

## Legal Education from the Perspective of Legal Practice

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### Abstract

One of the primary issues of the debate on the model of legal education is the relationship between theory taught at universities and skills necessary in legal practice. The choice between one model and another is commonly regarded as a dilemma. The aim of this article is to show that such a perception of the matter is a misunderstanding. Consequently, the solution to the issue is not advocating any of those seemingly opposite options, but their skillful and balanced combining. The success of their combination, in turn, involves a change in the manner of teaching, and not the subject. In order to justify the above thesis this paper presents a critical analysis of the model of modern Polish legal education, with the emphasis on its main drawbacks seen from the point of view of a legal practitioner. It determines the consequences of the educational model, and proposes a change.

### Key words

Legal education; legal skills; teaching approach

### Resumen

Uno de los principales temas objeto de debate sobre el modelo de enseñanza del Derecho es la relación entre la teoría que se imparte en las universidades y las competencias necesarias en la práctica del Derecho. La elección entre uno u otro modelo se considera un dilema. El objetivo de este artículo es mostrar que esa percepción es fruto de una comprensión errónea. En consecuencia, la solución no consiste en abogar por una de esas opciones aparentemente opuestas, sino en su combinación hábil y equilibrada. El éxito en combinarlas, a su vez, implica un cambio en la manera de enseñar, y no en el objeto de enseñanza. Para justificar esta tesis, el artículo presenta un análisis crítico del modelo de educación de Derecho actual de Polonia, con especial atención a sus principales desventajas, desde el punto de vista de un practicante del Derecho. Determina las consecuencias del modelo educativo actual y propone cambios.

### Palabras clave

Enseñanza del Derecho; competencias jurídicas; enfoque pedagógico

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## 1. Introduction

Legal education has been the subject of a long lasting, more or less heated debate in Poland. An example referring to relatively modern times is a publication by Czesław Znamierowski from 1938, with the meaningful title *On the repair of legal studies*.<sup>1</sup> So far, such discussions have not resulted in a revolution. Nonetheless, a lot has changed at the level of systematic solutions, e.g. didactic entities have been guaranteed autonomy in developing their academic curricula.

The most serious and long sustained criticism towards modern legal education is still valid. It concerns the education of skills required for the practice of the legal profession.<sup>2</sup> Due to this, one of the primary issues of the debate on legal education is the relationship between theory and practice. Should the dispute continue to be based on the opposition of the practice and theory-based models, no drastic change can be expected.<sup>3</sup> The problem is artificial, and from the perspective of a future legal practitioner, the solution to this apparent controversy is simple. The problem is artificial because of the ubiquitous correlations between legal practice and jurisprudence. It is not necessary to choose between the two extremes.<sup>4</sup> The solution is simple, because if law schools are to educate future lawyers, they should *also* teach skills required in legal practice.

Therefore, in order to meet the valid requirements of legal practice, legal studies cannot remain separated from the necessary practical skills. However, law schools should not be transformed into *legal trade schools* offering only professional training without proper education. This would be at odds with the idea of academic education. I believe the solution to the problem is not advocating any of these seemingly opposite options, but combining them in a skilful and balanced way. The success of their combination first of all involves a change in the manner of teaching, and not its subject.

## 2. Memory-Based Learning System

Legal studies in Poland are dominated by dogmatic courses. In this respect, Polish legal education is similar to that throughout the world. This is not a bad approach, and it would be difficult to imagine a different one. Therefore, the diagnosis concerns teaching of particular areas of law. I am marginalising the issue of the remaining areas of jurisprudence, however not for the purpose of their depreciation. Although their situation is not ideal, the primary problem, resulting in the hopeless condition of Polish legal education, does not concern them. It particularly concerns legal dogmatism, and constitutes the source of a number of other issues. The problem is the memory-based learning system.

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<sup>1</sup> The issue of legal education was also commented on in the post-war period, e.g. Koranyi 1946; after the transformation of the political system, Grajewski 1992, Sośniak 1992, Waltoś 1996, and currently, e.g. Turska 2002, Łomowski 2005, Izdebski 2009.

<sup>2</sup> Compare Sośniak 1992. The criticism does not exclusively concern Polish education. It is also present in the USA, although American Law Schools represent an approach much more strongly based on developing practical skills; compare Sonsteng 2007, Cassidy 2012

<sup>3</sup> In this context, the term "theory" is not intended to mean the theory of law as a discipline of jurisprudence, but what the term is commonly interpreted as in such discussions, i.e. everything taught in the scope of the current model of legal studies. It is worth mentioning that the practical skills mentioned further in the article are not meant as purely *technical*, simple, repetitive activities related to practicing the profession that require only training to perform them (replicating). The fifth point of the article touch on these issues included an explanation what I meant by "skills required in legal practice" or "practical skills."

<sup>4</sup> According to one of the approaches concerning the relation between dogmatism and practice, the difference between them boils down to institutional differences between the work of dogmatists and lawyers, and not to differences in the scope or character of their activity. The knowledge necessary for both of the aforementioned areas of activity is largely equivalent. A substantial difference consists in the fact that due to functioning in the scope of particular institutions, the activities of the former, in contrast to the latter, do not use the power of causing actual effects; see Leszczyński 2010.

The memory-based learning system is the core of the anti-model of legal studies, spread in Poland to a various degree.<sup>5</sup> It involves strong emphasis on memorising the content of provisions, possibly with their doctrinal description and summaries of rulings, and its consecutive reproduction from memory, while neglecting a number of other, much more important skills. This way of teaching has several drawbacks.

Firstly, it does not consider the common availability of Internet resources and legal databases. It even seems to disregard the invention of printing. Why should it be demanded from a future lawyer to memorise vast amounts of detailed information easily available in legal databases? It is not of key importance either for theory or practice. It is also not supplemented with e.g. text elaboration skills, involving efficient obtaining, processing, and use of relevant information, although these are the basic skills necessary for a future legal apprentice, clerk, or employee of a legal department in a corporation.

Secondly, it would seem that if legal studies focus so strongly on the memory-based learning system, memorising provisions must be one of the necessary or desirable characteristics of any lawyer. A young lawyer introduced into legal practice quickly realises that the knowledge of provisions is only a very basic issue and it is of no significance whether the content of provisions is obtained as a result of direct access to a legal text, or from one's memory. In fact, no one seriously dealing with law depends solely on his or her own memory.

Thirdly, in the times of rapid development of legislative, judicial, and commentarial activities, the memory-based learning system is bound to become a never-ending learning process. It only serves the thriving education business. If its purpose is to familiarise students with an extensive scope of normative material, the learning process is never-ending. It is always worth introducing students to a new area of law, for example in the field of environmental protection, state-owned enterprise transformations, or the nuances of the procedure of collective redundancies, constituting the subject of numerous extensive monographs. Such a model of studies provides no progress towards the completion of studying. Some regulations become invalid, while others come into force. Due to the continuous changes, the model generates an educational *perpetuum mobile*.

The memory-based learning system, above all, is frequently combined with a specific manner of teaching. It does not require teachers to apply sophisticated didactic methods. Because it focuses on the students' knowledge of provisions, the entire responsibility of meeting this objective is borne by the student. Teaching only involves transfer of information on the content of legal provisions, possibly with their explanation available in numerous commentaries, and the verification of the degree to which they were memorised.<sup>6</sup> It is unclear for what reasons scientific employees adopting the method organise lectures and classes. Due to the situation in the publishing market, oral knowledge transfer is no longer a necessity.

In spite of the presented criticism, my intention is not to entirely deny the need of the memory-based knowledge of provisions. It is obviously necessary knowledge. Without it, dealing with a particular area of law is like walking in the dark. It is also undeniable that a number of legal professions involve situations where there is no time to do research on a given subject and perfect knowledge of legal provisions is

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<sup>5</sup> I have not carried out any research on how much the phenomenon of memory-based learning system in Poland is widespread and, therefore, I did not specify the degree of its occurrence. In my opinion, the criticism of a certain phenomenon - which is the aim of the article - does not require a prior reconstruction of its scale, although surely, it would be very valuable. As for its presence, I assumed that this fact is a matter of common knowledge and does not need to be proved.

<sup>6</sup> It is worth mentioning that the described didactic method, focused on a unilateral stream of information, is at variance with the approach to effective learning represented by modern cognitive sciences. According to modern research in the scope, effective learning requires the involvement of both the left and right cerebral hemispheres. Passive memorising of transferred information only engages the left hemisphere, without the involvement of the right one, responsible for the processes of synthesis, analysis, reference to context, and inference of relations between facts; compare Merritt 2007.

necessary, or at least constitutes an advantage. An example is work in the courtroom. The lecture room, however, is very different from the court room from the student perspective.

In every profession, and within the same profession in every specialisation, the subject and scope of required knowledge is different. The role of the knowledge of provisions also differs depending on the specificity of individual cases a given practitioner deals with. The preparation of an opinion concerning legal aspects of the organisation of a large undertaking requires considering a number of provisions from various areas of law. The sole determination of the vast number of adequate regulations may be difficult. The situation is different in the case of a dispute resulting from different interpretations of one fragment of a specific provision. Without going into unnecessary details, it can be stated with a high degree of generalisation that the complexity of legal texts lies in their interpretation.

Increasingly more opportunities are offered during legal studies permitting contact with various forms of legal practice, from legal clinics to internships at judicial authorities or law firms, speech contests or moot courts. From the point of view of this paper, attempts to involve students in *law in action* are definitely positive phenomena. Nonetheless, these activities are parallel to the regular memory-based learning. They generate a separate course of education, which is only formally related to regular studies, does not interfere with the courses included in the curricula, and has no effect on the didactic methods.

A certain manner of speaking concerning the relation between legal studies and legal practice accurately illustrates the character of this relationship. Practical courses are considered to offer an opportunity to become familiar with the problems of practical execution of legal professions. It is a form of self-education based on own experience, and not a form of teaching. Anyone familiar with the reality of work in judicial authorities, where internships are usually conducted, knows that due to the heavy workload, it is very difficult to find someone who would be willing to participate in the mentoring of interns.

### 3. Sources of the Problem

The fact that legal education in Poland has reached a dead end obviously has its reasons. Two of them are worth mentioning.

Firstly, our debate on legal education particularly concerns the level of systematic or institutional solutions. Systematic solutions can be a motor of changes, but can also effectively impede them, petrifying interests blocking reforms. Therefore, they cannot be depreciated. The issue concerning every student, and later law practitioner, namely the didactic methodology, is discussed to a very little degree or not at all.

The issue is evidently neglected. For example, in the United States of America, both issues – institutional and methodological – complement each other. In the course of development of legal training, Christopher Columbus Langdell, one of the most widely known US law school deans, working at Harvard, introduced the so-called case method as the basic teaching method (Spiegel 1987). The method was introduced in 1870. Already then, it constituted a response to the criticism of education based on the passive memorising of information transferred through university lectures (Kimball 2009). At the time, the implemented changes were perceived as revolutionary, and met opposition on the part of students and teachers alike. The method remains dominant in American Law Schools until today, but discussions about its disadvantages also continue. Its criticism reveals that methodological issues still remain in the focus of the American debate on legal education. In relation to the beliefs from the pre-war period, no substantial changes occurred in our methodology of teaching dogmatism (Znamierowski 1938). Have we developed a method which no longer requires improvement?

Secondly, young employees are not prepared for their role as teachers. They are bound to reproduce teaching patterns which they witnessed as students, contributing to the revival of the described method. Hopefully, with years, based on their experience, they eventually notice the drawbacks of the method, and improve their teaching skills. Self-education in the scope of didactics is a positive phenomenon. It would be better, however, if instead of starting from scratch and learning from their own experiences, they could be supported by already developed foundations.

It seems that the described state of the matter, maintained in Poland for years, is a specific phenomenon. On the one hand, the problem is familiar to anyone even remotely related to legal studies, and it is difficult to find anyone praising the model. The so-called *legal studies graduate profile*, declared by the Conference of Deans of Legal Departments, stipulates a number of skills, and does not restrict them to memorising provisions.<sup>7</sup> The causes of the situation also cannot be associated with taking example from other countries. Countries distant to us in terms of legal culture, as well as those belonging to the common law culture, evidently reject the memory-based learning system. Teachers from that cultural circle choose not to teach the law, but rather skills. Although the problem is well-known, the difference between the previously mentioned graduate profile and the actual profile attainable through the course of law studies, remains enormous.

#### 4. Consequences of the memory-based learning system<sup>8</sup>

According to the realistic approach to education, the form and manner of conducting exams determines the manner of preparation for the exams, and therefore directly affects the entire educational process. As a consequence, the average law graduate has skills which were required during the studies.<sup>9</sup> Because exams usually take the form of tests requiring the knowledge of the content of the highest number of provisions possible, it is not surprising that law students focus on memorising provisions. This in turn leads to several negative consequences.

Firstly, instead of a graduate equipped with skills constituting the quintessence of the profession, the job market and society is provided with a graduate prepared for taking quizzes including questions such as what is the term of submission of a given application, who appoints a specific person to fulfil a given function, or in what form a specific agreement is concluded. This, of course, only lasts for a certain time. With time, the vast amount of *unused* information is replaced in the memory with new information, or simply becomes invalid as a result of legislative changes. In such a situation, it is no surprise that fresh law graduates do not have a good reputation in the job market.

Secondly, memorising the content of provisions and being familiar with their interpretation presented by commentators or authorities applying the law in a dogmatic way, does not teach the skill of formulating arguments in favour of a

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<sup>7</sup> "The academic graduate should have the skill of application of knowledge in the scope of courses included in the curriculum, and particularly in the scope of administrative and court administrative law, civil law and proceedings, criminal law and proceedings, and constitutional law. This means among others the skill of understanding legal texts, applying rules of logical thinking, interpretation of provisions, and ability of further specialisation in any area of law. The academic graduate should know a foreign language at the B2 level of the Common European Framework of Reference for Languages, and the skill of using specialised language in the scope of law. Graduates should be prepared to undertake any kinds of internships necessary for the execution of legal professions, and to fulfil functions in all institutions and public and non-public organisations requiring legal knowledge, as well as to further expand their knowledge in the scope of post-graduate or doctoral studies" (Conference of Deans of Legal Departments).

<sup>8</sup> The consequences of the memory-based learning system have been defined by my participant observation both as a participant of legal education (student) and as a legal practitioner.

<sup>9</sup> The term "average" in this context does not imply mediocrity with a pejorative meaning. It is intended to have a meaning rendered in statistics, where it means typical, and having a certain characteristic to a sufficient degree, also from the perspective of efficiency in completing specific tasks.

given thesis. But what is most important, it also does not convince students that they are members of an interpretive community in which they have the right of active participation. It only convinces them of their passiveness, excludes them from participation, and does not permit interpretation as an activity which can be practiced from the first contact with the law. As a consequence, particularly in the first contact with legal practice, young people avoid the responsibility of interpretation, only seeking for authorities and ready interpretive theses applicable to the analysed case. Unfortunately, the observation of legal practice suggests that in many cases, this behaviour is maintained for years.

Thirdly, one of the main arguments against the education model based on skills useful in legal practice is the risk of losing their academic character. It is of high importance, because any reform attempt must consider the difference between education, i.e. investment ensuring intellectual progress and universal development offering the possibility of individual adjustment of one's potential to changing conditions, and training or instruction, based on efficient execution of specified ad hoc tasks included in the scope of the training.

Considering the rate of changes occurring in the modern world, including the environment of law and lawyers, and the significant social role and influence of lawyers on it, it would be highly dangerous to exclusively provide training.

It is difficult to briefly define the academic character of studies. Considering the working assumption, however, that it involves education of bright people distinguished by lack of obedient thinking, the utmost threat is the currently widespread dogmatism based on the educational model of the memory-based learning system. The model, based on unilateral stream of information on provisions, wreaks intellectual havoc. It does not expect criticism or develop creativity. It does not encourage analysing, and does not pose questions to which students should search for answers themselves. It only teaches the reproduction of the transferred knowledge. The core of the problem is perfectly described by Czesław Znamierowski, stating that:

legal education is almost exclusively based on dogmatism, commenting, and memorising legal provisions. It prepares the mind for routine and simple conformation with the predefined formulas. It develops the inability to look at issues in an open and unbiased manner. This means that its effect on the mind is the opposite to that which should be the basis of academic education, aimed at free, unrestricted, unbiased, and full of creative imagination approach to things. (Znamierowski 1938)

The degree to which opening universities to the development of skills necessary in legal practice would make the problem even more acute, and to what degree it would permit meeting the objectives of academic education, obviously depends on the understanding of such practical skills. I believe the direction of changes proposed further in the article, skilfully combined with legal education, and applied in balanced proportions, can only enrich the education model without converting it to bare instruction.

## 5. Direction of changes

Proposals regarding changes in the teaching method of dogmatic courses must be preceded by an attempt to determine the legal skills discussed in the paper. Because legal professions are largely varied nowadays, it would be risky to attempt the development of a conclusive list of such skills. For the purpose of illustrating the problem, it is worth mentioning that differences between the character of work, and therefore the required skills, of an attorney running its own law firm and defending criminal cases, a judge from the department of land and mortgage registers, or a solicitor in one of numerous departments of an international corporation, are so vast that they could become a subject of a separate work.

Should we, however, attempt to point out certain universal skills, largely generalising the issue, we could start with a statement that the challenge of any lawyer is solving problems arising in the process of application of law. Apart from the knowledge of provisions and their general functioning, solving such problems requires the following skills:

- diagnosing of the essence of the problem (separation of key issues from secondary issues),
- searching, processing, and using information (particularly in the areas unknown to the person, be it the law or other fields of knowledge),
- perceiving a problem from all perspectives significant in given circumstances (e.g. facts, evidence, substantive and procedural criminal law from various areas of law, rules of law, consequences of decision-making),
- making decisions,
- selecting the most effective legal measures from the point of view of meeting the intended objective,
- formulating arguments in favour of the represented stand, and its presentation in various forms (as a public speech, or in writing).

As mentioned before, the list is not conclusive. In a high degree of simplification, it concerns skills directly related to the application of law. It omits a number of so-called soft skills, such as negotiating, counselling, or seeking agreement, without which functioning in the legal services market is difficult to imagine. Their role in legal education, however, is a subject for a separate article. Considering exclusively the aforementioned skills, it is evident that the memory-based learning system fails to develop any of them.

Without getting deeper into a theoretical discussion on the essence of the application of law, it can be stated for the purpose of this article that it does not involve mechanical adjustment of the unquestionable facts occurring in a given case to obvious and coherently interpreted rules. At each stage, it requires making assessments and choices. Therefore, it is obviously impossible to teach the application of law by presenting a procedure guaranteeing a uniform and objectively correct solution under the condition of consistent application of such a procedure.

This, however, does not exclude offering a similar solution. A method which does not provide this kind of guarantee, but at least offers a possibility of observing and understanding problems occurring in the process of law application, is *engaging* students in its functioning (from the perspective of the participant). I am thinking of a way of the teaching based on the essential in legal practice necessity of information processing, not acquirement of knowledge itself, as it is in the memory-based learning system.

It involves an attempt to identify with the situation of the participating parties, select legal measures relevant for the intended purposes, and present them in the written or oral form. The substantial advantage of the method is that it permits identification with the situation, and confrontation with problems to be encountered by the legal practitioner in reality.

The method combines theory and practice. On the one hand, it develops the aforementioned skills, forcing creative thinking instead of knowledge reproduction. It requires the identification of the student with a party in the scope of the analysed case, and presentation and justification of their arguments in accordance with the objectives. On the other hand, no attempt to defend a case can take place without a theoretical preparation of the problem, namely relevant provisions, their current interpretation by commentators, current judicial rulings, etc.



The following should be considered for the full understanding of the method's character.

Firstly, in spite of a number of considerable similarities between the approaches, it does not involve what is commonly referred to as *studying instances* or *case method*. The application of the working term *case* in opposition to the popular term *instance* emphasises the difference between the approaches. It reflects the different character and manner of procedure when dealing with an instance and a case.

Instances are an artificial form of actually occurring or possible to occur problems. They neglect the aspect of actual arrangements, focusing on a single legal problem. At the initial stage of education, it is obviously justified. Nonetheless, practical application of law involves a number of interrelated issues: the determination of facts and their interpretation in terms of their possible evidencing, validation and interpretive issues, and substantive and procedural criminal law issues.

Another difference between an instance and a case is suggested by the kind of language used to refer to them. Instances are solved, and cases are conducted. The term *to solve*, associated with the language of math, suggests that an instance has a predefined solution, and the problem boils down to its finding with the application of certain unquestionable methods. Such an approach to law is associated with extreme legal positivism (so-called *mechanical jurisprudence*), and has little to do with reality. The term *solving instances* may be even associated with the attempts by J. Austin to find a legal method "so certain, it cannot be found elsewhere except for math", and in the scope of which the law would be treated as an educational system with a *mechanical* application, only determined by logical causes (compare Opalek 1954).

On the other hand, conducting a case requires the selection of a strategy and related assessment and argumentation of choices at various stages of law application. This is due to the possible interrelations of the occurring facts, possibilities of their evidencing, provisions, and their possible interpretations. Conducting cases requires not only the knowledge of provisions, but generally speaking the skills of their application.

Solving an instance, i.e. providing answers to several legal questions concerning a situation described to a student, designed to qualify for the application of specific provisions, differs considerably from direct contact with a case, including lawsuit documents, agreements, other documents, testimonies, and the remaining evidence which are not automatically transformed into the so-called factual state predefined in instances.

An attempt to act in the scope of such living history involves an attempt to select a strategy suitable for obtaining the intended objective, and preparing relevant documents, including the presentation of arguments in favour of the preferred solution. It is much more consistent with the conditions in which young lawyers will have to deal with in the future than the mechanical solving of instances. It also supports the development of skills instead of requiring sole reproduction of information.

Secondly, the described change in the didactic method is one of many proposals of changes needed in the Polish system of legal education. It is worth mentioning that the modern legal services market continuously undergoes considerable transformations (compare Susskind 2010). In the USA, such transformations are also analysed from the perspective of their effect on education. Such changes also result in among others criticism of the case method.

On the one hand, the criticism concerns the excessive focus on the process of judicial application of law. On the other hand, it is emphasised that due to the changes in the market, legal practice based on the model of work as a counsellor in the direct customer-lawyer relation will decline. It may be partially replaced with

lawyers-managers supervising projects, and engineers of legal knowledge, dealing with standardisation, systematisation, and classification of law for other lawyers, or even laymen (Susskind 2010, pp. 16-18). This requires completely new skills, impossible to teach by means of the case method (Fromm 2017).

The analysis of the curricula of American universities shows that along the classic courses focusing on particular areas of law, universities offer an extensive range of interdisciplinary courses, or courses focusing on the development of skills, e.g. Judgment and Decision-Making, Analytical Methods for Lawyers, Legal Writing, Legal Research, or Trial Advocacy Workshop. Polish legal education would highly benefit from the adoption of such courses. It is certain that argumentative skills, methodology of legal, or knowledge of decision-making in the process of law application would be valuable for Polish students of law.

## 6. Fromm's 'modi' of being and legal education

The difference between the reality of Polish legal education and the model that I see as more valuable can be represented with the distinction between *modi* of having and being, presented by Erich Fromm (2017).

The author distinguishes two fundamental ways (*modi*) of existence (experience, relation against the world), which composition gives a difference not only between the characters of the units but also different types of the social character. This is not a place to present them in detail. Significant is that, according to Fromm, the possession modus has been dominating since the beginning of the industrial epoch and has a specific reflection in the everyday life, e.g. within education. Within its range, the education resolves to collecting information similar to collecting things. Students listen to lectures, note, memorize, and that is how they gain knowledge. The aim, however, is passing the exam. In this mode, the student and the knowledge given to him remain in strange relation to each other, they are connected only with the relation of possession. According to Fromm, the process of learning is totally of different quality for people who present the modus of being to the world. Instead of a passive attitude of listening, they hear, acquire, and what is most important, they respond in a creative and active way. In the modus of being, participation in the lecture become an act full of life, it stimulates the thinking processes, stimulates new answers and thinking.

At this point, a question appears, which is its relation with one or another shaping of the legal education, since the modus of being and possession have a subjective character, which means they make up the ways of the existence of the specific units. However, the answer comes up itself. Fromm writes that the modus of being "can dominate only where the lecture proposes a stimulative material. One cannot react to empty words in the modus of being, in such a situation the student will probably decide not to listen, and he will get back to his own thoughts" (Fromm 2017).

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