FRANCISCO DE VITÓRIA'S CRIMINAL LAW CONCEPTS IN *DE LEGIBUS* AND THE HUMAN DIGNITY

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Abstract
Criminal Enlightenment emerged as the culmination of a process of paradigm shifts. Thus, it owed much to the pioneering positions that were developed prior to its emergence, particularly those of rationalist Natural Law, which formed the foundation of legal thought in the Modern Age. In this context, Francisco de Vitória's penal ideas take on notable importance for understanding the foundations of modern Criminal Law, as they are linked to the Enlightenment. These ideas break with the medieval paradigm and replace theocentrism with anthropocentrism in the criminal field, as evidenced both by the custom of leniency toward the defendant and by the linking of punishment to guilt.

Keywords
Francisco de Vitória. Criminal Ideas. Punishment and Guilt. Custom and derogation.

Summary

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1. INTRODUCTION.

Criminal law in a democratic state governed by the rule of law is characterized by limitations on *the jus puniendi*. These limitations protect the individual against the state and, as a result, restrict the application of criminal consequences—punishment—through a series of prerequisites for its application. In fact, these requirements were structured beginning in the 19th century into three theories that form and shape criminal doctrine: the Theory of Crime, the Theory of Punishment, and the Theory of Criminal Law, which are generally identified as resulting from the Enlightenment in criminal law, although they underwent subsequent independent development. It should also be noted that the scientific nature of Criminal Law was built upon the first of these theories, namely the Theory of Crime, since it structures a series of legal institutions that distinguish criminally relevant conduct, which also present themselves as obstacles that must be overcome for the application of punishment, thus revealing themselves as criteria that in themselves limit the State's power to punish.

Legal doctrine is unanimous in highlighting the contribution of the Marquis of Beccaria, Cesare Bonesana, to the construction of this so-called enlightenment Criminal Law. The second half of the 18th century is thus identified as a milestone of this phase, a period in which the work *On Crimes and Punishments,* dated 1764 and authored by that nobleman, was published. In this context, the Principle of Legality, identified as the cornerstone of a society united through the social contract, would have implications for the application of Criminal Law, as this principle would give rise, for

example, to the utility of punishment, the equality of persons before the law (no longer distinguishing between nobles and serfs in the application of punishment), and the prohibition of analogy, among others.

It should be noted that Beccaria's work is not classified as criminal dogmatics, as his thesis on the limitation of the power to punish is defended within the realm of political philosophy. This does not mean, however, that in his time there was no distinct framework for Criminal Law. Although the tripartite division of the Theory of Crime (typicality, unlawfulness, and culpability) used today developed from the 19th century onward, based on the postulates of limiting the State's power to punish—which, as already stated, characterize the Criminal Law of the Democratic State under the Rule of Law—at that time, Italian legal practitioners had already consolidated a series of institutions. By way of example, one may cite Tiberius Deciano's **Tractatus* Criminalis*, which presented these so-called institutions based on Aristotle's four primary causes. The formal cause of the crime was the **lex**, whether positive law or natural law; the material cause of the crime was *intent*; the efficient cause of the crime was the *act*; and, finally, the final cause of the crime was the *motives*. But Beccaria was not concerned with the analysis of penal institutions per se, addressing them only in passing, for his work, as he himself stated, was directed toward a critique of subordinate despots, who, weighed down by their own tyrannies, used criminal law to assert their authority.

In this vein, researchers in Criminal Law generally do not concern themselves with research prior to Beccaria. The Enlightenment is thus taken as the seed of liberal Criminal Law,

which, while not entirely mistaken, presents itself as a statement that is, at the very least, incomplete. As Sílvia Alves points out, humanism contributed to the emergence of a general framework by outlining a systematic and synthetic direction for criminal law[2] ; thus, it is clear that criminal Enlightenment, upon its emergence, already encountered a solid body of theories on criminal law.

In fact, the Enlightenment in criminal law did not arise out of nowhere. On the contrary, it emerged as the result of a process rooted in rationalist Natural Law, which, in turn, provided modern jurists with the foundation for the criminal institutions used today, since this latter school was far less concerned with political philosophy, as it was focused on providing concrete answers to the legal problems it needed to address in its time.

Now, among the thinkers of Criminal Law within rationalist Natural Law, Francisco de Vitória of Salamanca holds special importance, as he anticipates positions, institutions, and consequences that would only be consolidated in the 19th and 20th centuries. Through Vitória's work, we find that much of what has been presented as the vanguard of contemporary thought is, in truth, something already constructed and defended earlier, based on the criterion of human dignity, which is the common ground between rationalist Natural Law and liberal Criminal Law. Investigating and analyzing Vitória's criminal thought is the purpose of this work.

2. SIXTEENTH-CENTURY HUMANISM AND THE CONTEXT

[2]ALVES 2014, 7.

OF VITÓRIA'S WORK

The 16th century was the stage for the birth and development of humanism. The re-appreciation of ancient knowledge, which had been disregarded by the medieval world, made possible the emergence of this new school of thought, which broke free from medieval traditions and had practical concerns, valuing humanity as the center and recipient of knowledge, as it focused on the problems at its core—namely, the human person. This emancipation differs greatly from the schools of the Middle Ages, whose speculative thought was not infrequently completely dissociated from practical life, taking its roots in metaphysics[3] .

Humanism, therefore, was not conceived as an original form of thought, but rather represented a rediscovery of elements of ancient philosophy, particularly from late antiquity, such as skepticism, Epicureanism, and, to some extent, Stoicism—all of which had been disregarded by the theocentric culture of the Middle Ages. In this vein, humanism represented a rediscovery and reinterpretation of classical culture[4] .

It should be noted that humanist thought went far beyond the law, extending to various fields of knowledge. However, in the legal

[3]On this topic, see Villey: "The nobles and bourgeois who contributed to its formation had concerns quite different from those of the clergy of the medieval university: more practical, less speculative. They showed no taste for the arid discussions of metaphysics. Closer to the active life of the common people, they adopted a more concrete lifestyle." VILLEY 2009, 437.

4 MEDER 2008, 191.

sphere, the first systematic impulse of humanism originated in France and was directly aimed at criticizing medieval legal thought, which had developed in Italy to such an extent that it was termed *mos italicus*, a concept that resonated within the medieval school of the post-glossators (1250–1400). The *mos italicus*, in its final phase, was characterized by the abuse of arguments from authority, dispensing with the justification of thought through rational arguments, and this was at the root of the humanists' criticism. Because it emerged in France, this school's method of studying law is called *mos gallicus*[5] .

As we have previously written[6] , the jurists of the humanist school returned to the study of the sources of law. Thus, the methodological goal was no longer the search for the common opinion of the doctors, but rather the understanding of both the cultural context and the textual meaning of the Justinian compilation. This led the humanists to a rediscovery of classical culture, which caused the researcher to encounter a system of elaborate use of logical

[5] It should be noted that the precursors of the humanists were Italian jurists, among them Petrarch and Bolognini. The humanists' method of study originated in Italy, but the school's development undeniably took place in France. Given the importance of the predecessors of humanism, some argue that the school began in Italy, although they acknowledge that its golden age occurred in France. *Verbis*: *"Mos gallicus* is the name given to a school of legal humanists who adopted a philological and historical approach in their study of Law. This school began in Italy with Petrarch, Ambrose of Camaldoli, Filelfo, Maffeo Vegio, Lorenzo Valla, Angelo Poliziano, Ludovico Bolognini, and others, but was raised to its greatest splendor by French authors such as Andreas Alciatus and Jacques Cujas." RIDDER-SYMOENS 1992, 392

[6] BRANDÃO 2012, 156.

arguments—expressed, since the Aristotelian analytics, as the perfect form of reasoning—that led to the pursuit of an understanding of legal institutions based on reason. The result of this pursuit

> "was a shift in the jurist's mindset, who no longer conceived of Roman law as current law, but rather as a lofty creation of the Roman genius and, therefore, as a historical expression of reason and equity, though not necessarily the only one"[7] .

Roman law ceased to be regarded as a revelation from God and came to be seen as outdated knowledge that no longer belonged to that historical reality[8] , although it was still regarded as a highly rationalized system, given the very purpose of that law: the pursuit of good and just decisions. The Justinian compilation had intrinsic value as knowledge leading to equity, but it should not be accepted as dogma. It is human reason that will enable the use of Roman law, which should be employed as an instrument in the pursuit of justice in the specific case and of the good decision—a rational activity guided by human faculties. Thus, they argued that knowledge of the law is not acquired solely through logic and dialectic, but also through

[7] LEVAGGI 1991, 98.

[8] "Humanists, consequently, ceased to regard the *Corpus Iuris* as a dogmatic text and viewed it as a historical work, that is, as a source of knowledge of classical law." BRITO 1978, 36.

philological, historical, and literary means—in short: through the humanities.[9]

Humanism spread to Protestant countries, such as the Netherlands and Switzerland. However, we must note its influence in Catholic countries, particularly Spain, and among Catholic thinkers, such as the Englishman Thomas More.

Francisco de Vitoria and Francisco Suárez were the leading figures of this Spanish humanism, also known as *Spanish Late Scholasticism*, which focused on legal anthropocentrism. With Suárez's move to the University of Coimbra[10] , Spanish humanism became even more closely associated with Francisco de Vitoria, who was its most prominent representative.

Francisco de Vitória studied in Paris during the first half of the 16th century, receiving his doctorate on June 27, 1522. Unusually, before obtaining his doctorate, he was appointed by the General Chapter of the Dominican Order, to which he belonged, to teach theology. In fact, the General Chapter held in Naples in 1515 entrusted Vitória with the task of teaching Peter Lombard's **Liber Sentenciarum** in Paris[11] . The seven years he spent as a professor in

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[9] BRITO 1978, 37.

[10] It should be noted that the term "Late Iberian Scholasticism" is also attributed to this school of thought, as it also encompasses the thought of Suárez, who moved to Portugal. For example: MAIHOLD 2005, 42.

[11]It should be noted that the General Chapter of Genoa in 1513 had already appointed Francisco de Vitória to teach in the arts program, which occurred just one year after the completion of his initial studies in Paris. The arts program was intended for those preparing to take religious vows within the Order itself, as

Paris brought Vitoria into contact with humanism, which he not only assimilated but also developed in an original way, especially considering the concrete problems he encountered upon his return to Spain and, in particular, during his tenure as a professor in Salamanca. It was his adherence to this movement that

> "led him to take up the defense of the just cause of the indigenous peoples. Addressing the cruel subject of the law of war, Vitoria affirmed principles of moderation and gentleness. Almost the entire pacifist movement of the sixteenth century stemmed from humanism, and this had influenced the Spanish thinker, continuing his work within the Church from earlier times. In 1520, during his stay in Paris, Francisco maintained contact with Josse van Assche and **Jodocus Badius Ascensius**, two of the greatest exponents of humanism.[12]

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preachers.

[12]CASELLA 1985, 358. The author further notes that "The name of Francisco de Vitória appears on the title page of two sermons by Cavarrubias, indicating that he reviewed the work. Other factors demonstrate that Francisco de Vitória was no stranger to the 'Republic of Letters,' as it is commonly called, formed as early as 1516 and of which Erasmus of Rotterdam was the recognized leader. Francisco did not

It was in addressing legal issues that Francisco de Vitoria affirmed man as the center and recipient of *the law.* The conquest of new lands brought a series of legal questions to the fore, among which one stands out: were the inhabitants of those territories, who were at an underdeveloped stage of civilization, subjects of rights? This question takes on particular importance considering the culture of the time, especially when considering their status as "barbarians," that is, subjects who do not profess Christianity. Indeed, the most significant problems to be resolved by this school of thought arose from the conquest of the New World, since the medieval *corpus chistianum* offered no answers to the questions stemming from that conquest[13] .

Francisco de Vitória addressed that question through the lens of humanism. By legally equating Christians and pagans, on the grounds of belonging to a community of nations and on the grounds of the human nature of the being, he ensured that all people—including the indigenous peoples—were, within his doctrine, viewed as subjects of rights. Thus, "his concern was, above all, with man and his inalienable rights"[14] .

Because Vitória's central concern was man, in his teachings, he did not remain silent on the problems arising from Criminal Law. Indeed, the issues revolving around the *punishment applied to man* were a concern of the Salamancan, giving rise to a line of thought that,

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hide his enthusiasm for Renaissance humanism, and a letter from Erasmus to Francisco has been preserved in which he speaks with reverence regarding Scholastic theology." Ibid. Ibid.

[13] MAIHOLD 2005, 48–49.

[14]AZEVEDO 2008, 128.

within the realm of dogmatics, confers upon humanism the character of the matrix of liberal Criminal Law. It should be noted that, when speaking in the field of dogmatics, one is addressing the Theories of Crime, Punishment, and Criminal Law, and it is in this area that Vitória differs from Beccaria. Indeed, while the latter dealt with the limiting foundations of the power to punish within the realm of political philosophy, the former addressed Criminal Law considering concrete problems, that is, in light of the penal institutions existing in his time.

3. CRIMINAL IDEAS DRAWN FROM *DE LEGIBUS*

Francisco de Vitória did not reject medieval culture, but rather reinterpreted it in the light of anthropocentrism and based his teachings on Thomas Aquinas's *Summa Theologica*[15] . For this reason, it is noted that Thomas Aquinas's criminal theory was incorporated into the work of Francisco de Vitória[16] . Regarding Criminal Law, the Salamancan did not disregard the theological and moral concepts

[15]STÜBEN 2011, 7. Langella notes on this subject that "The choice of the Summa as the primary text for his lectures, made during his teaching in Paris and later consolidated in Valladolid, became definitive as of 1526 and constituted the fundamental characteristic of his teaching. (…) Within a few years, the innovation introduced by Vitoria was adopted by his own colleagues, even though the Statutes mandated the reading of the Sentences." LANGELLA 2010, 19–21.

[16]Take, for example, Schlosser and Willoweit, who begin their study of the theology of punishment under the heading: "On the Criminal Theory of Thomas Aquinas and its Reception in Late Spanish Scholasticism: The Example of Francisco de Vitoria." SCHLOSSER; WILLOWEIT 1999, 313.

developed in the Middle Ages, for he understood criminal offenses above all as a sin and his response as an ethical doctrine (eudemonism), which aims, above all, at human happiness, both in this world and in the supernatural world[17] . However, these offenses were interpreted considering a special dignity conferred upon the perpetrator of such offenses, so as to regard him as the ultimate recipient of the law itself.

It should also be noted, regarding the Salamancan's criminal thought, that:

> "Late Spanish Scholasticism (of which Vitoria is the leading figure) and its doctrine of natural law, which was later assimilated by Hugo Grotius during the period of German natural law doctrine and by German idealism, played a decisive role in the systematization of the concept of punishment." [18]

It is therefore no surprise that attention is drawn to the significant influence of the criminal law ideas proposed by Vitória, which were taken up by Hugo Grotius—the leading exponent of German natural law doctrine—and by the criminal law thought of German idealism. Thus, the possibility that custom could derogate from a criminal law, as well as the conceptualization of punishment and the linking of punishment to guilt—which lie at the heart of the

[17] STIENING 2011, 133.
[18] MAIHOLD 2005, 2.

criminal law proposed by the Salamancan—spanned the centuries until the emergence of the tripartite dogmatic system of the nineteenth century.

3.1. Custom as a source of derogation of criminal law.

It was only after the consolidation of the Principle of Legality as a guiding principle of Criminal Law in democratic states governed by the rule of law that it was affirmed as a protection of the individual against the state's *jus puniendi*. Thus, the Principle of Legality has a *ratio pro libertatis*, serving to expand the scope of freedom by explicitly restricting the scope of punishment.

In this context, the power of custom was invoked to derogate from anachronistic criminal offenses that were out of step with social reality. Indeed, while the Principle of Legality prohibits the application of custom as a basis for criminalization—that is, custom *im malam partem*—by *the* same *rationale* it admits custom that generates effects to the benefit of the party. Custom that expands the scope of freedom will thus be teleologically consistent with the Principle of Legality. The effectiveness of custom in light of the Principle of Legality will occur, as Maurach teaches regarding the 20th century, to eliminate criminal offenses that do not align with the succession of acts of an era and are therefore considered anachronistic.

As Maurach tells us:

> "The derogatory efficacy of customary law (desuetude) constitutes, in legal life, an

> indispensable means for the exclusion of threats of punishment that have become obsolete, and that the legislator has not formally repealed due to negligence or impossibility."[19]

What today appears as a guarantee provided by the application of Criminal Law according to the methodology of a Democratic State governed by the Rule of Law—by placing the human person at the center of applied criminal doctrine—was defended by Vitória considering the same human-centered approach. It is noteworthy that in his work on law, Vitória clarifies that custom has binding force, repealing the law through disuse.

In this vein, the Salamancan tells us:

> "ARTICLE THREE. — Can custom have the force of law and be binding?
> The answer is yes, and he explains how the legislator can express his will not only in words but also in deeds; for example, if he ceases to punish those who violate a law, that law is repealed by custom."[20]

[19]MAURACH; ZIPF 1994, 139.
[20]VITÓRIA 2010, 161–162.

Note that Vitória completes his thought by stating that if custom establishes that a certain conduct is good, it is not for the legislator to prohibit it. The Salamancan scholar also tells us that, when there is disuse, the legislator's rule has no force of law[21] .

Thus, Vitória concludes his argument by stating that:

> "In the final chapter on custom, it is expressly stated that any long-standing custom contrary to a human law derogates from the law, because the authority of a long-standing custom is not to be disregarded (*quia longavae consuetudinis non est contemnenda auctoritas*)"[22]

It should be noted that the punitive laws, cited by Salamantino as an extreme case of his reasoning, are of a criminal nature precisely because of the punishment they inflict. Thus, by ultimately invoking the derogation of the punishment prescribed by law through custom, Vitória thereby also limits the power to punish. It is worth reflecting that what is presented as one of the pillars of the current criminal method—namely, the use of *desuetude* to derogate from criminal law, as a consequence of the Principle of Legality applied to custom (*nullum crimen nulla poena sine lege scripta*)—has been advocated

[21]VITÓRIA 2010, 163.
[22]VITÓRIA 2010, 163.

since the 16th century as a product of a human-centered conception of law, which reveals the avant-garde nature of this thinking.

3.2. The Relationship Between Punishment and Guilt.

Vitória explicitly argues that criminal culpability stems from the legal precept. Indeed, in a theory in which the law is directed toward the person, with rationality at its core — since it is grounded in the intellect and not in the will — it follows that censure of an individual is a prerequisite for the application of punishment. To say that specific laws are binding in the face of culpability is to say that laws are binding in the face of the penalty imposed for the violation of an imperative, which makes a certain behavior obligatory.

This is what the Salamancan explicitly tells us:

> "Finally, the question arises as to whether specific criminal laws—that is, criminal laws that establish a specific penalty—are based on culpability. (…) Enrique Gandavese states that sometimes-criminal provisions contain both a precept and a penalty, (…) while at other times they establish only the penalty. The first formula imposes an obligation based on guilt; the

> second does not. The *Summa Angelica* follows this view."[23]

It should be noted that, in the original text, Vitória uses the Latin phrase *an obligent ad culpam,* which relates the criminal problem to the problem of sin. The culpability Vitória refers to is that linked to the theological categories of venial sin or mortal sin, and this indicates that Vitória is relating the penalty to personal culpability.

We must not forget that the concept of culpability derives from the translation of the German word *Schuld*, which indicates the debt of sin (a word, incidentally, also used in the German language in the Lord's Prayer as a synonym for offense).

Note that the entire framework surrounding the relationship between culpability and punishment is steeped in theological influences. Consider the following: the place where the guilty party serves their sentence is called a penitentiary, a term derived from the word *penance*, that is, the satisfaction that must be provided for the expiation of guilt. The place where the prisoner serves their custodial sentence is called a *cell*; this name is also given to the room where monks live and perform their penance. Penance is imposed, theologically, in the sacrament of *confession*; it is not surprising, then, that confession was regarded throughout the 19th century and part of the 20th century as the queen of evidence, especially if we note that this was the period in which the first conceptions of guilt as an element of crime emerged.

[23]VITÓRIA 2010, 149.

By linking punishment to guilt in the realm of criminal law, Vitória points to the need to ground the severity of punishment in the censure that must be directed at the offender. This, in the theological context applied to sin, was already drawn from *the penitents' manual,* and allowed for the gradation of penance imposed by the priest when administering the sacrament. It so happens that this argument foreshadowed the substance of what is today presented as an achievement of Criminal Law in the Democratic Rule of Law.

Jescheck, in addressing culpability considering the jurisprudence of the German Federal Court, tells us:

> "Punishment requires culpability first. Culpability is blameworthiness. Through the condemnation of culpability, the perpetrator is censured for not having behaved in accordance with the law, for not having chosen it, when he could have behaved in accordance with it, when he could have chosen it." [24]

In fact, there is no difference between the substance of what Vitória teaches and the current relationship between punishment and guilt, exemplified here through Jescheck's work, since the *personal censure* Jescheck speaks of is the same *censure of guilt* brought forth by Vitória.

[24]JESCHECK 1988, 19.

In this context, both authors establish that culpability is, logically, the cause of punishment, as it represents a prerequisite for the application of criminal sanctions. It is for this reason that both link punishment to the issue of guilt, since the former is viewed as suffering, which is justified only if imposed in response to satisfaction owed by the perpetrator for a crime. This concept, in both authors, is clearly expiatory, reflecting the religious roots present in these institutions.

4. CONCLUDING REMARKS

Vitória does not present us with a systematic understanding of Criminal Law. On the contrary, the power to punish, criminal law, and what follows from its application are scattered throughout his theorizations, imbued with theological foundations. However, in seeking to resolve the problems of his time, the Salamancan addresses concrete issues applicable to the resolution of disputes, and in doing so, he embodies the very objective of the body of knowledge known today as criminal dogmatics: the resolution of concrete cases.

Without disregarding medieval knowledge, but rather interpreting that knowledge through a new lens — humanism — he generated an interdisciplinary system of knowledge that simultaneously enshrined political, theological, moral, and legal dimensions. Consequently, his aim was not to delineate the issues of criminal legal institutions viewed in isolation. However, by solving the criminal problems of the time, it indirectly revolutionized those institutions.

His theories, when reinterpreted by the schools of German Natural Law and German Idealism, were able to reach — albeit in many ways indirectly— the period of the construction of the scientific dogma of the Theory of Crime. It should be emphasized that this period began in the 19th century, with the consolidation of the Principle of Legality, through Feuerbach's Theory of Psychological Coercion, as the guiding principle of liberal Criminal Law.

The major milestone that can be attributed to Vitória in the field of criminal law is the positioning of the individual—viewed as the recipient and focal point of the law—as the foundation upon which the cases he sets out to resolve must be decided. By raising questions regarding the link between punishment and guilt, or the possibility of derogating from criminal law through custom, the Salamancan anticipates solutions that are today regarded as cutting-edge positions in the Criminal Law of the Democratic Rule of Law. Since in his time there was not even this political concept of the State, the final solution he presents—because it is concerned with conferring *dignity upon the human person*—shows us that it is this foundation—today translated into a legal principle—that lies at the root of the law of that State.

As can also be inferred from the Salamancan's positions regarding both the derogatory effect of custom in criminal law and the relationship between guilt and punishment, concrete criminal problems are resolved according to criteria that emphasize the individual vis-à-vis the power to punish, insofar as punishments are ruled out based on a justification that takes into account criteria that expand the sphere of freedom (criteria *pro libertatis*), thereby restricting the scope of punishment.

It is noteworthy that the legal context in which Vitória writes his penal ideas is the *jus omnes gentium*, that is, the Law of All Peoples. Belonging to humanity is, therefore, the interpretive key for criminal institutions to be applied to concrete cases, as can be inferred from the Salamancan's thought. His criminal theorization, in light of this legal context, emerged in the face of an international law information and was grounded in the recipient of punishment, given that the relationship of belonging to the human race exists within it. In the current legal landscape, as if in a cyclical manner, criminal law is once again developing in the international sphere, especially with the continued affirmation of the International Criminal Court, and the problems arising in this "new" sphere converge on the same substance pointed out by Vitória: the condemnation of man. It is therefore urgent that we resort today to the same interpretive key indicated.

In this context, Vitória's thought lies at the core of contemporary criminal dogmatics, not because he delineated criminal institutions in and of themselves, but rather because he unveiled their substance, their most essential foundation: the protection of *human dignity* in the criminal sphere.

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