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2. Property rights: Locke, Kant, Peirce and the logic of volitional pragmatism

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The task I have set myself here is to explore the *idea* of property rights in the American experience. To get there we will need to contend with John Locke, Immanuel Kant and Charles Sanders Peirce.

TAKING LOCKE LITERALLY

Locke plays a central role in the American idea of property rights. He works out a theory of the *acquisition* of 'property,' such acquisition then giving rise to several desirable outcomes, from which flow the main justifications for the *holding* of property.¹ Locke's *deus ex machina* is a 'creation story' (Krueckeberg, 1999) in which a Calvinist God gives the earth to humans *in common* and admonishes them to take dominion over that commons by, among other things, mixing their labor with it. When they have done so, and of course, given that humans have something called 'natural rights' in their own labor power (another necessary assumption), it is easy to show that the only way for humans to have an incentive to mix labor with something that, so far, belongs to no one is to reward them both with the fruits of their labor and with the thing on which they have so assiduously labored.

Since we are still in a state of nature – pre-civil society – the problem then becomes one of protecting from the predations of the lazy or the thuggish that which has been acquired by dint of hard work. Enter the state. The *purpose* of the state is to protect those who have labored as God commanded, and thereby to bestow on all the beneficial effects to arise from this class of hard-working citizens. The state, having arisen to protect those who have, out of nothing but hard work, created so much is thus obligated to stand as a shield for those who now hold 'property.' That protection works in two important directions. It works against others who may wish to prey on the industry of those who labor on their land, and it works, reflexively, against that very state. That is, the state itself is restrained – by the collective realization of the

great beneficence to arise from the existence of an owning and laboring class – from interfering with those activities it finds so beneficial and compelling.

We may notice here an example of the *teleological fallacy*. One commits the teleological fallacy when effect is confused with purpose. Early belief that the ‘purpose’ of the moon is to facilitate travel by night depicts just such a fallacy. To observe that property rights can indeed, at particular times, have the effect of preventing certain activities from occurring is not correctly to conclude that such is their purpose. The teleological fallacy, in the hands of strict deductivists, allows for a general theory of property rights to become twisted into a justification for very particular regimes of property rights. That is, from a general theory about individual autonomy and initiative, and the idea that one ought to be able to reap where one has sown, it does not inevitably follow that in all circumstances sowing begets automatic and inevitable reaping.

It is here that we come to the Lockean idea of holding land. If one acquires land in the Lockean way, then it has been justly acquired, and its continued holding is justified on moral grounds. Equally important, this holding is justified on prudential grounds since the effect of individuals holding land is the production of benefits to the community at large:

Property was to be an aid to creative work, not an alternative to it ... The law of the village bound the peasant to use his land, not as he himself might find most profitable, but to grow the corn the village needed ... Property reposed in short, not merely upon convenience, or the appetite for gain, but on a moral principle. It was protected not only for the sake of those who owned, but for the sake of those who worked and of those for whom their work provided. It was protected, because, without security for property, wealth could not be produced or the business of society carried on. (Tawney, 1981: 139)

But the key justification for the continued holding of land (‘property’) finds its expression in the idea that this grant is the essential assurance of liberty for those who hold land. They are assured of liberty because the state agrees to protect them from the predations of others, and they are assured of liberty because the state itself agrees to refrain from its own form of predation by which the hard work of a few might be threatened by the greed of the many who would otherwise enlist the coercive power of the state as a collective instrument of their individual avarice. Why would anyone agree to this arrangement? Because they too might wish to become an owner someday and this logic can be seen to benefit them as well. Locke has cleverly closed the circle. Almost.

Locke recognized that as the earth filled up, and as less and less of God’s commons was available for free expropriation, a certain inconvenience might arise. As Locke put the matter, his theory of justified acquisition and subse-

quent justified holding worked only so long as there was 'enough and as good' for others. This Lockean proviso brings us to Kant.

TAKING KANT SERIOUSLY

It is fair to say that Immanuel Kant is not known as a major theorist of 'property.' But he has some fundamental ideas about rights and therefore about property rights. Kant takes us to the nub of the matter when he notices that rights are not tangible empirical realities (*possessio phenomenon*) but rather noumena (*possessio noumenon*). Those things that cannot be apprehended by the senses but are knowable only by reason constitute noumena. Kant motivates his inquiry into rights by asking what conditions are necessary in order that an individual might be able to make internal something that is, by its very nature, external. The key idea here is one of belonging – of *belonging to*. Something external to an individual is made internal by understanding the idea of belonging to. And how is it decided that something external belongs to an individual?

The individual may well declare that some particular object or situation belongs to her. Notice that this is a claim against all others to whom the object or situation might otherwise belong. Such claims are asserted by those who wish to make the point that the speaker is the rightful (justified) possessor and controller ('owner'?) of the thing under discussion. Something external has now, by dint of unilateral proclamation, become internal to the speaker.

Kant noticed something important here. He recognized that such claims represent negations of the interests of others within the same community. And he suggested that while one individual may indeed announce and display physical *possession* of something external, this was not the same as having a socially sanctioned authority to make that declaration binding on others who might wish to make internal that very same thing. That is, unless others to whom the possessor directs her assertion are predisposed to respect those claims, the situation is unstable and therefore cannot be expected to settle the matter once and for all. Kant noticed that it is only from the consent of others that one can make internal that which is clearly external. For if that external thing can belong to *anyone* within the community, what mental process will allow it to become internal (to belong to) any *particular* member of that community? Why should others willingly accept binding duties on nothing more compelling than the self-serving assertions of those already in possession of something of potential value to others?

Kant said that such assertions are nothing but the affirmation of empirical possession. And by being based on mere possession (*possessio phenomenon*), they confuse physical control with something much more profound. That

more profound circumstance is one that Kant called intelligible possession (*possessio noumenon*). We see intelligible possession at work when a community of sentient beings reaches agreement that indeed it is both right (moral) and good (prudential) that someone among them should be able to make internal something that has hitherto been external.² On this account, what is mine depends not on what I say about it being mine. Rather, what is mine becomes mine in virtue of the assertions of all others who, by their declaration, acquiesce in their own disenfranchisement from the benefits associated with that object or circumstance. Others grant me *possessio noumenon* – I cannot take it for myself.

TAKING PEIRCE ABDUCTIVELY

Locke has given us a basis for justified acquisition and holding of land ('property') as long as there is 'enough and as good' for others (Becker, 1977). But Locke stopped short of a complete theory of what is to be done when there is *not* enough and as good for others. That is, Locke developed a theory of acquisition and holding that works best when it is needed least. Kant enters to point out that continued holding of land ('property') in the face of scarcity requires something very special. For scarcity raises the specter of deprivation and exclusion if Lockean acquisition and holding work against the interests of others in the community who – in virtue of coming late – find that all of God's commons has already been justly acquired. How are we to explain (justify) holding of land ('property') once there is no more of it to be justly acquired?

Contemporary Lockeans have a ready answer to this question: let the latecomers buy it from those who have justly acquired it (or who have previously purchased it). We see that once the initial acquisition has been transferred to another for due consideration (a purchase price), the logic seems compelling and without end – all future acquisitions must be mediated by due consideration to the extant holder of land ('property'). And what is transferred in this way is – and must be – precisely what earlier acquirers obtained. The just acquisition and holding continues into perpetuity.

This seeming escape from the grips of scarcity leaves one fundamental issue still to be addressed. What if the current holding results in land ('property') use practices that, in the fullness of time, are found to be neither moral nor prudential?³ Given this possibility, on what grounds can payment then be justified in order to induce the current holder to stop using his land ('property') in an antisocial manner? In other words, what is to preclude one or more holders of land from engaging in social extortion? We see that land justly acquired may evolve into land unjustly held – its current use is no

longer moral or prudential. Here Locke joins Kant in admitting that under certain circumstances the presumed beneficial link between acquisition and holding might be severed. Recall that Locke presumed that land justly acquired would be used in a manner that redounded to the benefit of the entire community, and that fact was part of the justification for its acquisition and continued holding. But what if this is not the case? Kant answered with the proposition that the community itself must determine whether land justly acquired remains justly held. How is this to be done? It is accomplished through *reason* emerging from a *bürgerliche Gesellschaft* – a civil society. It is the community itself that must set the standards by which continued holding of justly acquired land ('property') remains justified.

This brings us to a difficult pass. We are, it would seem, in need of a new theory of holding. Such a theory must offer an explanation (justification) for difficult decisions about just and prudential holdings into the future. In more practical terms, this theory must address the issue of what to do when extant holdings are found to warrant just attenuation. Must payment using public funds be made for this attenuation? This is the essential 'takings' question.

The deductivist would start work on such a theory by invoking certain axioms, soon to be augmented with a few auxiliary assumptions, with the intent of producing a general theory about how one decides when extant holdings may be abridged in the absence of payment to the holder. We see one particular form of this deductive chain in play when some commentators produce a 'theory' indicating that there are *no* circumstances in which actions on land ('property') justly acquired can be partially or completely attenuated by government without being accompanied by payment.⁴ We see such a theory at work in the writings of Richard Epstein (1985). Epstein and his colleagues deploy axioms and assumptions that allow them to conclude that *any* attenuation by the state of uses on justly acquired land requires payment from the public purse.

Deduction is also the epistemology of choice of those who believe that there are plausible grounds to fashion an approach that is less absolute. That is, this group of legal theorists seeks to invoke axioms and auxiliary assumptions that will allow sharper distinctions to be drawn about justified and therefore uncompensated attenuation. The 'theories' that emerge from this group of legal scholars invoke several assumptions (hypotheses) as may be needed to give their 'theory' traction. Here we are likely to see assumptions (explanatory hypotheses) such as: (1) reciprocity of advantage; (2) reasonable investment-backed expectations; (3) beneficial use; (4) proportionality; (5) the distinction between preventing harms and providing benefits; (6) legitimate public purpose; and (7) the extent of diminution of 'all economic value.' These deductivists clearly imagine that they have a more coherent and consistent theory of justified and uncompensated attenuation – a more nuanced

theory – than the extreme position of, for example, Richard Epstein. Such theorists will dissect the facts of ‘takings’ cases, and they will carefully read legal decisions in an effort to discern which of these several ‘causal factors’ can explain the particular findings. Sometimes one of these factors will be found sufficient. In other cases several of them will be found necessary in order to ‘explain’ the decision. But in most cases the legal scholars can resurrect enough hypotheses as being dispositive that they can then advance a ‘theory’ of that particular case.

We may notice something quite odd here. That is, all posited explanations of this sort ‘explain’ the particular decision under scrutiny, but they obviously fail to offer us a general theory by which we may understand the general idea and practice of property rights in the American experience. Each ‘theory’ is of a very particular kind – and it is, therefore, not a theory at all. Each ‘explanation’ merely re-describes the specific findings and in doing so tells us that one or more hypotheses are adequate to ‘understand’ this particular decision. The cynic would call this *ad hoc* empiricism, or – worse – verificationism.

Enter Charles Sanders Peirce, who insisted that knowledge production required a new means whereby novel hypotheses might be brought on to the stage. Abduction is a class of inference that yields explanatory hypotheses for – or explanations of – observed phenomena. In contrast to deduction, abduction is not the result of the application of axioms, assumptions and applicability postulates to produce a theory. Instead, abductive knowledge starts with particular known empirical circumstances and then invokes specific axioms, assumptions and applicability postulates to produce explanatory propositions (testable hypotheses) about the known phenomena. These propositions might then come to constitute a theory of the nature and content of property rights. Abduction is not confined to particular cases – though it can tell us something of those cases. Rather, abduction seeks, just as with deduction, a general theory of the thing – property rights – under scrutiny. Aristotle called this way of knowing *diagnosis* and it is indeed the very process engaged in by those whose task it is to diagnose empirical phenomena – physicians, automobile mechanics contemplating an engine that will not start, and pathologists who perform autopsies (Ducasse, 1925). I follow Charles Sanders Peirce who used the term abduction. We use abduction when we observe certain empirical regularities (or irregularities) in the world around us and seek to construct plausible explanations.

The contrasts between deduction and abduction can be illustrated as follows. The deductivist will ask the question: ‘does this particular Supreme Court respect (protect) – or fail to respect (protect) – property rights?’ The deductivist will then invoke hypotheses (assumptions) that will render a tentative answer to that question. Or, the deductivist will ask a somewhat

subtler question: 'what is the position of this particular Supreme Court with respect to property rights?' Notice that both of these questions start with a prior idea of the nature of property rights, and the investigator then seeks to answer his/her own question by reading carefully, and by parsing, particular legal decisions and linguistic niceties in footnotes.

The abductivist would find both of these questions to be seriously flawed. The questions are flawed because they presume (axiomatically) the prior nature and scope of something (property rights) that is the very idea (concept) requiring explanation. It is akin to asking a three-year-old if she is 'telling the truth.'

The abductivist has a more promising epistemology. The abductivist would observe a series of Supreme Court decisions that, on their face, appear to hold quite different implications for the concept (the *a priori* idea) of property rights. Candidate cases – the empirical phenomena requiring explanation – might easily include a few of the classic 'takings' cases of recent memory: *Euclid v. Ambler Realty* (272 US 365 (1926)), *Teleprompter Co. v. Loretto* (285 US 419 (1982)), *Hadacheck v. Sebastian* (239 US 394 (1915)), *Mugler v. Kansas* (123 US 623 (1887)), *Penn Central Transportation Co. v. New York City* (438 US 104 (1978)), *Agins v. City of Tiburon* (447 US 225 (1980)), *Lucas v. South Carolina Coastal Council* (505 US 1003 (1992)), *Keystone Bituminous Coal Association v. deBenedictis* ((480 US 470 (1986)), *Nollan v. California Coastal Commission* (483 US 825 (1987)), *Pennsylvania Coal Co. v. Mahon* (360 US 393 (1922)), *Palazzolo v. State of Rhode Island* (533 US 606 (2001)) and most recently *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (122 S. Ct 1465 2002). To the deductivist the findings in these cases would appear idiosyncratic and without logical coherence. These cases are the stuff of long and tortured exegetical law review articles in search of some unifying explanatory thread. After all, the Supreme Court must have some guiding principles by which it resolves property rights disputes. Aren't there durable legal doctrines that inform decisions in such important cases?

The abductivist, rather than finding these cases perplexing, would use their very 'confounding' reality as the starting-point for working out a theory of property rights in the American experience. That is, these cases and their findings are the very reality that cries out for a theory – an explanation. And there is a plausible explanation for these seeming disparate decisions by the Supreme Court, but it will require the joining of abduction with the idea of volitional pragmatism.

PROPERTY RIGHTS AND VOLITIONAL PRAGMATISM

I submit that the only way to understand the idea of property rights in the American experience is to understand that this term is the benediction applied to those settings and circumstances that, when the dust of consideration by various levels of jurisprudence has finally settled, are found worthy of indemnification by the state. This proposition springs from the logic of volitional pragmatism. Notice that the term property rights is not something known axiomatically – something whose essence is clear to us by intuition or introspection before the specifics of a particular legal struggle is joined. Rather, the idea of property rights is arrived at – created – in the process of resolving mutually exclusive rights claims before the court. That is, property rights are not *a priori* ‘essences’ that exist and await mere discovery in a particular legal scuffle. Rather, property rights are created in the process of resolving disputes originating in conflicting rights claims brought before the courts. This means that the American judicial system does not seek to discover where the *a priori* property right lies. Rather, the courts offer a necessary forum before which, from time to time, conflicting and mutually exclusive rights claims will be brought. When the more compelling rights claim has been determined, the courts will issue a decree to that effect. We see that property rights are made, not found.

This recognition follows necessarily from the meaning of ‘right.’ To have a right means that you have been granted the ability to compel the coercive power of the state to come to your assistance against the contrary claims of others. Rights allow individuals to enlist the wondrous powers of the state as their very special ally. The granting of a right by the state (and the courts are but the final arbiters of state action) does not imply passive support by the state. Rather, that grant bestows active assistance for those to whom the state has granted that status of a ‘right.’ That is, the state stands ready to be enlisted in the cause of those to whom it has granted rights. We say that rights expand the capacities of the individual by indicating what one can do with the aid of the collective power (Bromley, 1989; Macpherson, 1973; Commons, 1968 [1924]).

Notice that to have civil rights means that the state will come to your aid if, for instance, you wish to eat in a particular restaurant or enroll in a particular university. Federal marshals, under a binding decree from the courts, stand ready to assist you in those desired acts, regardless of their personal views about the legitimacy (justifiability) of your demands. You have rights and the state is your ally, the reality of which is the necessary condition for you to be said to have rights. Others – owners of restaurants unhappy about your desire for a meal there, governors intent on keeping you out of particular universities – have duties to comply with the wishes of the state on pain of police

action (itself possibly coerced by the courts and, if necessary, the national militia).

We must also understand that property is not an object but is, instead, a value. When one buys a piece of land (in the vernacular, a 'piece of property'), one acquires not some physical object but rather control over a benefit stream arising from that setting and circumstance that runs into the future. That is why one spends money (one benefit stream) in order to acquire a different benefit stream ('ownership' of a new benefit stream arising from the fact of ownership). Notice that the magnitude of that new benefit stream is a function of the legal parameters associated with it – can one build a tall office tower on it, or a mere bungalow? Is it now covered by water six months out of the year, and if so, will local ordinances allow it to be drained for some 'higher' (that is, a more remunerative) use? The price paid to acquire that new benefit stream is none other than the expected discounted present value of all future net income appropriable from 'owning' the thing. This is why property is the value, not the object (Bromley, 1991; Macpherson, 1973, 1978). And of course, we put together two concepts – property and right – to arrive at the understanding that this pertains to the grant of authority by the state to a person now called an 'owner.' That authority promises that the state is a willing participant in the imposition of binding duties on all those in the class of individuals called 'non-owner.'

I insisted above that the courts create property rights out of the disputes that come before them. This act of creation stands in contrast to the idea that the courts discover property rights as they dig into conflicting rights claims. What might this idea of 'creation' entail? Here I draw on Louis Menand's recent book *The Metaphysical Club* (Menand, 2001). Menand's subject concerns the origins of pragmatic philosophy in America. Central players in this story include William James, John Dewey, Oliver Wendell Holmes and Charles Sanders Peirce. While Holmes turned out to be one of the most celebrated of American legal theorists, Menand writes that 'It was Holmes's genius as a philosopher to see that the law has no *essential* aspect' (Menand, 2001: 339, emphasis added). What is meant here by 'essential' aspect?

In philosophy, essence is the being or the power of a thing – its necessary internal relation or function. Essence is what a thing (including an idea) does for us or to us. For Locke, essence is the being whereby a thing is what it is. For Kant, essence is the primary internal principle of all that belongs to the being of a thing. For Peirce, essence is the intelligible element of the possibility of being (Runes, 1983: 112). Indeed, Peirce insists that knowing is confined to the possibilities of being. That is, 'Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object' (Peirce, 1934: 1).

Menand, in writing about Holmes and his famous book *The Common Law*, notes that this book (compiled from 12 Lowell Lectures presented at the Harvard Law School in 1880) was intended to trace and explain the evolution of legal doctrine. More importantly, the lectures were an attempt to explain the remark that Holmes had made in his very first law review article in 1870 that 'It is the merit of the common law that it decides the case first, and determines the principle afterwards' (Menand, 2001: 339). This of course is a paradox. If legal principles don't decide cases, what does? Holmes's answer to this paradox provides the basis of all of his later jurisprudence. Menand conveys Holmes's views as follows:

A case comes to court as a unique fact situation. It immediately enters a kind of vortex of discursive imperatives. There is the imperative to find the just result in this particular case. There is the imperative to find the result that will be consistent with the results reached in analogous cases in the past. There is the imperative to find the result that, generalized across many similar cases, will be most beneficial to society as a whole – the result that will send the most useful behavioral message. There are also, though less explicitly acknowledged, the desire to secure the outcome most congenial to the judge's own political politics; the desire to use the case to bend legal doctrine so that it will conform better with changes in social standards and conditions; and the desire to punish the wicked and excuse the good, and to redistribute costs from parties who can't afford them (like accident victims) to parties who can (like manufacturers and insurance companies).

Hovering over this whole unpredictable weather pattern – all of which is already in motion, as it were, before the particular case at hand ever arises – is a single meta-imperative. This is the imperative not to let it appear as though any one of these lesser imperatives has decided the case at the blatant expense of the others. A result that seems just intuitively but is admittedly incompatible with legal precedent is taboo; so is a result that is formally consistent with precedent but appears unjust on its face. (Menand, 2001: 339)

And Menand continues: 'Many years later, when Holmes was on the Supreme Court, Holmes used to invite his fellow justices, in conference, to name any legal principle they liked, and he would use it to decide the case under consideration either way ... When there are no bones, anybody can carve a goose' (Menand, 2001: 240).

Volitional pragmatism is the core idea of American jurisprudence, and it offers a theory not only of general jurisprudence, but it is particularly apt to property rights cases that are charged with figuring out where the most compelling property interests lie. The problem here is to blend moral and prudential arguments in search for the best thing to do. That best thing will comprise the 'truth' in that particular setting. In fact, we may say that truth is merely that which it is better, at the moment, to believe (Rorty, 1999). Or, as William James (1907) would put the matter, truth happens to an idea. Truth is the very special benediction we bestow on our settled deliberations.

IMPLICATIONS

John R. Commons, an astute observer of American institutions and their evolution, insisted that the Supreme Court constituted the quintessential 'volitional theorist' in American history. In his book *The Legal Foundations of Capitalism* (1968), Commons sought to work out a theory of the evolution of institutional arrangements (of which property rights are of a fundamental kind) by studying how disputes and conflicts got 'worked out.' Commons insisted that Adam Smith got it wrong when he sought to work out a general theory of economic life predicated on harmony and mutual benefit from exchange. To Commons the very essence of the human condition is one of conflicts over scarcity – and those scarcities are not mediated by mutually beneficial bargaining but rather by negotiations and struggle.

Ultimately those struggles, many of which start out at a local level, or in a national legislature, stand a good chance of ending up in the courts. And indeed a fraction of those disputes will find themselves at the Supreme Court. Commons noted that it is here – at the Supreme Court – that 'disputes go to die.' That is, the Supreme Court must pick a winning side. Commons used the term 'to pick a value.' In essence, the decisions of the Court must look to the future and decide which possible future it seems better to endorse. All struggles are, after all, about the future. The members of the Supreme Court must create a future they find compelling, and they must then decide the cases before it in light of that future. As with Holmes, Commons knew that the Court does not act on principles – legal doctrine. It decides cases in terms of what, at the moment, seem to be the more compelling reasons. In doing so, the Court 'picks values.' Commons called this 'reasonable valuing.'

I submit that conventional efforts to divine the idea of property rights in the American experience are flawed in their epistemology. A general theory of property rights requires the conjunction of abduction and volitional pragmatism. On this account, property rights evolve in light of emergent *created imaginings* (Shackle, 1961). The Supreme Court considers and imagines possible futures, and it then figures out which of the claimants before it has the more compelling claim in light of those imagined futures. Holmes was right – the absence of bones makes it possible for anyone to carve a goose.

NOTES

1. This seems like the place to comment on the word 'property.' In everyday use this term is asked to do considerable work. It can mean a piece of land, it can mean an automobile or other moveable objects, and it can mean an income stream (that which the holder of a patent or copyright has assured to her). Much unnecessary confusion arises from all of this disparate use. I will confine the term 'property' to the stream of benefits (monetary or

- otherwise) that arises from a particular setting or circumstance. The term 'property rights' shall then refer to the social arrangements pertinent to that benefit stream whose very purpose is to specify the nature of social protection accorded that benefit stream (Bromley, 1991).
2. We see immediately that the essence of empirical possession is a dog with a bone. There is not, nor can there be, recognition among the community of dogs – all of whom covet the bone – that it 'belongs to' the one in whose mouth it now resides. The most one can say is that they acknowledge possession. It takes Kantian reason to transcend empirical possession. Dogs are as incapable of *possessio noumenon* as they are of the idea of 'yesterday.'
 3. For example, what are we to do if prostitution – once an acceptable form of commercial land use – suddenly is regarded as morally unacceptable? Are those who created commercial opportunities by which this activity might flourish suddenly to be compensated from the public purse when it is no longer an acceptable economic activity? A Kansas brewery learned the hard way that shifting moral grounds can indeed leave stranded assets uncompensated — *Mugler v. Kansas*, 123 US 623 (1887).
 4. We are here discussing the realm of regulatory takings, not *per se* takings in which the state physically removes a just holder from her land.

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