Chicago faculty. Responding to my email informing him that Frank had died, Bo Burt noted: “Frank was a mentor in every sense of that role—as a scholar, a teacher, an advisor, a moral beacon, and a model of decency. I can’t think of a person I have admired more.” Email from Robert A. Burt, Alexander M. Bickel Professor of Law, Yale Law School, to Jerold H. Israel, Ed Rood Eminent Scholar in Trial Advocacy & Procedure, University of Florida, Levin College of Law (Apr. 14, 2007) (on file with author).

27. I forget the exact constitutional law topic I had started to research, but I mentioned to Frank that it was a monster topic and at each turn I found myself needing to do more research. He responded that he thought the best approach to writing a first article was to duplicate the experience of a student on law review. Start with an article that focused on a single case, and write under a deadline. I stated that this idea made a good deal of sense, and a few weeks later, I received a letter from Phil Kurland, who was then editor of the *Supreme Court Review*. On the basis of Frank’s recommendation, Phil invited me to write an article on the Supreme Court’s recent ruling in *Gideon v. Wainwright*, 372 U.S. 353 (1963). There would be a strict deadline, but I was very familiar with the *Gideon* issue. I accepted the invitation and turned out the article within ninety days, as scheduled. With the perspective gained from that first article, I returned to the original topic and decided that continuing would be a waste of time because I really didn’t have anything to add to what already had been written. If not for Frank’s intervention, I could well have spent a full year on a “dry hole,” and with a three year window for gaining tenure (the standard back then), that wasted effort would have been a disaster.

28. At the memorial service, Dean Jerry read the following email from Professor Slobogin (who was then in California): “Frank was a major influence in my career, not just in terms of scholarship, but as a role model for what a professor should be. Frank was elegance personified. He spoke as beautifully as he wrote. He could be critical without being nasty or humbling. He was a natural leader without being pushy or egoistic. He was always polite and correct, but at the same time warm and intuitive. We all benefitted from his presence on our faculty.” Email from Christopher Slobogin, Stephen C. O’Connell Chair, Professor of Law, University of Florida, Levin College of Law, to Jerold H. Israel, Ed Rood Eminent Scholar in Trial Advocacy & Procedure, University of Florida, Levin College of Law (Apr. 25, 2007) (on file with author).

memory of Francis A. Allen, whose tremendous encouragement and generous if not extravagant praise of a young scholar, will be repaid in kind.”²⁹ Winston Nagan has described how Frank saved the day in advising Winston on how to respond to the likely concerns of the Department of Justice when he testified in favor of the ratification of the Convention that outlaws torture (Winston having dealt in the past only with the strikingly different concerns of the State Department).

In acting as a mentor to younger faculty (and a wise counselor to some not-so-young, such as Winston), Frank was also serving as a role model for the entire faculty, those who sought his advice and those who did not, those who knew him well and those who did not. For the combination of that “Hall of Fame” record of accomplishments, his collegiality, his concern for students, and his willingness to place institutional needs first, made it apparent to everyone that here was the embodiment of what legal education should be seeking in a law school faculty member. We were fortunate, indeed, to have him as a member of our law school community.

—*Jerold H. Israel**

29. See Charles Collier, *Terrorism in Legal, Cultural, and Historical Perspective*, 55 BUFF. L. REV. (forthcoming Dec. 2007).

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