

# The Architecture of Unequal Absolutes

## Overall Fairness, Absolute Rights, and the Exclusion of Evidence under the European Convention on Human Rights

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\*\*RESEARCH AND DISCUSSION PURPOSES ONLY\*\*

### Abstract

This article interrogates a structural paradox in the jurisprudence of the European Court of Human Rights (the Court). The Convention proclaims certain guarantees — pre-eminently the Article 3 prohibition of torture and inhuman or degrading treatment — to be absolute and non-derogable. Yet the principal doctrinal instrument through which the Court superintends the fairness of criminal proceedings, the so-called overall fairness test under Article 6, is avowedly relational, contextual and expressly non-absolute. The article advances three connected claims. First, that the architecture of unequal absolutes is constructed not at the level of Article 3's substantive prohibition, which the Court has in fact defended with considerable rigour, but at the *remedial* interface between Articles 3 and 6, where the evidentiary consequences of an established violation are settled. Secondly, that the Court has developed a bifurcated exclusionary doctrine — confessions extracted by treatment contrary to Article 3 are inadmissible *per se*, whereas *real* evidence derived from such treatment is admitted or excluded according to the all-things-considered fairness of the trial — and that *Gäfgen v Germany* must be read with full attention to its evidentiary complexity, including the fresh trial confession on which the conviction was founded. Thirdly, that the dynamism appropriate to Article 3 is not the thematic expansion the Court has extended to the open-textured Article 8, lately in *Verein KlimaSeniorinnen Schweiz v Switzerland*, but an intensive rigour in the enforcement of a closed and categorical prohibition. Engaging with the consolidated fairness framework of *Ibrahim and Beuze*, the recent Grand Chamber judgment in *Yüksel Yalçınkaya v Türkiye*, the comparative practice of the Court of Justice of the European Union, and the theoretical literature on absoluteness, the article contends that an absolute right demands a correspondingly categorical remedial logic which the overall fairness test, as presently applied, does not reliably supply.

## I. Introduction: The Problem of an Absolute Right in a Relational Test

The European Convention on Human Rights is conventionally described as a charter of indivisible guarantees, yet its internal structure has never been egalitarian. The text itself ranks its provisions. Article 15 permits derogation in time of war or other public emergency, but withdraws that permission from a small core: Articles 2, 3, 4(1) and 7.<sup>1</sup> Within that core, the prohibition in Article 3 — “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” — occupies a singular position. It admits no exception on its face, no limitation clause, no balancing against competing interests, and no derogation even in the gravest emergency. The Court has affirmed this absolute character in the strongest terms, most influentially in the expulsion context in *Chahal* and *Saadi v Italy*, where it rebuffed sustained pressure from intervening Governments to weigh the risk of ill-treatment against the danger an applicant posed to national security.<sup>2</sup>

It would therefore be a mistake to begin this enquiry where the existing literature, and an earlier version of this argument, was tempted to begin: with the assertion that the Court has relativised the prohibition of torture as such. On the substantive plane, the opposite is closer to the truth. The difficulty lies elsewhere, and it is more subtle. It arises at the moment when the Convention asks what *follows* from a breach of Article 3 in the conduct of a criminal trial — when the prohibition, having been established, must be translated into a remedy. That translation is performed almost entirely through Article 6 and its governing methodology, the assessment of whether the proceedings, “taken as a whole”, were fair. The central wager of this article is that the inequality between the Convention’s absolutes is generated by the encounter between a categorical right and a relational test, and that the proper object of critique is not the scope of Article 3 but the structure of Article 6.

This reorientation matters because Article 6, unlike Article 3, is not an absolute right and has never claimed to be.<sup>3</sup> The guarantee of a fair hearing is a composite of elements — the presumption of innocence, the privilege against self-incrimination, equality of arms, the right to challenge evidence and witnesses — and the Court has long held that the admissibility of evidence is in the first place a matter for national law, its own task being to determine whether the proceedings *in*

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<sup>1</sup>Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 15. On the non-derogable core see *Ireland v United Kingdom* (1978) 2 EHRR 25.

<sup>2</sup>*Saadi v Italy* [GC] (2008) App no 37201/06, [127], reaffirming *Chahal v United Kingdom* (1996) 23 EHRR 413, [79]–[80]. The Grand Chamber unanimously rejected the United Kingdom’s submission, as intervener, that the “real risk” standard be diluted, or a heightened standard of proof imposed, where the applicant was alleged to pose a danger to the community.

<sup>3</sup>The Court has repeatedly stated that, in contrast to Article 3, Article 6 does not enshrine an absolute right: see *Gäfgen v Germany* [GC] (2010) App no 22978/05, [178]; *Bykov v Russia* [GC] (2009) App no 4378/02, [93].

*their entirety* were fair.<sup>4</sup> That holistic methodology is the engine of the present problem. A relational test, by design, has no fixed output; it weighs. When such a test is asked to vindicate a right whose entire normative point is that it cannot be weighed, the result is a doctrine that affirms absoluteness at the level of principle while administering it at the level of degree. The remainder of this article seeks to demonstrate, and then to assess, precisely that dynamic.

The argument proceeds in six further parts. Part II reconstructs the overall fairness test under Article 6 and its consolidation in *Ibrahim and Others v United Kingdom* and *Benze v Belgium*, tracing the scholarly anxiety that the test has weakened the “minimum rights” the provision was meant to secure, and reading the recent Grand Chamber judgment in *Yüksel Yalçınkaya v Türkiye* as a corrective at the margins. Part III turns to the evidentiary interface between Articles 3 and 6 and offers a deliberately balanced reading of *Gäfgen*, attending to the relationship between the impugned real evidence, the excluded pre-trial confessions, and the fresh confession the applicant volunteered at trial. Part IV addresses the question of dynamism, distinguishing the extensive expansion permitted by the open texture of Article 8 from the intensive rigour appropriate to the closed text of Article 3. Part V grounds the critique philosophically; Part VI situates it within the wider European legal order, with a corrected account of the case law of the Court of Justice of the European Union and of national constitutional courts; and Part VII concludes.

## II. The Overall Fairness Test: Article 6 and Its Methodology

Any critique of the Court’s evidentiary jurisprudence must begin from an accurate account of what the overall fairness test is and why the Court adopted it. Article 6(1) guarantees a fair hearing; Article 6(2) the presumption of innocence; Article 6(3) a list of specific entitlements expressly designated “minimum rights”.<sup>5</sup> From an early stage the Court declined to treat Article 6 as laying down rules of evidence. In *Schenk v Switzerland* it held that, while Article 6 guarantees a fair trial, it does not prescribe the admissibility of evidence, which is primarily regulated by domestic law; the Court’s function is to ascertain whether the trial as a whole was fair, including the way in which the evidence was obtained.<sup>6</sup> This deference has a respectable justification. The Court is a subsidiary, supranational tribunal supervising forty-six legal systems with widely divergent rules of procedure and proof; a uniform European code of admissibility would be both institutionally implausible and

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<sup>4</sup>*Schenk v Switzerland* (1988) 13 EHRR 242, [46]; *Khan v United Kingdom* (2000) App no 35394/97, [34]; *Jalloh v Germany* [GC] (2006) 44 EHRR 32, [94]–[95].

<sup>5</sup>ECHR art 6(3): “Everyone charged with a criminal offence has the following minimum rights ...”. On the textual force of “minimum rights” see Ryan Goss, “The Disappearing “Minimum Rights” of Article 6 ECHR: The Unfortunate Legacy of *Ibrahim* and *Benze*” (2023) 23(4) Human Rights Law Review ngad024.

<sup>6</sup>*Schenk* (n 4) [45]–[46]. The unlawfully recorded telephone conversation in *Schenk* was admitted; the Court found no violation of Article 6, the applicant having had the opportunity to challenge its authenticity and use.

contrary to the principle, lately reinforced by Protocol No 15, that primary responsibility for securing Convention rights rests with the States.<sup>7</sup>

The content of the fairness enquiry was given its most influential modern formulation in *Ibrahim and Others v United Kingdom*. There the Grand Chamber observed that it is often artificial to assign a case to a single sub-paragraph of Article 6, and set out a non-exhaustive list of factors against which the impact of any procedural failing on the overall fairness of the proceedings is to be measured: the applicant’s vulnerability; the legal framework governing the pre-trial process and the admissibility of evidence, and compliance with it; the opportunity to challenge the authenticity of the evidence and oppose its use; the quality of the evidence and whether its reliability was affected by the circumstances in which it was obtained; whether the evidence was decisive or supported by other material; and the weight of the public interest in prosecuting the particular offence.<sup>8</sup> The same Grand Chamber confirmed that, in the context of access to a lawyer, the absence of “compelling reasons” for a restriction does not in itself entail a violation; rather, it triggers a “very strict scrutiny” of the overall fairness, with the burden on the Government to demonstrate that the trial as a whole was nonetheless fair.<sup>9</sup>

In *Beuze v Belgium* the Grand Chamber generalised this approach, applying the two-stage test and the *Ibrahim* factors even where the restriction on legal assistance was systemic and statutory.<sup>10</sup> The doctrinal consequence, as Ryan Goss has demonstrated in the leading recent study, is that the “minimum rights” of Article 6(3) have been progressively reconceived as mere ingredients of an impressionistic global assessment, rather than as entitlements with independent normative force; and the proceedings-as-a-whole lens has, in practice, furnished Contracting States with repeated opportunities to advance public-interest justifications for restricting rights that the Court continues to describe as unqualified.<sup>11</sup> This is the heart of the matter. A test that converts categorical entitlements into weighable factors will, when it meets an entitlement that is supposed to be categorical, tend to dissolve it into the weighing. The overall fairness test is not objectionable in itself; it becomes objectionable when it is the *sole* instrument for vindicating an absolute right.

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<sup>7</sup>Protocol No 15 amending the Convention (opened for signature 24 June 2013, entered into force 1 August 2021) CETS No 213, inserting a reference to subsidiarity and the margin of appreciation into the Preamble.

<sup>8</sup>*Ibrahim and Others v United Kingdom* [GC] (2016) App nos 50541/08, 50571/08, 50573/08 and 40351/09, [274]. The list is expressly “non-exhaustive”.

<sup>9</sup>*Ibrahim* (n 8) [262]–[265]. The two-stage structure derives from *Salduz v Turkey* [GC] (2008) 49 EHRR 19, [55].

<sup>10</sup>*Beuze v Belgium* [GC] (2018) App no 71409/10, [120]–[150]. A concurring opinion expressed concern that the judgment effectively recast the *Salduz* principle.

<sup>11</sup>Goss (n 5). Goss identifies two trends: an analytical move that allows the Court to look past the text of Article 6(3) towards overall fairness, and a structural opening to government public-interest argument. See also Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff 1993).

It would, however, be one-sided to present the fairness test as uniformly corrosive of protection, and a balanced critique must register its protective deployments. The recent Grand Chamber judgment in *Yüksel Yalçınkaya v Türkiye* is instructive. The applicant, a teacher, was convicted of membership of a terrorist organisation decisively on the basis of his alleged use of an encrypted messaging application, ByLock, the underlying data for which he was never able to access or effectively contest. The Grand Chamber held that the domestic courts' treatment of that evidence — adopting it as near-conclusive proof of guilt while denying the applicant any genuine opportunity to challenge its reliability or his individualised connection to it — rendered the trial unfair under Article 6(1), alongside violations of Articles 7 and 11, and it identified the problem as systemic, affecting many thousands of comparable convictions.<sup>12</sup> Here the very factors enumerated in *Ibrahim* — the opportunity to challenge the evidence, its quality and decisiveness — operated to *expand* protection against an authoritarian use of digital evidence. The test, in other words, is genuinely double-edged. The argument of this article is not that overall fairness always under-protects, but that its relational structure makes it constitutionally ill-suited to carry the weight of an *absolute* guarantee, as the evidentiary interface with Article 3 makes plain.

### III. The Evidentiary Interface: A Balanced Reading of Gäfgen

The point at which Articles 3 and 6 collide most acutely is the admissibility of evidence obtained through, or derived from, ill-treatment. Here the Court has constructed a bifurcated rule. Confessions and other *statements* extracted by torture, or by inhuman or degrading treatment, are inadmissible per se: their use renders the trial automatically unfair, irrespective of their probative value or their causal weight in the conviction.<sup>13</sup> *Real* evidence — physical objects, locations, derivative material discovered as the “fruit” of a tainted statement — is treated differently: its admissibility is assessed against the overall fairness of the proceedings, with particular weight given to whether the breach of Article 3 had a bearing on the applicant's conviction or sentence.<sup>14</sup> This asymmetry — categorical exclusion for statements, conditional exclusion for their material fruits — is the structural seam along which the inequality of absolutes runs.

It is impossible to evaluate that asymmetry responsibly without a careful account of *Gäfgen v Germany*, the case in which it crystallised, and the earlier draft of this argument did the case an

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<sup>12</sup>*Yüksel Yalçınkaya v Türkiye* [GC] (2023) App no 15669/20, esp [303]–[341] (Article 6(1)), [237]–[274] (Article 7), [392]–[407] (Article 11). The Court invoked Article 46 to characterise the matter as systemic.

<sup>13</sup>*Gäfgen* (n 2) [166]–[167], [173]; *Jallob* (n 4) [105]–[107]; *Harutyunyan v Armenia* (2007) App no 36549/03, [63]–[66]. The rule is sometimes traced to the proscription of compelled self-incrimination and to the imperative of dissociating the administration of justice from the methods used.

<sup>14</sup>*Gäfgen* (n 2) [173]–[178]. For real evidence obtained as a direct result of treatment classified as torture, the Court has indicated that admission would always render the trial unfair; for real evidence derived from inhuman or degrading treatment the question turns on overall fairness: [173], [178].

injustice by reducing it to the bare admissibility of evidence obtained under threat of torture. The facts repay precision. Magnus Gäfgen abducted an eleven-year-old boy, J, and suffocated him, then sought a ransom from the child’s family. Arrested and believing the child might still be alive, the police, on the authority of a deputy commissioner, threatened Gäfgen with severe pain unless he disclosed the boy’s whereabouts. Under that threat he revealed the location of the body and made admissions; the threat was later found by the Grand Chamber to constitute inhuman treatment contrary to Article 3, though not torture.<sup>15</sup>

Crucially for the Article 6 analysis, the chain of evidence was not simple. Following his coerced disclosures, the police recovered the body and a range of *real* evidence — including the child’s corpse, the results of the autopsy, and tyre tracks left by the applicant’s car near the site. The German trial court then took two decisive steps. It *excluded* all of the applicant’s pre-trial statements, holding them tainted by the continuing effect of the prohibited threat, and it administered a fresh caution informing the applicant that those earlier statements could not be used against him and that he retained the right to silence. At trial, and after that caution, Gäfgen made a *new* and full confession, which he maintained — both at first instance and on appeal — he had volunteered out of remorse. It was that fresh confession, not the coerced disclosures, which the domestic court treated as the essential basis of the conviction; the impugned real evidence was used in a subsidiary capacity, to test the veracity of the trial confession rather than to establish guilt independently.<sup>16</sup>

On that footing the Grand Chamber held, by a majority, that there had been no violation of Article 6. Its reasoning had two limbs. First, it accepted that a trial’s fairness, and the effective protection of the Article 3 prohibition, would be at stake in this context only where it was shown that the breach of Article 3 had a bearing on the outcome — on the conviction or sentence. Secondly, it found that, on the facts, the causal link between the prohibited threat and the conviction had been broken: the pre-trial confessions had been excluded; the applicant had been cautioned; and his decision to confess afresh at trial was, on his own consistent account, a voluntary act of contrition rather than the product of the earlier coercion. The contested real evidence had no determinative role. The Court accordingly characterised the situation as one in

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<sup>15</sup>*Gäfgen* (n 2) [3]–[18], [94]–[108]. The Grand Chamber, by eleven votes to six, classified the treatment as inhuman rather than torture, taking account inter alia of the absence of long-term physical or psychological consequences and the fact that the threat was not carried out — a classification itself criticised in the partly dissenting opinions.

<sup>16</sup>*Gäfgen* (n 2) [34], [187]. The domestic court relied on the applicant’s “new, full confession” at trial as the essential basis of its findings of fact; the contested real evidence (the autopsy results and the tyre tracks) was of an “accessory nature” and was used only to test the truthfulness of that confession.

which the applicant had varied his defence strategy, not one in which the conviction rested on the fruits of ill-treatment.<sup>17</sup>

Read fairly, then, *Gäfgen* is not a case in which the Court admitted a coerced confession; it is a case in which the Court declined to hold that the *indirect* and ultimately accessory presence of real evidence derived from an Article 3 breach contaminated a conviction founded on an independent, cautioned, and avowedly voluntary trial confession. The distinction the Court drew from *Jallob* — where the emetic-induced regurgitation of a drugs sachet was both a direct product of Article 3 treatment and the central evidence of guilt — is genuine rather than contrived.<sup>18</sup> Acknowledging this is not a concession fatal to the present critique; it is the precondition of a critique worth making.

What, then, remains troubling? Two things, and they are connected. The first is the contingency of the entire reasoning upon the existence of the “other evidence” and the fresh confession. The majority’s conclusion depended on a fortunate evidentiary posture: a domestic court that *did* exclude the tainted statements, a defendant who *did* confess again, and real evidence that happened to be accessory rather than decisive. Strip away any of these, and the protection collapses. The joint partly dissenting opinion of six judges put the objection with force: where evidence has been secured in consequence of a violation of Article 3, its admission in any form should taint the proceedings, regardless of its weight in the verdict, because the exclusionary consequence is not a function of causal contribution but of the State’s disqualification from profiting in any degree from a breach of an absolute right.<sup>19</sup> On this view the very introduction of an outcome-sensitive enquiry — did the breach “have a bearing” on the conviction? — is the concession that betrays the absolute. An absolute right, the dissent implies, cannot be vindicated by a test calibrated to consequences.

The second difficulty concerns the relationship between the “other evidence” and the trial confession, which the editor of this Journal rightly pressed and which the majority treated too quickly. The applicant’s claim was that he confessed at trial *because* the real evidence — itself the fruit of the coerced disclosure — had foreclosed any realistic defence. The majority answered that he had consistently said he confessed out of remorse, and that it was not persuaded he could not

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<sup>17</sup>*Gäfgen* (n 2) [178]–[188]. The Court was not persuaded by the applicant’s contention that he confessed at trial only because the real evidence left him no defence, noting his consistent domestic claims that he confessed out of remorse.

<sup>18</sup>*Jallob* (n 4) [107]–[108]: the real evidence (the drugs) was obtained as a *direct* result of treatment contrary to Article 3 and was the decisive evidence; its use rendered the trial unfair. In *Gäfgen* the real evidence was an *indirect* product and accessory to the conviction.

<sup>19</sup>*Gäfgen* (n 2), Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, [2]–[10]. The dissenters argued that the “break in the causal chain” reasoning relativised the Article 3 breach and that real evidence obtained in consequence of ill-treatment must be excluded irrespective of its impact on the outcome. See also Lutz Oette, ‘*Gäfgen* before the European Court of Human Rights: The “German Torture” Case’ (REDRESS).

have remained silent. But this reasoning places considerable weight on a defendant's post hoc characterisation of his own motivation, in circumstances where the strategic and the contrite are not mutually exclusive: a defendant confronted with damning real evidence may confess *both* from remorse *and* because silence has become forensically pointless. To treat the professed remorse as severing the causal chain is to assume away the very influence the exclusionary rule exists to neutralise. The more candid analysis would acknowledge that the fresh confession was made in an evidential landscape already shaped by the Article 3 breach, and would then ask — as a matter of principle rather than counterfactual psychology — whether the State should be permitted to build a conviction on a foundation it laid only by violating an absolute right. *Gäfgen* does not ask that question; it asks a narrower, outcome-determinative one, and answers it in the State's favour.

That the Court is capable of the more categorical posture is shown by its subsequent extension of the exclusionary rule in *Ćwik v Poland*, where statements extracted by a private criminal gang through violence amounting to inhuman treatment were held inadmissible under Article 6, the majority reasoning from the State's positive obligations under Article 3 not to lend the machinery of justice the support of such material.<sup>20</sup> And in the trans-national setting, *El Haski v Belgium* held that where there is a “real risk” that evidence — there, the statements of witnesses interrogated abroad — was obtained by torture or inhuman treatment, its admission violates Article 6.<sup>21</sup> Most strikingly, in *Othman (Abu Qatada) v United Kingdom* the Court — far from “mediating” Article 3 for geopolitical convenience, as the earlier draft suggested — held that the applicant's deportation to Jordan would breach *Article 6*, because there was a real risk that evidence obtained by torture of others would be admitted at his retrial, a prospect amounting to a flagrant denial of justice; the Article 3 limb failed only because the Court was satisfied that specific, verifiable diplomatic assurances genuinely removed the risk to the applicant himself, not because that risk was balanced away.<sup>22</sup>

The juxtaposition is revealing. When the question is the use of statements, or the prospective use of torture evidence abroad, the Court reaches for a bright line; when the question is real evidence at home, derived indirectly from a domestic Article 3 breach, it reaches for overall

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<sup>20</sup>*Ćwik v Poland* (2020) App no 31454/10, [63]–[89]. The Court extended the absolute exclusionary rule for statements obtained by torture or inhuman or degrading treatment to ill-treatment inflicted by private individuals, grounding the extension in the State's positive obligations under Article 3; cf the partly dissenting opinion questioning the deterrent rationale where the perpetrator is a private actor.

<sup>21</sup>*El Haski v Belgium* (2012) App no 649/08, [85]–[99]. The standard for foreign-obtained evidence is a “real risk” of ill-treatment, a lower threshold than proof, reflecting the difficulty of establishing what occurred in a third State.

<sup>22</sup>*Othman (Abu Qatada) v United Kingdom* (2012) App no 8139/09, [258]–[267] (Article 3 assurances), [263], [267]–[287] (Article 6: real risk of admission of torture evidence constituting a flagrant denial of justice). This was the first occasion on which the Court found that expulsion would violate Article 6 on this ground. The decision is, if anything, evidence of the robustness of the Court's treatment of torture-tainted evidence, and a balanced critique must say so.

fairness. The inconsistency is not in the Court’s commitment to Article 3 in the abstract — that commitment is real and, in *Saadi* and *Othman*, formidable — but in the remedial logic it selects once a breach is established. The absolute is honoured at the threshold and negotiated at the consequence.

#### IV. Two Kinds of Dynamism: Why Article 3 Is Not Article 8

A central ambiguity in the earlier formulation of this argument was its demand that Article 3 receive the same interpretive “dynamism” the Court has lavished on Article 8 — the implicit complaint being that, while the right to private life has been expanded to embrace environmental harm, the prohibition of torture has been left static. The objection conflates two quite different things, and the distinction must be drawn carefully, because it goes to the architecture of the Convention itself.

Article 8 is, in the Court’s taxonomy, a *qualified* right. Its first paragraph protects a deliberately capacious set of interests — private and family life, home and correspondence — and its second paragraph contemplates interference, provided it is in accordance with law, pursues a legitimate aim, and is necessary in a democratic society. The text is open in two directions at once: open as to the *interests* it protects, which the Court has read to encompass physical and psychological integrity, identity, reputation, the environment of the home, and much else; and open as to the *justifications* for limiting them, which proceed by proportionality. It is precisely this open, balancing structure that makes thematic *expansion* both possible and disciplined: new spheres can be admitted under paragraph (1) because paragraph (2) supplies the mechanism for accommodating the competing public interests that expansion brings in train. The Court’s recent recognition, in *Verein KlimaSeniorinnen Schweiz v Switzerland*, of a positive obligation under Article 8 to provide effective protection against the serious adverse effects of climate change is a paradigm of this extensive dynamism: the Grand Chamber expressly grounded the obligation in Article 8, left the scope of any analogous right under Article 2 undetermined, and modulated the obligation through a margin of appreciation as to means.<sup>23</sup> The environmental line on which it builds — from *López Ostra* to *Tătar* and *Cordella* — is itself a product of Article 8’s elastic first paragraph.<sup>24</sup>

Article 3 is built on the opposite principle. Its text is closed. There is no second paragraph, no enumerated legitimate aim, no proportionality clause, no permissible interference. The provision does not protect a sphere of life capable of admitting new contents; it prohibits a defined class of

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<sup>23</sup> *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] (2024) App no 53600/20, [519]–[554] (Article 8), [519] (leaving Article 2 open), [566]–[574] (margin of appreciation and the finding of “critical lacunae”). The companion cases were dismissed on admissibility grounds: *Carême v France* (2024) App no 7189/21; *Duarte Agostinho and Others v Portugal and 32 Others* (2024) App no 39371/20 (non-exhaustion of domestic remedies).

<sup>24</sup> *López Ostra v Spain* (1994) 20 EHRR 277; *Tătar v Romania* (2009) App no 67021/01; *Cordella and Others v Italy* (2019) App nos 54414/13 and 54264/15.

treatment absolutely. To ask the Court to be “dynamic” about Article 3 in the *manner* of Article 8 — to expand the protected interest into adjacent spheres — is therefore a category error, and one the Convention’s structure forbids. The dynamism proper to Article 3 is of an entirely different kind. It is *intensive* rather than extensive: it operates not by widening the field of protection but by raising, over time, the standard of treatment the prohibition condemns. This is the genuine sense in which Article 3 is a living instrument, and the Court articulated it in *Selmouni v France*, holding that acts once classified as inhuman or degrading may, as European societies’ standards rise, come to be classified as torture, so that the prohibition is read with increasing severity.<sup>25</sup>

Once the two dynamisms are separated, the true shape of the critique emerges, and it is sharper than the earlier draft allowed. The complaint is *not* that Article 3 has been left static — substantively, through *Selmouni*, *Saadi*, and the positive-obligation jurisprudence on investigation and protection, it has evolved considerably. The complaint is that the Court has been intensively dynamic about Article 3’s *substance* while remaining remedially timid about its *enforcement*. It has raised the bar of what counts as a violation, yet declined to attach to the established violation the categorical evidentiary consequence that an absolute right implies. The asymmetry, properly stated, is between a maturing definition and an immature remedy. What Article 3 requires is not the borrowed expansiveness of Article 8 but a remedial logic faithful to its own closed and absolute character — and that is a demand for rigour, not for reach.

## V. Philosophical Foundations: Absoluteness, Dignity, and the Limits of Balancing

The intuition that an absolute right cannot be administered by a balancing test has a respectable theoretical pedigree, and making it explicit clarifies what is at stake in the evidentiary doctrine. The most rigorous recent treatment is Natasa Mavronicola’s, which reconstructs the absoluteness of Article 3 along two axes: *applicability* — the prohibition binds in respect of all persons, in all circumstances, without exception or derogation — and *specification* — the substantive delimitation of what the prohibition forbids, which, once settled, admits of no further qualification by reference to competing goods.<sup>26</sup> On this analysis, the legitimate site of judicial reasoning is the *specification* of the wrong; what is illegitimate is the reintroduction of balancing *after* specification, under the guise of remedy. The overall fairness test, applied to real evidence derived from an Article 3 breach, does

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<sup>25</sup>*Selmouni v France* [GC] (1999) 29 EHRR 403, [101]: conduct previously classified otherwise “could be classified differently in future”, given the increasingly high standard required in the protection of human rights. This is the characteristic dynamism of Article 3 — an evolving threshold of condemnation, not an expanding subject-matter. See also *Bouyid v Belgium* [GC] (2015) App no 23380/09, [81]–[90], on dignity and the degrading-treatment threshold.

<sup>26</sup>Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart 2021) chs 1–2. The distinction between applicability and specification allows one to see that the real interpretive work lies in *specifying* the wrong, after which no balancing is permitted.

exactly that: it specifies the wrong (a violation is found) and then weighs its consequences (did it bear on the conviction?). Corina Heri’s study of vulnerability and ill-treatment reaches a complementary conclusion, showing how the Court’s contextual, responsive reasoning under Article 3 can soften the categorical edges the provision is supposed to possess.<sup>27</sup>

The deontological objection is older still. Kant’s formula of humanity — that rational beings must be treated as ends and never merely as means — supplies the moral grammar of the modern prohibition of torture, and it is structurally incompatible with a doctrine that permits the State to retain the evidentiary advantage of having used a person as a mere instrument, provided the resulting trial can be described as fair on balance.<sup>28</sup> Beccaria, writing against judicial torture at the threshold of the Enlightenment, located the illegitimacy of coerced proof not merely in its unreliability but in the corruption of the criminal process it effects: a tribunal that profits from coercion forfeits the moral authority on which its judgments depend.<sup>29</sup> Dworkin’s thesis that rights function as trumps over collective goals, rather than as weights within a calculus of utility, is the jurisprudential statement of the same idea; a right that yields whenever the public interest in conviction is sufficiently weighty is, in his sense, not a right at all but a policy preference dressed in rights language.<sup>30</sup>

Robert Alexy’s theory of constitutional rights supplies, paradoxically, the most precise diagnosis. Alexy treats most constitutional rights as principles to be optimised through proportionality — which is precisely why balancing is appropriate to them. But balancing, on his own account, presupposes that the colliding norms are *not* absolute; to subject a genuinely absolute rule to proportionality is to recategorise it as a principle and thereby to dissolve its absoluteness.<sup>31</sup> This is the conceptual core of the present argument: the overall fairness test is a proportionality instrument, and a proportionality instrument applied to the remedial consequences of an Article 3 breach silently converts the absolute prohibition into a defeasible principle. Jeremy Waldron’s warning against the “normalisation of exceptionalism” — the slow legitimisation of practices once

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<sup>27</sup>Corina Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (Hart 2021). Heri analyses how the Court’s deployment of “vulnerability” introduces a responsiveness to context that sits uneasily with absoluteness.

<sup>28</sup>Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785, Mary Gregor tr, Cambridge University Press 1998) 4:429. The point is not that *Gäfgen* admitted a coerced statement, but that an outcome-sensitive remedial test treats the dignity wrong as a cost to be weighed rather than a limit to be respected.

<sup>29</sup>Cesare Beccaria, *On Crimes and Punishments* (1764, Richard Bellamy ed, Cambridge University Press 1995) ch 16. Beccaria’s argument is independent of reliability: even accurate evidence procured by coercion taints the process.

<sup>30</sup>Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) chs 4 and 7; Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 93–96.

<sup>31</sup>Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2002) 57–69, 100–110. If Article 3 is a rule rather than a principle, the overall fairness test — a proportionality-type balancing exercise — is the wrong instrument for determining the consequences of its breach.

thought beyond the pale by the accretion of carefully reasoned exceptions — describes the mechanism by which this conversion proceeds, case by balanced case.<sup>32</sup>

None of this entails that the Court was wrong on the *facts* of *Gäfgen* — reasonable judges divided sharply, and the majority’s causal analysis was not perverse. It entails something narrower and more structural: that the *method* by which the Court reaches its conclusion — an outcome-sensitive weighing — is in tension with the kind of right it is purporting to vindicate. The philosophical literature does not supply a knock-down argument for excluding all derivative evidence in every case; it supplies a reason to be suspicious of a remedial test that makes the protection of an absolute right contingent on the contingencies of proof.

## VI. The European Composite: Fragmentation, the CJEU, and National Courts

The Strasbourg position does not exist in isolation. It is one element of a composite European order in which the Court of Justice of the European Union (CJEU) and national constitutional courts also adjudicate the admissibility of unlawfully obtained evidence, and the comparison both illuminates and complicates the critique. It must, however, be drawn accurately, and the earlier draft overstated the contrast.

The CJEU has not, in truth, adopted a general presumption that rights-infringing evidence is inadmissible. Its most directly relevant rulings are more textured. In *Prokuratuur*, concerning access to retained communications data in a criminal investigation, the Court held that where evidence has been obtained from data retention incompatible with EU law, the national court must exclude that evidence in criminal proceedings against a person suspected of crime if that person is not in a position to comment effectively on it and it is likely to have a preponderant influence on the findings of fact.<sup>33</sup> That formula — exclusion where the defence cannot effectively comment and the evidence is decisive — is conspicuously close to the Strasbourg fairness factors, not opposed to them. The point was confirmed in the Grand Chamber’s much-anticipated judgment in *M.N. (EncroChat)*, where the Court, addressing the trans-national use of intercepted encrypted communications, declined to lay down an autonomous EU rule of inadmissibility, held that admissibility remains in principle a matter for national law subject to the principles of equivalence and effectiveness, and required exclusion only where the accused is not able to comment effectively

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<sup>32</sup>Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681, 1718–1726; Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999). Waldron’s related work on dignity as rank and status develops the connection between law’s expressive content and its treatment of the most vulnerable: *Dignity, Rank, and Rights* (Oxford University Press 2012).

<sup>33</sup>Case C-746/18 *Prokuratuur (Conditions of access to data relating to communications)* EU:C:2021:152, [41]–[44]. The duty to exclude is conditioned on the inability to comment effectively and the decisive character of the evidence — a fairness-based test resembling, rather than contradicting, the Strasbourg approach.

on evidence likely to have a preponderant influence.<sup>34</sup> Far from a categorical EU exclusionary rule, the CJEU has thus arrived at a position structurally analogous to Strasbourg’s — which weakens, rather than strengthens, any claim that the ECtHR is a uniquely deferential outlier on evidence.

Where the CJEU has been more robustly constitutional is not in admissibility doctrine but in the *upstream* question of what data collection EU law permits at all. In *Digital Rights Ireland* it annulled the Data Retention Directive as a disproportionate interference with Articles 7 and 8 of the Charter, and in *La Quadrature du Net* it held generalised and indiscriminate retention of traffic and location data incompatible with EU law save in narrowly defined circumstances.<sup>35</sup> The genuine divergence between the two European courts, in other words, lies less in their treatment of admissibility than in the constitutional intensity of their review of the underlying interference — and even that contrast is one of degree.

Among national constitutional courts, the German *Bundesverfassungsgericht* offers the sharpest example of a categorical, dignity-based approach, though here too precision is essential, because the earlier draft confused two of its landmark decisions. In the *Großer Lauschangriff* (acoustic surveillance of the home) judgment, the Court held that there exists an inviolable core of private life, anchored in the guarantee of human dignity in Article 1(1) of the Basic Law, which is wholly withdrawn from the reach of even the most compelling state interest and which surveillance may not penetrate.<sup>36</sup> In the *Aviation Security Act* judgment it struck down a statutory power to shoot down a hijacked passenger aircraft, holding that to treat the innocent passengers as a mere means to the protection of others on the ground would violate their dignity absolutely.<sup>37</sup> These decisions instantiate exactly the categorical, anti-instrumentalist logic that the analysis above commends, and they show that such a logic is workable within a sophisticated constitutional order. The foundational status of human dignity in German constitutional doctrine traces to the *Lith* jurisprudence and the objective order of values it inaugurated.<sup>38</sup>

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<sup>34</sup>Case C-670/22 *M.N. (EncroChat)* EU:C:2024:372 (Grand Chamber, 30 April 2024), [104]–[130], esp [128]–[130]. Contrary to some early commentary, the ruling is best read as permitting EncroChat-derived data to be admissible in principle, while insisting on effective adversarial testing of decisive evidence; the headline of the leading case-note is that the data “can be admissible”.

<sup>35</sup>Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2014:238; Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others* EU:C:2020:791. These decisions discipline the *legality of collection*; they do not establish a free-standing rule of evidentiary exclusion.

<sup>36</sup>BVerfGE 109, 279 (*Großer Lauschangriff / Acoustic Surveillance of the Home*), judgment of 3 March 2004, 1 BvR 2378/98 and 1 BvR 1084/99. The Court identified an absolutely protected core area of private conduct (*Kernbereich privater Lebensgestaltung*) immune from balancing.

<sup>37</sup>BVerfGE 115, 118 (*Luftverkehrsrecht / Aviation Security Act*), judgment of 15 February 2006, 1 BvR 357/05. The two decisions are distinct: BVerfGE 109, 279 concerns acoustic surveillance and the inviolable core of privacy; BVerfGE 115, 118 concerns the Aviation Security Act and the Kantian objection to instrumentalising the innocent. They should not be conflated.

<sup>38</sup>BVerfGE 7, 198 (*Lith*), judgment of 15 January 1958. For a comparative common-law analogue of categorical exclusion see *R v Grant* [2009] 2 SCR 353 (Supreme Court of Canada), [71]–[86], establishing a structured test under s

The friction between Strasbourg and the national level is real, and the retention of DNA and fingerprint data illustrates it. In *S and Marper v United Kingdom* the Grand Chamber condemned the blanket and indefinite retention of the biometric data of persons not convicted of any offence as a disproportionate interference with Article 8; the domestic implementation of that ruling was protracted, and the United Kingdom Supreme Court, while acknowledging the incompatibility, declined to grant an immediate remedy.<sup>39</sup> This is a familiar pathology of a soft-remedial regime: a violation is declared at the European level, but the absence of a categorical domestic consequence allows the impugned practice to persist under the cover of procedural compliance.

The divergence is sharpest, and the practical stakes highest, in the law of non-refoulement, where Article 3 and its Charter analogue, Article 4, meet the machinery of the Common European Asylum System. In *M.S.S. v Belgium and Greece* the Grand Chamber held that the transfer of an asylum seeker to a Member State whose reception conditions exposed him to treatment contrary to Article 3 engaged the responsibility of the sending State; the CJEU reached a parallel result under the Charter in *N.S.*, and developed the principle for the European Arrest Warrant in *Aranyosi and Căldăraru*.<sup>40</sup> Yet the convergence is incomplete. The Strasbourg Court has insisted, in *Tarakhel v Switzerland*, that even systemic deficiencies do not relieve the applicant of demonstrating a real risk to himself in his individual circumstances, so that the evidentiary burden, and therefore the practical reach of the same absolute prohibition, varies according to which court's threshold is engaged.<sup>41</sup> That a single absolute norm should yield different burdens of proof, and hence different protective outcomes, depending on the adjudicating forum is itself a manifestation of the architecture this article describes — unequal protection of an ostensibly equal absolute.

Theoretically, the composite order lacks a single *Grundnorm* from which a unified hierarchy of rights could descend; it is, in Neil MacCormick's phrase, a system of interacting legal orders

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24(2) of the Canadian Charter that weighs the seriousness of the breach, its impact on the accused, and society's interest in adjudication on the merits; and, in the United States, the constitutional exclusionary rule of *Mapp v Ohio* 367 US 643 (1961). Comparative caution is warranted: each rule is embedded in its own remedial architecture.

<sup>39</sup>*S and Marper v United Kingdom* [GC] (2008) App nos 30562/04 and 30566/04, [119]–[126]; *R (GC) v Commissioner of Police of the Metropolis* [2011] UKSC 21, [2011] 1 WLR 1230. On the structural problem of weak remedies for strong rights see Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures' (1997) 35 Osgoode Hall LJ 75.

<sup>40</sup>*M.S.S. v Belgium and Greece* [GC] (2011) 53 EHRR 28, [358]–[368]; Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* EU:C:2011:865, [86]–[94]; Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, [88]–[104].

<sup>41</sup>*Tarakhel v Switzerland* [GC] (2014) 60 EHRR 16, [104]–[122]: the existence of general reception deficiencies in the receiving State was not, without an individualised assessment of risk, sufficient; specific assurances as to the conditions awaiting a family with young children were required. The result is a calibrated rather than categorical protection, even for an absolute right.

without a sovereign apex.<sup>42</sup> George Letsas reminds us that the Strasbourg Court is not a constitutional court but a subsidiary international tribunal dependent on State compliance, and that this institutional position does much to explain — without thereby justifying — its remedial caution.<sup>43</sup> Dzehtsiarou’s realist defence — that consistency must sometimes yield to the imperative of preserving the Court’s authority across forty-six jurisdictions — is the strongest case for the status quo, and it deserves to be met rather than dismissed. The answer is that the defence proves too much: if the protection of the most fundamental rights may be calibrated to the Court’s institutional survival, then those rights are precisely the policy preferences Dworkin warned against, and the Convention’s claim to enshrine a non-negotiable core is forfeit. Institutional prudence is a reason for incrementalism in the qualified rights; it is not a licence for elasticity in the absolute ones.

## VII. The Proceduralisation of Dignity and the Expressive Stakes

The foregoing analysis can be generalised into a thesis about the form the Court’s reasoning takes. Across the evidentiary jurisprudence one observes a steady *proceduralisation* of dignity: the substitution of formal guarantees — the opportunity to challenge, the availability of judicial discretion, the integrity of the trial “taken as a whole” — for the substantive question whether the State has forfeited its entitlement to rely on what it obtained. Dignity, on this approach, is no longer an immovable limit on what may be done to a person and then used against them; it is reconstituted as a quality of the trial’s architecture, satisfied if enough procedural boxes are ticked. The shift is consequential because it relocates the wrong. The harm of admitting evidence derived from ill-treatment ceases to lie in the original violation and comes instead to lie, if anywhere, in some residual procedural deficit — which can, by definition, be cured by procedure.

Jürgen Habermas’s diagnosis of a “legitimation deficit” — the condition in which legal form persists while the substantive grounds of its authority erode — captures the danger precisely.<sup>44</sup> A criminal process that is procedurally impeccable and substantively complicit in the fruits of coercion has the outward form of legality and the inward condition of its absence. This is also the point at which the literary register of the original argument earns its place: the bureaucratic

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<sup>42</sup>Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 193–205; Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999) 113–121; Neil MacCormick, *Institutions of Law* (Oxford University Press 2007).

<sup>43</sup>George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 80–98. For a realist defence of pragmatism as the price of maintaining consensus among the Contracting States see Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 134–150.

<sup>44</sup>Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Polity Press 1996). The legitimacy of legal form, on Habermas’s account, depends on its connection to substantive principles of justice that the form is supposed to realise, not merely express.

administration of injustice — lawful in every step, unjust in its sum — is the precise situation Kafka anatomised, in which the law is everywhere present as procedure and nowhere present as judgment.<sup>45</sup>

The stakes are ultimately expressive as well as instrumental. Law instructs not only by the rules it announces but by the conduct it is seen to tolerate, and a court that declares the prohibition of torture absolute while admitting, on balance, the material advantages a State has gained from breaching it communicates a more equivocal message than its rhetoric admits.<sup>46</sup> The populations most exposed to this equivocation are predictably the least powerful — terrorism suspects, irregular migrants, the politically inconvenient — whose treatment is most readily absorbed into the language of overall fairness because the public interest in their conviction is most readily asserted. The risk, in an era of resurgent executive assertiveness and contracting judicial confidence, is not the dramatic abandonment of Article 3 but its quiet conversion into a presumption: strong in ordinary cases, elastic in hard ones, and weakest precisely where the gravity of the alleged offence makes the temptation to cut corners greatest. The paradox with which this article began — that the seriousness of the crime, which ought to fortify rights protection, instead licenses its relaxation — is the practical signature of a proceduralised dignity.

### **VIII. Conclusion: An Absolute Right Deserves a Categorical Remedy**

The architecture of unequal absolutes, this article has argued, is not located where it is usually sought. It is not that the Court has hollowed out the substantive prohibition of torture; on the contrary, in *Saadi*, *Othman*, *El Haski* and *Ćwik* it has defended Article 3 with a rigour that the polemical literature too readily forgets. The inequality is generated downstream, at the remedial interface with Article 6, where the consequences of an established breach are settled by a relational test — the assessment of overall fairness — that is, by its own admission, non-absolute. A categorical right administered through a relational remedy is honoured in its definition and negotiated in its enforcement.

Read with the care it deserves, *Gäfgen* is a harder and more honest case than its reputation suggests: the conviction rested on a fresh, cautioned, and avowedly voluntary trial confession, the tainted pre-trial statements having been excluded and the impugned real evidence used only to corroborate. The majority's causal reasoning was defensible on its facts. But the case nonetheless

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<sup>45</sup>Franz Kafka, *The Trial* (Mike Mitchell tr, Oxford University Press 2009). The invocation is not decorative: Kafka's subject is precisely a process whose procedural density obscures its substantive vacancy.

<sup>46</sup>On the expressive or pedagogical function of exclusion see Andrew Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' in Peter Mirfield and Roger Smith (eds), *Essays for Colin Tapper* (LexisNexis 2003); Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010) ch 12.

exposes the structural difficulty, because the protection it afforded was contingent on an evidentiary good fortune that the rule itself does not guarantee, and because its outcome-sensitive enquiry — did the breach bear on the conviction? — is the very form of reasoning that an absolute right is meant to foreclose. The six dissenting judges saw this clearly.

The remedy this analysis recommends is correspondingly modest and precise. It is not that Article 3 should be expanded into new thematic spheres in the manner of Article 8; the closed text of the prohibition neither permits nor needs such extensive dynamism, and to demand it is to misunderstand the provision. It is rather that the *intensive* dynamism the Court has already shown in *specifying* the Article 3 wrong should be matched by a categorical logic in *enforcing* it — that evidence secured in consequence of a breach of the absolute prohibition should be excluded as a matter of principle, because the State may not profit in any degree from a wrong it was forbidden to commit, and not as the variable output of a balancing exercise. Such a rule would not displace the overall fairness test across the whole of Article 6, where its flexibility is legitimate and, as *Yüksel Yalçınkaya* shows, often protective. It would carve from that test a small, categorical exception co-extensive with the small, categorical core the Convention has always claimed to possess.

The Convention was drafted in the knowledge of what States are capable of doing to those in their power, and the absoluteness of Article 3 is the textual memory of that knowledge. To administer that absoluteness through a test that asks whether, all things considered, the resulting trial was fair enough is to substitute the logic of the audit for the logic of the limit. The reform proposed here is not a counsel of perfection but a counsel of coherence: that a right the Convention declares to be beyond balancing should be enforced by a remedy that does not balance. Until the Court draws that line, the prohibition of torture will remain absolute in its statement and conditional in its vindication — which is to say, unequal among equals.

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