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DISSENT IN COURT AND IN LITERATURE: THE BRAZILIAN TECHNIQUE OF ADDING COLLEGIATE MEMBERS TO COURT AND THE MINORITY REPORT

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ABSTRACT: This paper is an analysis of how the event of outvoting is seen in the Brazilian procedural order, especially regarding the introduction of a technique for expanding the number of court members, which replaced the Motions for Reconsideration in the edition of the 2015 Brazilian Code of Civil Procedure. The research is developed from the narrative lived by the character John Anderton, of the short story *The Minority Report*, by Philip K. Dick. The relevance of the study comes from the need to evaluate the recent, deep changes in procedural law when it comes to dissenting opinions in court. The investigation is of bibliographic-documental type, with an analogy between the literary and the legal environments, in a theoretical research with qualitative approach, descriptive and exploratory regarding the results. The conclusion is that, similarly to fiction, the new judgement technique seeks to grant the debate within courts regarding the event of outvoting, with aims at providing more rationality to trials and avoiding a merely formal approach to dissent.

KEYWORDS: Technique of adding collegiate members to court; Motions for Reconsideration; Law and Literature.

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1 INTRODUCTION

This paper is based on the analysis of the short story *The Minority Report*, conceived by the American writer Philip K. Dick in 1956, adapted to a 2002 film by Steven Spielberg. The purpose is to develop research in the Law and Art area, in order to debate the situation of judgement by majority opinion, and especially analyzing the rules for outvoting, which have significantly changed in the Brazilian 2015 Code of Civil Procedure.

The story is about a future in which crime had been severely reduced due to a program called precrime, which relied on three clairvoyants called precogs, capable of foretelling the future and prophesize the crimes days before being committed. Based on the data regarding the authorship, the time and the place of the crimes, the Precrime Police imprisons the prospect guilty individuals even before they attack anyone. The predictions, however, usually face dissent, since the future is considered changeable; if not, the crimes revealed by the precogs would not be stopped, as it would be impossible to alter the foreseen chain of events.

The proposed scenario, even if fictional, allows for a judicial analysis of the procedural approach regarding the dissent of the (pre)judges, which, in many aspects, is similar to the procedures of judicial courts. Among them, the highlight goes to the minority report, which is the title of the narrative, representing the fact that a prediction can differ from the majority opinion. This study becomes relevant, as the recent and deep changes in criminal procedural law become official in Brazil, especially regarding the extinction of the so-called Infringing Embargoes law, that is, the technique of Motions for Reconsideration – a resource that used to be the solution for dissent in court – which has been replaced by the technique of court members expansion, even if it is still in the criminal law.

With aims at developing the proposed goals of this study, we developed an investigation with the method of bibliographic-documental type, by means of making an analogy between literature and law, in a

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theoretical study, with qualitative approach, descriptive and exploratory as for the objectives.

This paper's first section is about how the relationship between Law and Art is made possible, as well as the intertwining of the legal content and the artistic expression of the literary work. The specific matter is the idea of predictions, which work as trials in the plot of the story. In the second part, the paper deals with the way the story and the Brazilian procedural law deal with dissent, with a critical analysis of the court member expansion technique, from the 2015 Civil Proceeding Code, based on the story by Philip K. Dick.

2 LAW AND ART: CLAIRVOYANCE AND TRIALS IN THE STORY *THE MINORITY REPORT*

The relationship between Law and Art has long gained the attention of jurists. The first studies in the area date from over a hundred years ago, and have developed throughout the twentieth century, although it might still be new for a good extent of the scientific community, according to André Trindade and Luísa Bernsts (2017).

Germano Schwartz and Elaine Macedo (2006) see it as a necessary and underestimated connection, as the Law can be seen as an artistic activity, too complex to give in to normativity; On the other hand, admitting the Law as a form of Art does not mean that this is the only or the best theory about it. Werner Gephart and Jure Leko (2017), in turn, are cautious in daring to associate Law and Art, as it would lead to a dangerous contact between art and politics, economy, or society, since the power of art can produce a beautiful appearance and develop breaches of aesthetics, which contradict the role of accomplishing tasks given to these aesthetically exaggerated fields of human societies.

This relationship, for Rafael Xeres (2012), encompasses countless forms, due to the unending source of human creativity, and can be seen under three modalities: law in art, seen as the representation of the legal discussion in works of art; art as law, or, art as an object of legal norms; and, finally, law as art, seen as the construction of legal norms as artistic

manifestations. Also, in his work, he highlights the power of art of inspiring reflection on subjective rights and meaningful values, such as life, liberty, dignity, through the representation of life.

Ian Ward (1995), When approaching specifically the Law and Literature debate, establishes his distinction between law in literature and law as literature. The former deals with the possible relevance of literary productions, especially those with a legal plot, such as certain novels by Dostoyevsky, Kafka, Camus, in order to analyze situations in the science of Law. As for the law as literature area, it deals with the application of literary criticism techniques onto legal texts. The author distinguishes the areas, but shows that, although convenient and effective, such distinctions may not always be thoroughly established, or even desired, as the relationship is fully complimentary.

Despite the possible matching aspects between the concepts, this paper fits best in the first category established by both the authors, that is, law in art (or, specifically, in literature), since it deals with a legal analysis taken from an artistic work in literary form. As Richard Posner (2009) ponders, as a conflict management system, law produces a great deal of metaphors that can be developed by writers, and the story written by Philip K. Dick is an example of this scenario, because it permits a contrary movement, that is, the study of legal norms via literary creation.

Legal-literary papers studying *The Minority Report* are not really new. Robert Batey (2004), when comparing the film adaptation to the short story, brings meaningful thoughts on criminal decision and trials, regarding the debate between Common Law and the US proposal of Model Penal Code. Leandro Chevitarese and Rosa Pedro (2002) indicate the possible radicalization of technological control devices, through absolute visibility, the hyper-expansion of vigilance, and the power over virtual life.

Douglas Pinheiro (2009) studies the literary story to warn against the paranoid, chrono-normative, consequentialist practices of a dystopian constitutionalism in Brazil – as opposed to values such as social plurality, minority protection, due legal process, and contention of state powers.

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Thiago Carvalho (2020) sees *The Minority Report*'s "new law" with irony, as the term is a subtitle for the Brazilian version of the work, and states that the precrime methodology is an updated version of Inquisition, since the discourse of liberal modernity could never contain the advance of punishment and violent control of divergence and vulnerable classes by the dominant power.

This research attempts to re-read the story bearing in mind those subjective rights, as well as epistemological and procedural aspects, not taken into account by the previously mentioned papers. The procedure adopted by the Precrime Police brings forth several matters, linked to fundamental principles, from the very description of the environment where the precogs dwell, and the way they are treated. There is an impressive amount of equipment connected to three humans (expressively referred to as idiots, deformed, retarded), who cannot even be distinguished among the wires.

These mutant creatures, although human, are objectified and are taken care of solely due to their clairvoyance. They supposedly have no spiritual needs or feelings and are described similarly to vegetables. They are kept in the so-called "monkey blocks", and it is widely known that every government bureau keeps their own "monkeys", so as to have clairvoyance as they will. It is a very distant setting from that of glamour and formality in court trials.

The context of the precogs' lives is, thus, completely disrespectful to the principle of human dignity, as seen from the perspective of Immanuel Kant (2007), of man with ends in himself, justified by the context of fiction by the social pacification the practice brings. The words by John Anderton, the creator of the precrime methodology and chief of the Precrime Police, answering to the shock of his successor Ed Witwer when seeing how the system works, are revealing: "But what does it matter? We have their prophecies. They give us what we need. They do not understand anything about it, but we do" (Dick, 2002, p. 43, translated).

The analytical machinery present in the "monkey block" registers the prophecies objectively, by interpreting the confusing babbling of the

three precogs. When two of them reach a common result, called a majority report, the prediction is statistically trustable, however, some dissent is expected, registered as a minority report. Dissent is common due to the possibility of multiple futures, that is, alternate horizons, if certain previously predicted circumstances change. The incoherence data, such as the name of the author, the victim, the place, the moment, are registered automatically in cards, ejected by the machine and sent to the analysis of agencies that deal with the type of crime predicted.

The system described in the story is an intertwining of three words as described by Karl Popper (1975): the physical world, of stuff (world 1); the world of our conscious experiences, of the mind (world 2); and the world of logical content from repositories, such as books, libraries, computer memory (world 3). In the narrative, the events of world 1 (criminal offenses) can be foreseen by the consciousness of the mutants (from word 2), and the precogs' data is then verified by mathematical theory, from world 3.

It should be highlighted that, despite the existence of a minority report, the further protocols do not include any kind of investigation or debate on the contents of the predictions or the possible alternate scenarios – in reality, the single result is the arrest of the potential felon. The manifestation (even if not unanimous) of the precogs is seen as proof enough of the future criminals' guilt, who are still innocent in fact, as pointed by Anderton, since they end up never committing the crimes they are convicted for.

The peripeteia[2] occurs when Commissary John Anderton, while showing the precrime system to his successor, receives a card with his very name indicating he would commit murder. The leading character then sees himself inserted in conspiracy theory and a plot to exclude him from the Agency management. The possibility of being imprisoned for a crime

[2] For Aristotle (2008), peripeteia or peripety is a sudden shift of the course of actions in narrative towards its opposite direction, according to verisimilitude and necessity. Jerome Bruner (2003) highlights that peripeteia is a sudden inversion of circumstances that rapidly transforms a regular sequence of events into a story.

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he did not commit makes him question the precrime methodology, as other characters show him possible vulnerabilities in the system, so he can explore them and eventually get to the answer to the weird situation he was living.

Until then, the predictions from the majority report were uncontested, never questioned or countered with the minority report. Only after being accused did Anderton doubt the efficiency of the system and regret having punished innocent people before. In the narrative, a prediction works like a trial with no possibility of resource, since the prospect criminal is imprisoned prophylactically, with no chance of defense.

Also, the precrime system is presented in the narrative as having scientific foundation. However, as seen in the thesis by Karl Popper (2004), in *Logic of Social Sciences*, such methodology cannot be considered scientific yet, as it is not open to pertinent criticism, as mentioned in his sixth thesis. Due to feeling threatened, the commissary himself leads the criticism to the objective knowledge generated by the precrime system (a dominant dogma), by contesting and trying to refute the proposed solutions. The plot brings, hence, epistemological questions on the criminal model of prediction, described in the narrative.

Evidently, the adventure of the leading character is linked to the minority report, the outvoted vision that is the title of the story. Its importance to the narrative leads to the legal analysis regarding the current way the Brazilian procedural law deals with outvoted opinions.

3 OUTVOTED OPINIONS IN *THE MINORITY REPORT* AND IN THE BRAZILIAN CRIMINAL PRODEEDINGS

The method of criminal persecution used in *The Minority Report* blatantly ignores the outvoted opinion, as it is seen as a mere collateral effect of the majoritarian prediction that, paradoxically, serves to confirm the effectivity of the system, since it proves that the future can be changed.

Precrime Police would never be successful if it were not possible to change the predicted fates of people; hence, the ideal scenario is that the foreseen crime does not occur. The non-realization of those prognostics acts curiously in favor of the prediction-based system – as long as the breach of these chains of events is started by the police themselves.

In Brazilian procedural law, outvoted opinions are somewhat important, although often ignored, registered for the sake of formality, such as in the work of fiction. In a context of relentless search for productivity goals (Conselho Nacional de Justiça, 2019; Toffoli, 2019), and with the increasing use of on-line trials (Freitas, 2019; Conselho Nacional de Justiça, 2015), which lack debate and dialogue between possibly antagonistic views from the opinions, the court routine starts to follow the logic of a liquid life, based on Zygmunt Bauman (2007), with emphasis given to speed, utilitarianism, pragmaticism, for the sake of legal efficiency and a reasonable length of the process. A dissenting vote is seen as a mere obstacle to the rapid solution of the conflict, a hinderance to the frenetic overcoming of work, an impediment to finishing a case and analyzing the next one, at last.

There is a growing debate on the relevance of the new technique that increases the number of court members in the national procedural order, as stated in the article 942 of the Civil Procedural Code (CPC/15). It is a complimentary method to judgements with non-unanimous decisions, with the increase in the number of judging members, aiming at deepening the discussion on the controversies of factual or legal aspects in court (Brasil, 2018b).

The new provision states that the method will be applicable in the non-unanimous judgments of appeal (regardless of whether or not the sentence is reformed), and of interlocutory appeal (only when there is a reform of a decision that partially judges the merits). According to the rules, there must be enough judging members to make it possible to revert the initial result. As for rescission actions, the judgment must proceed in the regimental body with the largest composition. It is granted to the interested parties and possible third parties the right to orally sustain their reasons in face of the new judging members. The technique is not

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applicable to incidents of assumption of competence, to the resolution of repetitive demands, to the necessary remittance, nor to judgments under the competence of the plenary or a special court (Brasil, 2019b).

Fredie Didier and Leonardo Cunha (2016) show that the application of the procedure happens before the consolidation of a decision, which removes from the technique a supposed appeal character. The trial is suspended and, with the addition of judges necessary to a possible overcoming of the previous decision, it simply continues, with no decision being issued regarding the preliminary result. It is not necessary for the parties to intervene, as there is a legal change in the jurisdiction for judgment, which must be complied officially.

The use of the technique has as result the suppression of the so-called Infringing Embargoes, that is, the Motions for Reconsideration, although their main characteristics have been maintained in the rationale of article 942 (Borges, 2018). The old resource, a typically Portuguese-Brazilian institute (Negri, 2007), was provided for in article 530 of the 1973 Code of Civil Procedure, and was applicable against a non-unanimous decision that reformed, in an appellate level, the judgment on merits, or upheld the rescission action. These embargoes should be restricted to the subject matter of the divergence (Brasil, 2015).

Many members of the order defended the permanence of the Infringing Embargoes, as they thought the resource used to promote more legal security to the decisions reached without unanimity (Barbugiani, 2014). However, the movement for its extinction prevailed, as it gained force since the exposition of reasons to the bill of law that gave rise to CPC/15 (Brasil, 2010).

It should be noted that the Infringing Embargoes, although extinguished from the civil scope, remain applicable to criminal procedures, according to article 609, single paragraph, of the Criminal Procedural Code. It is possible to file embargoes in case of non-unanimous second instance decisions that are unfavorable to the defendant, and the appeal remains restricted to the dissonant aspects of deliberation (Brasil, 2018a). The technique of increasing the number of court members is not applicable due to the lack of legal provisions.

As for labor law, the Infringing Embargoes have minimum hypothesis of use, and may be applicable to the Superior Labor Court in specific cases of non-unanimous decisions on collective bargaining or normative sentences (Brazil, 2019a). As for the technique of court-member number increase from CPC/15, it had its scope expressly removed from the Labor Process through Normative Instruction No. 39 of the Superior Labor Court (2016), which was explained generically by the lack of omission in the labor procedural system that could justify the subsidiary application of the method or by incompatibility of this norm with the labor procedure. With that, the outvoted opinion in Labor Proceedings usually has no practical results.

When comparing both norms, it is possible to understand that the technique of increasing the number of court members can be useful for solving dissent, internally and automatically. This seems to be an attempt to force the checking of outvoted opinions, avoiding a merely formal report of dissent. The strategy is consonant to the idea of Conrado Hübner Mendes (2013), when stating that collegiality is a virtue that cannot be imposed by design, although it can be stimulated by proceedings. In the previous model, when the Infringing Embargoes are applicable, only the non-conformity of the damaged party can bring up a new discussion on the outvoted arguments.

The tension feeding the debate on how to deal with dissent in a collegiate order can be compared to the futuristic story *The Minority Report*. After being informed of the murder he had committed and being helped by a secret force of police support, John Anderton receives a message saying, "The existence of majority implies, logically, a corresponding minority" (Dick, 2002, p. 132, translated). Thus, the character understands that his unusual situation could be solved by analyzing the divergence among the precog mutants, specifically by considering the opinion that was discarded so easily by the Precrime Police, which he used to lead. Later, the narrator highlights the conclusion reached by Anderton: "This was the meaning of the message in the package. The report of the third precog, the minority report, had, to some extent, importance. Why?" (Dick, 2002, p. 144-145, translated).

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Anderton decides to invade the "monkey block" to see the minority report, given by Jerry, one of the mutants. The narrative highlights that the individual data produced by the precog had simply been rejected, as they did not agree with the majority reports. Analyzing them, the character sees that the report by Jerry invalidates the majority one, dealing with a possible future in which Anderton had had access to that privileged piece of information and, due to that, had decided not to commit the murder. Jerry's diagnosis uses the majority report as data to build his own prediction, and this fact makes Anderton anguished and regretful of the countless times other similar situations might have happened in the past.

When they are fleeing, Anderton and his wife, Lisa, also a police officer, realize that both the reports are genuine and truthful. For a single circumstance, Jerry's report overcomes the majority one, but it does not make it false, but it has been overcome. However, the conclusion might discredit the precrime system, with the possibility of suspects being able to not commit the crimes they are accused of, in alternate futures. In this borderline situation, Lisa understands that the precrime methodology cannot be put in check and decides to accuse her own husband. Once again, the leading character is saved by the parallel police force, represented by the character Fleming.

The physical combat that follows ends up revealing to Anderton that Fleming is linked to the supposed victim of his murder, the army general Leopold Kaplan, to demoralize the precrime system, whose implementation made the military lose power and control over society. Discussing the scenario, Anderton and Witwer realize that, after all that, the Precrime Police would have the same destiny, since the armed forces would expose the fault in the methodology and the how disrespectful the preventive police was to fundamental rights. In search for a solution, the commissary decides to investigate the report of each one of the precogs that formed majority.

Firstly, the policeman analyzes the report made by Donna, and finds out that the murder would occur in a context of a military coup attempt to overcome the precrime system. As for the report made by Mike, the third precog, at first Anderton thinks it is identical to the previous one,

however, due to unrevealed motivation, the narrator mentions there is great difference between them both. Later, the commissary decides to murder general Kaplan, in name of entrusting the precrime system, although still defending that the majority report is accurate.

The surprising action of Anderton's is explained in a conversation between Ed Witwer and the now former commissary. He mentions the existence of three minority reports, one at a time. In the first one, the general is murdered due to the discovery of his conspiracy; in the second one, the first report is used as data and the crime is avoided by the reluctance and the self-preservation will of Anderton; lastly, the third report took both the previous one into account, added with the will of the police officer to safeguard the reputation of the precrime system. Such as a chain novel character, according to Ronald Dworkin (1999), the character John Anderton was, similarly to the common law judges, a criticist and an author of his own story and tradition. While understanding the paradox of the precrime system, the police officer wrote and rewrote his own history, and that of the Precrime Agency.

Anderton's saga works as an allegory to the technique of increasing the number of court members. Although in the story there are no new precogs added, each of their predictions is acknowledged as the story moves forward, and a real dialogue between the opinions voted only happens due to a special circumstance, but in a collegiate decision it would be part of the protocol. This shows how important it is to confront antagonist opinions, or even the converging ones, so as to rightfully see the whole of events.

Hübner Mendes (2013) highlights that collegiate decisions are hubs for different other virtues, such as the commitment to argumentation and cooperation, and the availability of fighting for collective decisions. Given the proportions, that is what Anderton understands and promotes while cautiously analyzing each of the precogs' predictions. A big part of Brazilian legal order defends the importance of collegiate decisions, such as Pontes de Miranda (2001), Antônio Carlos Cintra, Ada Pellegrini Grinover and Cândido Rangel Dinamarco (2010), stating that group deliberation grants more rationality and safety to sentences:

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> The norm, for appeals, is the collegiality of sentences. That is: the *plurality of judges, with the political purpose of granting different examinations at the same time*, besides a double or a multiple examination in the first-degree judge and the superiors' time. Science shows that council does not come from reflection; *reflection comes from council*. Man is a result of councils. *This priority of a simultaneous multiple examination, in relation to the examination of one person only, becomes superior whenever a higher degree of certainty is needed*. Collegiality for deciding on appeals obeys this intimate necessity of man when "reason" comes in handy (Miranda, 2001, p. 11, translated, highlighted).

Even though there are contrary positions to this point of view, even due to the acritical posture of the rapporteur's vote by the other judges (Alvim, 2017), it certainly permeates the Brazilian legal dogma, and its essence can be seen in the implementation of the norm from article 942 of the Civil Procedural Code of 2015. A similar perspective is noticeable in *Th Minority Report*: the system demonstrated its faults when the predictions were examined with excessive objectivity, ignoring the nuances of the minority precogs' reports, which were often not analyzed or even seen.

Dierle Nunes (2015) understands that the purposeful addition of court members and the potential creation of fake consensus to avoid it might foster new discussion on the deliberation system and the establishment of sentences in Brazilian courts. For the author, the *per curiam* model could avoid the problem – a system in which the court gives a single decision, consolidated, and not a series of individual votes (*seriatim* method), which is currently used in Brazil and, for example, in the American Supreme Court.

In a corrective collegiality, which would allow the integrity, consistency and stability required by article 926 of CPC/15, judges would no longer be able to scrutinize cases in isolation, under assumptions and conditions not problematized with their peers (Nunes, 2015). In fiction, as long as the predictions were not seen in dialogue, their true meaning remained hidden.

Greater rationality was given to the precrime methodology based on the incident experienced by Anderton. The singular event highlighted the

importance that, for a judgment as accurate as possible, all views on the case be carefully studied. The same rationale can be seen in the creation of the increase of court members technique. In order for the dissenting vote not be simply ignored, or so as to avoid that only the parties' resignation, via Infringing Embargos, could lead to a debate on the expired vote, the legislators chose to establish a system that could more strongly compel the judges to, in fact, look into the subject matter of dissent.

4 FINAL CONSIDERATIONS

The plot of *The Minority Report* allows the jurist, based on a work of art, to face matters of subjective rights, legal epistemology and proceedings, which strengthens the bonds between Law and Literature, and confirms the analysis of those who study such bonds, in the sense that there are always important points of influx between Law and Art, and vice-versa.

As for subjective rights, the scenario of a peaceful society is contrasted to the precarious and undignified condition of the main responsible people for avoiding almost every violent crime from happening, since they have no access to the right to life, liberty, and dignity. Little care is given even to their predictions, which creates vulnerability to the system and allows for the supposed criminals also having their fundamental rights denied.

Epistemologically, it is possible to understand that, besides the apparent success, the precrime methodology does not have scientific support, due to the absence of criticism, which is overcome during the story. The adventures of John Anderton to understand his own future, by contesting and refuting the so-far proposed solutions, portray criticism to the objective knowledge produced by the precrime system (a dominant dogma).

It is also found that the story offers a significant parallel with one of the changes brought by the 2015 Code of Civil Procedure, the introduction of the technique of expanding the court body in case of divergence in the votes in courts, replacing the old Infringing Embargoes method. The new technique dictates that, if there is dissent in court, it is necessary to proceed with the vote with the addition of judges in a sufficient number so

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as to be possible to reverse the initial result. In the narrative, the leading character, based on a dissenting vote (the minority report), starts to carefully analyze the other predictions (the majority report) to finally realize that they dialogued with each other and that each related to a specific alternative future, with no foresight confirmed by at least two precogs, which was different from their initial perception.

The adoption of this new method in the scope of civil procedure suggests the legislator's concern to encourage the confrontation of arguments contained in the outvoted opinions, thus avoiding a merely formal approach to dissent. In the previous model, when the Infringing Embargoes were applicable, only a complaint by the aggrieved party could unleash a new discussion on the outvoted opinions. It should be recalled that the norm in criminal processes, with the maintenance of the Infringing Embargoes, and that of the labor processes, in which such appeal virtually does not exist, remains unchanged.

The scenario described in the futuristic story by Philip K. Dick matches the procedural order in Brazil, since an effective collegiate court, that is, with debates between different views, either antagonist or converging ones, grants more rationality and safety to deliberation when constructing a sentence. This position, defended by traditional jurists, might be seen as an inspiration to the technique of adding collegiate members to court.

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