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Rejoinder to Dominiak on bagels and donuts

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Abstract

This is but the latest in a series of debates I have been having with my friend and colleague, Łukasz Dominiak. Included are the following texts: Block (2021), Dominiak (2017; 2019; 2021). We have been agreeing and disagreeing with each other concerning the implications of the bagel and donut theory for a while. The present paper continues this tradition: both agreeing and disagreeing with each other in regards to libertarian theory and trespass on private property.

Introduction

Think of a three-level bull's eye diagram with land area A in the middle of it, the middle ring features zone B, and an outer layer, the rest of the world, which depicts area C. The issue arises: would it be legitimate to homestead in zone B? The answer I have long given to this question is that no, this would be illegitimate. Why? This is because the person who did so, call him Mr. B, would then control area A, even though he had not mixed his labor¹ with any of it.² That is, he can preclude

¹ For libertarian homesteading theory, see Block, 1990; 2002A; 2002B; Block and Edelstein, 2012; Block and Yeatts, 1999–2000; Block and Epstein, 2005; Bylund, 2005; 2012; Grotius, 1814 [1625]; Hoppe, 1993; 2011; Kinsella, 2003; 7.09.2006; 22.05.2009; 21.08.2009; Locke, 1948, 17–19; 1955, Ch. 5; Paul, 1987; Pufendorf, 1927 [1673]; Rothbard, 1973, 32; Rozeff, 1.09.2005; Watner, 1982.

² To make this example more realistic, I assume that there are no helicopters, no bridges, no tunnels; the only way Mr. C, now located in area C, can have access to A would be to trespass on Mr. B's territory.

entry to A by all outsiders. He will not own A, to be sure. Ownership implies both the ability to use the terrain and to preclude others from so doing; with his homesteading in pattern B, he has the latter power, but not the former.³ But still, this is unwarranted control. The “Blockian Proviso” maintains that this would be illicit under libertarian law.⁴ If Mr. B wants to do this, he must open up a path for access to A for Mr. C, the resident of area C.

Dominiak (2017; 2019) has some problems with all of this. However, in his latest contribution to this dialogue he and I have been having (2021), he also turns things around. He does not only examine whether Mr. B may properly preclude Mr. C from access to A anymore. Rather, he turns things inside out. He posits that Mr. C has now taken possession of area A, and maintains that the Blockian Proviso be extended. In his view, it is not sufficient for Mr. B to allow outsiders into area A. Now that Mr. A⁵ has taken possession of A, Mr. B must, further, allow Mr. A access to and egress from A; he calls this territory, A, “landlocked property.” When Mr. A utilizes area B for the purpose of access, either going in or disembarking, Mr. B may not properly accuse him of trespass. My debating partner claims that if the Blockian Proviso is not interpreted in this manner, there will be a conflict in rights, anathema to libertarian theory,⁶ and we should strive mightily to address this issue.

1. Theoretical framework of the research

The theories and concepts that were followed in the research involve homesteading, property rights, and the Blockian Proviso.

2. Research methodology

I critically analyze Dominiak’s latest offering. I quote him widely and then respond to his claims.

3. The background

Dominiak (2021)⁷ sets for himself the following challenge:

³ This is always reserved to him, since he can homestead A whenever he wishes, secure that no one else can beat him to it.

⁴ For more on the Blockian Proviso, see Block, 2016B; Kinsella, 11.09.2007.

⁵ He is the ex Mr. C. I name people based upon the land they occupy. There are only three land masses in this analysis: A, B, and C.

⁶ I wholeheartedly support him in this contention.

⁷ Unless otherwise indicated.

whether landlocked property generates conflicts of rights and what to do with such conflicts [...] So, without any further ado, let me begin with easements. Block claims that necessity easements are justified only if landlocked area A is unowned [...] How then can this pattern of appropriation be anything else than “a contradiction to libertarian theory”? Is it not the case that then the investor is “controlling A, even though he never mixed an ounce of labor with that territory”? After all, he and only he decides whether C can enter B’s (sic)⁸ homesteaded area, A. Hence, it seems obvious to me that if there is “a contradiction to libertarian theory” when the landlocked area is unowned, there must also be “a contradiction to libertarian theory” when the landlocked area is homesteaded, for also in this case, the investor, “without ever laid a finger or toe on territory A,” still controls it.

Yes, I agree, there indeed is a contradiction to libertarian theory here, but that is because we allowed Mr. B to engage in this anti-libertarian behavior: control over A without ever having homesteaded it. Ownership consists of the right to utilize one’s own property without a by your leave from anyone else,⁹ and, also, to prevent others from so doing. Mr. B clearly has the latter benefit. He even has some of the former: he can contemplate A to his heart’s content, secure in the knowledge that no one can stop him from so doing.

Dominiak continues:

if there is an easement in the case of land-locked virgin area (as Block claims), there must also be an easement in the case of landlocked property (as I claim). And if accessing landlocked property without permission amounts to a trespass (as Block claims), then accessing landlocked virgin land must be a trespass, too. It is clear to me that with his fancy donuts, Block spotted a very important thing indeed; namely, conflicts of rights that can be generated by libertarian theory (in this case, by the homestead principle of justice specifically), despite its promise to avoid any such conflicts. And Block’s reaction to his sad discovery was a proper one; that is, to propose a slight revision of the libertarian theory in the form of a very small cap put on the absoluteness of private property rights.

My learned colleague and I have a parting of the ways here. In my view, private property rights are still absolute. They are now ever *more* absolute than before the Blockian Proviso. Previously, they were not absolute in that they were excessive: Mr. B had a right to partially control area A without homesteading it. Now, with this proviso, Mr. B has no such right. Dominiak’s point is that with the proviso, Mr. B now has less than absolute private property rights in his own area B. I would say instead that the *doctrine* of absolute private property rights is still secure, even more so with the proviso, but that yes, our author is correct, Mr. B himself now has less than full property rights in his own territory B.

But the reason for that is entirely compatible with the doctrine of private property rights! It is just that Mr. B has violated this doctrine, and thus must be made to pay the appropriate penalty for his misbehavior: he must allow Mr. C to transverse his property so as to have access to area A.

But this is not the first time on record that people have had less than full private property rights over what would otherwise be considered their own land —

⁸ At this point Dominiak says “C’s.” I think this is a typographical error on this part and I have corrected it.

⁹ Assuming, of course, the owner does not violate the rights of others in so doing.

for example, if they signed a restrictive covenant, disallowing them from certain activities. Or, if they agreed, for sufficient consideration, not to build a high fence, allow trees to grow past a certain height, so as to protect a neighbors' view. Or if they voluntarily joined a homeowners' association. As none of these cases would constitute "a very small cap put on the absoluteness of private property rights," neither, then, should the Blockian proviso be described in this manner.

Dominiak next avers as follows:

the unowned center of the bagel may (is permitted to) traverse the investor's land in order to reach the virgin parcel and mix his labor with it. I like it. Before the Blockian Proviso, there was a conflict of rights: potential homesteaders had duties not to traverse the investor's property and they had liberty-rights to enter the virgin land, but since they could not enter the virgin land without traversing the investor's property, it followed that they also had no liberty-rights to enter the virgin land, which was a plain contradiction rightly identified by Block. After the Blockian Proviso, there is no such conflict of rights anymore; potential homesteaders no longer have duties not to traverse the investor's property. They have easements for homesteading purposes. But this strictly analogous conflict of rights takes place in the case of land-locked property, and unless the Blockian Proviso is extended to such cases, a contradiction ensues. Thus, without the Blockian Proviso, the owner of the center of the bagel has a duty not to traverse the investor's property, and being equipped with a right to control his own center parcel, he also has a liberty-right to enter this parcel, but since he cannot enter it without traversing the investor's property, it follows that he has no liberty-right to enter his own center parcel.

Or to leave it. Aha, this is the blockade objection to private roads. This was dealt with in Block (2009B). How does Mr. A get there in the first place? He first homesteads A, leaving B entirely alone. But, how did Mr. A get to area A in the first place? B was at that time virgin land. Mr. A traversed area B before Mr. B was there, in order to get to area A to homestead it in the first place. Thus, Mr. A at the very least has a homestead right to access and egress from his own land A, since he established this before Mr. B came on the scene. So, there is no contradiction to libertarian theory involved here.

Continues Dominiak:

[Block] gives us a series of hypothetical scenarios in which owners go travelling and cannot come back home because they got flat tires or do not have money. Block believes that from the fact that they now lack the where-withal to travel home, it does not follow that they have a right to such wherewith-al. And I agree with this author. Under libertarianism, they do not have any such rights. But this is entirely beside the point. Notice that these scenarios were supposed to prove the non-existence of a very different right, namely the right that A has "[a]s the owner of the land" to his own land, that is, "a right to possess and use the land." Now from the lack of rights to the wherewithal, it decidedly does not follow that these poor travelers also lack rights to possess and use their own home bases.

I do not see why not. If these travelers lack bus fare to return home and it is too far to walk to get there, then they certainly do not have a right to get there. There are no positive rights in libertarianism. Well, I spoke too soon. They still have a right to "possess" their land, in the sense that they could call the police to

evict trespassers. But they would have no right to “use their own home bases,” since by stipulation they lack the means to get back there.

Dominiak now launches a three-pronged critique of my perspective:

As I see it, there are at least three things that cause Block’s analogies to misfire. First, it is suggested in their very formulation (e.g. a flat tire) that there are various means available (after a bit of effort) to the poor traveler by which he can come back home, possibilities explicitly assumed away in the bagel scenario. Second, even if he really could not get himself any money to pay for any of these various means and literally no one could give him a lift or whatever, there would still be innumerable property owners whose money could make it possible for the traveler to access his home base, whereas in the bagel scenario, there is only one owner whose property is eligible for an easement. Third, none of these innumerable people does anything to make the poor traveler’s return impossible, whereas in the bagel scenario, it is a specific person who homesteads the land in a way that makes it impossible for the landlocked owner to access his property. And this is exactly this very person that should suffer the servitude [...] Should the investor be compensated for giving easements to potential homesteaders and landlocked owners? I cannot see why not. After all, compensating owners for their land being trodden on by others seems like strengthening their ownership, not weakening it.

There is nothing at all wrong with Mr. B being paid by Mr. A so that the former will allow the latter access to his property, B. All mutually voluntary commercial interaction is certainly compatible with and supported by libertarian theory. However, suppose Mr. B refuses for any price to allow Mr. A access to his land, B.¹⁰ My debating partner would see great problems in this eventuality. He might even see a “contradiction” or a “conflict in rights” should this scenario come to pass. I take a different position. If Mr. B will not allow Mr. A access to territory B, well, that is just too bad for Mr. A. He will have to do without property A, which would otherwise be owned by him. Can he be trapped there, and forced to die, without any food coming in?¹¹ Of course not. How did he get in there in the first place? Presumably, through area B. Well, then, he has thereby homesteaded at least the right to leave, if B was unowned at the time. However, if Mr. B was the proprietor of that terrain at the time, the only way then Mr. C, now Mr. A, could have arrived at A would have been via trespassing through B. He would have been a criminal. But, surely, any civilized punishment law would not allow the death penalty for so relatively minor a crime. Thus, he would have been allowed to escape.

¹⁰ I confess I cannot see this eventuality ever arising as a practical matter. Right now, purchasers of real estate commonly — make that almost certainly — also buy title insurance. This assures them that what they are obtaining from the vendor is actually owned by him. Similarly, in the free society, this “blockade” that Dominiak poses would also never arise; before consummating a deal, the shopper would avail himself of access insurance, both ingress and egress. Or, would legally tie up the vendor, Mr. B in our case, so that the latter could not blockade him, prohibiting him from entering or leaving the property he is now obtaining, A. For more on this see Block, 2009A; 2009B.

¹¹ As I write this, there are truckers in convoy in Ottawa, Canada, protesting COVID policies. The government is contemplating just this tactic in order to quell them.

Continues Dominiak:

It seems like putting still a smaller cap on the absoluteness of private property rights. It seems more libertarian than no compensation at all. So, let me make my thesis more explicit and see whether now it is more palatable for Block: yes to necessity-easements for landlocked proprietors, but only with compensation to the servient owners.

Compensation schmompensation. This would be akin to eminent domain coupled with the stipulation that the government is compelled to “compensate” the victim. But eminent domain is unjustified¹² in the first place, whether undertaken by the state or privately, as advocated by this author. Further, who sets the level of compensation? If Mr. B, the owner of land B, does, he can demand an infinite price. That is, he is not willing to be paid any amount to have trespassers utilize his land. That is what “the absoluteness of private property rights” really means. It does not, as per Dominiak, mean that the owner’s property rights may be abrogated and then he is paid for this violation of rights. Rather, it means that his property rights cannot be violated in the first place.

But Dominiak has several other arrows in his quiver:

if Block prefers the language of trespass to the language of easements (with compensation), then I am happy with that. And it seems that he does, for he says that according to NAP, the land-locked person traversing the land of his neighbor commits a trespass. If so, I am also ready to admit that the landlocked owner who traverses the investor’s land without authorization commits the tort of trespass and ought to compensate the investor. But nothing more! Decidedly, he should not be prevented from traversing the investor’s land or punished for doing it, for the landlocked owner has a justification for his act in the form of exercising his ownership rights. So, in a sense, I would agree with Block when he says that “[t]o Dominiak it seems that, surely, in that world a landlocked person still acts morally permissibly in crossing other people’s property without permission if necessary to survive” and to exercise his ownership rights. But the moral permission with which the landlocked person acts is not full permission, for it does not magically extinguish the investor’s property rights; thus, the tort of trespass is committed nonetheless, and so compensation is due.

My response is that trespass is trespass. It is still trespass even if the trespasser does so for reasons very important to him. Now, I go along with Dominiak to this extent: it is better that the trespasser pay the landholder compensation for this crime than not do so and violate private property rights scot-free. But this is hardly the libertarian answer. Rather, it is that no trespass at all occurs. It is the same with any other crime: murder, rape, theft, kidnapping, fraud; the ideal libertarian solution is that none of these acts take place, and if they do, the malefactor be imprisoned and the rights violation be stopped in its tracks. However, and this seems to be the only point on which I can agree with Dominiak — if for some reason these wrongdoings cannot be stopped, then yes, it is better that the criminals pay

¹² See the following for libertarian opposition to eminent domain: Benson, 2005; Block, 1998; Block and Block, 1996; Block and Epstein, 2005; Gordon, 27.03.2020; Gregory, 5.12.2006; Nedzel and Block, 2007; 2008; Paul, 1987; Speiser, 27.07.2005; Ward, 22.11.2012. For the case in favor of eminent domain made by otherwise supporters of free enterprise and private property rights, see Epstein, 1985; Tullock, 1996.

compensation to their victims¹³ than if they are not forced to do so. But why this should be considered to be fully compatible with libertarianism is very unclear.

Dominiak now poses the case of a ship captain, A, who is forced to jettison cargo in his care belonging to C due to a storm at sea which will capsize the vessel unless he does so.¹⁴ According to our author, this sets up yet another conflict in rights. He continues:

what Block says in his rejoinder, it seems that there is no answer to this question on libertarian grounds. Whatever A does, he is damned. Whatever he does, he is blameworthy. Or, paraphrasing Block: whatever he does, this captain “commits a crime and should be duly punished for it.” But “we should not be deterred by it, no matter how dramatic, if we wish to uphold the pure libertarian position.” That is a failure, for it is obvious what A ought to do: he should jettison the cargo. Yet it does not mean that C’s rights are thereby automatically extinguished (that would be in ‘a contradiction to libertarian theory’).

I do not see any clash in rights here. Presumably, there would be an explicit contract between A and C in this case such that if an emergency arises at sea, C’s cargo is jettisoned. If there is no such explicit contract, surely, there is an implicit one to this effect. Consider this case: X is choking to death, or about to be hit by an onrushing truck. Y sees this and successfully provides the Heimlich maneuver on X or pushes him out of the path of the truck and into safety. However, in so doing, Y breaks X’s ribs. Dominiak would see this as a conflict in rights, since Y has no right to break X’s ribs. I see his point, but I just cannot see my way into agreeing with it. Surely, there is no rights conflict in this story; Y is a hero. And the same thing applies to the captain of the ship who jettisons cargo to save his vessel and all the lives of his shipmates.

But Dominiak rejects this response of mine. He maintains:

After all, crime is never what one ought to do, and throwing the cargo overboard is what A ought to do. Similarly, crime is something for which one is blameworthy, and no one is ever blame-worthy for doing what one ought to do. So, it is not a crime, and A should not be punished. However, he should pay compensation to the cargo owner, C.

Possibly, the explicit contract between the boat owner A and the cargo owner C would stipulate whether the former owed the latter compensation.¹⁵ It all depends upon who the risk bearer of storms at sea is. But let us posit that this is the case: A owes C money for jettisoning his cargo. I still do not see how this proves that the trespasser should not be stopped by the forces of law and order from continuing his depredations in our bagel case. Yes, the intruder should have to pay compensation, but why not also be prevented from continuing his crime spree? Moreover, there seems to be a disanalogy between the two cases. In the encroachment example, the crime is ongoing; my learned colleague does not object to its continuation. He only insists, quite properly, that the squatter should be made to

¹³ Or to the heirs of the victims in the case of murder.

¹⁴ B is mentioned here, but I am not sure who he is. Perhaps the sailors on the ship.

¹⁵ But surely Y owes no compensation to X?

pay compensation to the landowner. How much, he does not say. Nor does he imply the aggrieved property owner would voluntarily accept this payment. Dominiak does not object to the continuation of this rights violation. The storm at sea example is very different. Here, all parties would agree that the ship captain should abandon the cargo. There is no blame. Again, my debating partner calls for compensation. Here, it is clear what the upper bound of that would be: the value of the freight. Nor can anyone object to a continuation of this practice: whenever there is a mighty storm, it is legitimate, even obligatory, to throw the consignment into the ocean. No one would disagree with that. But there is plenty of discord concerning the interloping in the donut case.

Our author then launches into the case where the ship captain proceeds into the storm, where he had the option of doing no such thing. I fail to see the benefit of this example.

At this point, Dominiak attempts to refute the *reductio ad absurdum* I utilized against his position.

If it is justifiable for people to trespass in order to save their lives, what else might become compatible with libertarian law for this life saving purpose. How about people who do not save for a rainy day; they are now going to starve (we abstract from private charity in all these cases), so government welfare programs would now be defensible on private property grounds.

What is his defense against this *reductio* of mine for trespassing in order to save lives? He offers the following:

However, landlocked owners do not have easements “in order to save their lives,” although they may exercise them also for this purpose. They have easements because otherwise, we would have an insurmountable conflict of rights which libertarianism promised to avoid and because, therefore, someone’s property rights simply have to partly give.

Perhaps I am being obtuse, but I still do not see any conflict in rights. Not in the cargo jettisoning case, nor when Y saves X’s life but breaks his ribs in the process. Yes, ordinarily, breaking an innocent person’s ribs constitutes assault and battery. But this assessment no longer prevails in the context of saving the victim’s life. Similarly, throwing someone’s cargo into the ocean in ordinary circumstances should be a crime. But not when we take into account proper international law, implicit if not explicit contracts, and the hoary law of the sea traditions.

A better case for Dominiak would be two bedraggled ship-wrecked sailors hanging on for dear life to a wooden board that can only support one of them. But even here there is no conflict in rights. For the owner of the ship, now reduced to this one piece of timber, would have to decide, perhaps in advance, which one of these sailors should stay alive and which must drown. Posit that no such ruling has been made in advance, and/or that the owner is not one of the two contending parties and cannot be found to make any such determination in the first place. Again, libertarian theory makes good this omission. We resort to homesteading theory¹⁶:

¹⁶ See fn. 12

whichever of them first touched the wooden board is the proper owner of it. It is only in the case there they each came into contact with this life saving piece of wood that there can be a conflict. But not a conflict of rights. For here, too, libertarian theory comes to the rescue: they can flip a coin, or bet on the next seagull, or resort to any other such fair determination process.¹⁷

Nothing loath, my scholarly colleague continues his intellectual sally against me:

So, there is a clear disanalogy between Block's reductions (sic)¹⁸ and cases of landlocked property and cargo. In the former case, there is no conflict of rights. In the latter case, someone's rights have to give. Now, what to do in such lifeboat cases? Contrary to the libertarian promise, there is a conflict of rights. What should we do? My answer: put a cap on the absoluteness of libertarian rights, give an easement and allow a breach, but with compensation.

I appreciate Dominiak's concern and his fear that our mutually beloved libertarian theory is not up to snuff. I welcome his attempt to ameliorate it with his compensation analysis. Where we part company is that I do not see the problem in the first place, and I do not understand how a continued rights violation, even a compensated one, can be even compatible with libertarian theory, let alone suffice to patch it up.

Conclusions

Dominiak ends his essay on a difficult note for libertarian theory. He avers:

Yet, I take it to be pretty uncontroversial that what the father (of the starving child) ought to do in this case is to steal the bread. Unless we thought so, there would be no dilemma to start with. And there is a dilemma to start with. Unless Block thought so, there would be no good reason why his 'heart would go out' to the father. And his heart goes out to the father. Moreover, I also take it to be uncontroversial that saving the child's life is a good much greater than leaving the baker's stock of bread intact — or alternatively, letting the child die is an evil much heavier than stealing a loaf of bread. So, it seems to me that the father has a ready justification for his action: the balance of evils. He committed a petty theft because that was necessary to avoid a great evil. He did what he ought to have done. Now, it would be both conceptually weird and morally unfair to hold him blameworthy for doing what he ought to have done. I therefore conclude that he should not be punished. However, because he infringed upon the baker's property rights, he should pay compensation to the baker. After all, the baker's rights are not only *prima facie* claims that disappear in the face of weightier considerations. They are absolute. But not as absolute as to condemn the father for saving his starving children.

¹⁷ In baseball, when the runner and the baseball arrive at first base at the exact same moment, the "tie goes to the runner." This is perhaps because less than 50% of batters can successfully hit the ball. Or, maybe, this rule was declared in order to make the game more interesting. Whatever the cause, this is not arbitrary from a libertarian point of view, since the process under which this rule was selected did not violate any rights.

¹⁸ I spy a typographical error here; this should be *reductios*, not *reductions*

Dominiak and I also part company concerning the father's theft of bread from the baker to feed his starving child. My heart still goes out to the father. But my libertarian "head" is on the side of the baker.¹⁹ Nor can we acquiesce in Dominiak's demand that the father "pay compensation to the baker." If he could have done so, he would have already paid the purchase price and had no need to steal.²⁰

Libertarianism does not ask what the father should have done in the face of this dilemma.²¹ That is a question for the discipline of morality to wrestle with. Libertarianism is only a small branch of that discipline: the subset concerned with the proper use of violence. And, here, it was the father who engaged in a rights violation, not the baker by stopping him.²²

My research results are that Dominiak's and my views of private property rights greatly diverge.

Acknowledgements

I acknowledge the work of Łukasz Dominiak. Even though I am somewhat critical of his work in this paper, I regard him more as a partner, a fellow traveler, in our mutual effort to shed light on this issue.

There was no financial support for this paper.

¹⁹ And, also, on the side of all the multitude of children who will starve if bakers cannot earn a profit and are forced into bankruptcy. Then, no bread for any children, nor adults. Hazlitt (2008 [1946]) teaches us to analyze the effects of a public policy not just on one person, but on all people involved; not just at the present time, but in the future as well. Dominiak does not take Hazlitt seriously enough. It is no accident that to the degree that private property rights are respected is the degree to which there are fewer starving children.

²⁰ In any case, compensation under libertarianism would be far in excess of the purchase price of bread. If the father cannot pay the latter, he certainly could not pay the former. On libertarian punishment theory, Rothbard (1998, 88, fn. 6) states: "It should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a retributive theory of punishment, a 'tooth (or two teeth) for a tooth' theory. Retribution is in bad repute among philosophers, who generally dismiss the concept quickly as 'primitive' or 'barbaric' and then race on to a discussion of the two other major theories of punishment: deterrence and rehabilitation. But simply to dismiss a concept as 'barbaric' can hardly suffice; after all, it is possible that in this case, the 'barbarians' hit on a concept that was superior to the more modern creeds." See also Block, 2009A; 2009B; 2016A; 2018; Gordon, 4.09.2020; Kinsella, 1996; 1997; Loo and Block, 2017–2018; Olson, 1979; Rothbard, 1977; 1998; Whitehead and Block, 17.02.2003.

²¹ See Block (2003) on a case where a hapless person is hanging onto a flagpole 15 floors above ground level and the owner demands that he drop to his death.

²² We assume that the father first sought charity to keep his child alive but that this option failed.

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