

RECONCILING COMPETING SYSTEMS OF PROPERTY RIGHTS THROUGH ADVERSE POSSESSION

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I. Introduction

THE LEGAL CONCEPT of adverse possession, in which title to property may change hands without compensation because a disseisor (i.e., would-be owner) holds the property as his own for a specified period (e.g., squatter's rights), has been a longstanding component of the common law. Though clearly utilitarian in its desirable ramifications for the usage of scarce resources (those using the land for productive purposes without complaint by prior claimants are thereby made owners of the land),¹ this convention might easily clash with a Lockean-libertarian scheme of property rights, in which unowned resources, once appropriated, customarily may never be reappropriated (except in the case of explicit abandonment), having been permanently taken out of the commons. In this paper, I shall attempt to reconcile the idea of adverse possession writ large with a strict Lockean-libertarian scheme of property rights. To do so, I shall appeal to the inherently temporal nature of appropriation of unowned land; if sufficient

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¹ See Posner (2007, 78–84) for a utilitarian defense of adverse possession without consideration of transaction costs.

labor mixing (or some variation thereof) is the means by which land is made private, a consistent treatment of property rights would also allow for the forfeit of neglected property because the improvements that created the property right have dissipated. Thus, by permitting adverse possession, property right creation and property right retention both appeal to the physical realities of the customary homesteading scenario.

The tension between adverse possession and a libertarian scheme of property rights has not gone without previous discussion. In his article “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights,” Robert Ellickson concludes that joint acceptance of adverse possession and unconditional perpetuities makes Richard Epstein an inconsistent libertarian. But in the article referenced by Ellickson, “Past and Future: The Temporal Dimension in the Law of Property,” Epstein’s logic on adverse possession, though somewhat convoluted, is that of a libertarian pragmatist. He argues that any alternative to a first-possession theory of property rights as a default rule is unworkable:

Who needs it [adverse possession]? How much of a temporal priority is needed to offset substantial use? ... The demands for “substantial use” could only induce a proliferation of borderline cases that place ownership (and hence the right to use and dispose) in limbo until the question of substantial use is resolved. Delay has its costs. These [transaction] costs should be minimized to reserve the bulk of resources for the productive use of assets.²

However, Epstein subsequently accepts adverse possession because, in a world of transaction costs, “the costs of making that determination [as to the original owner] continue to mount over time.”³ Thus, Epstein’s cost-based framework provides both an argument against alternatives to first possession (based on the costs of settling disputes over substantial use) and a counterargument in favor of adverse possession because of the eventual infeasibility of establishing the original appropriator.

In essence, Epstein identifies two types of enforcement costs and judges those arising from establishing the original appropriator to be more burdensome than those arising from establishing substantial use. However, his appeal to enforcement costs fails to settle the more fundamental philosophical conflict over the a priori permissibility of adverse possession within a libertarian system of property rights; the existence of a rule that limits transaction costs in property disputes does not imply that the rightful

² Epstein (1986, 672).

³ Ibid. (p. 676).

owner of the property will be established, were such costs to be ignored. Thus his argument, though convincing (and consistent) on its own terms, is unhelpful at a more basic philosophical level.

Alternatively, one might justify adverse possession on the Humean-Hayekian grounds that a common law principle, having been adopted and employed for many centuries, should be embraced as part of a spontaneous order of property rights. As with Epstein's transaction-costs argument, an appeal to custom does not establish whether adverse possession is or is not a priori consistent with a Lockean-libertarian scheme of property rights.

The primary purpose of this article is therefore to reconcile original appropriation of resources with the "temporal dimension" Epstein discusses. Such revision does not rule out the common libertarian dictum of a perpetual claim on (previously unowned) property as illegitimate per se, but rather as one extreme on a spectrum of what I shall call "temporal attitudes" toward property rights.⁴ In short, I argue that because the human improvements on unowned resources (which grant ownership) depreciate over time, a consistent labor theory of property rights must also consider a temporal dimension for retaining a property right over resources. Such temporal considerations are already inherent in homesteading theory with respect to the requisite speed of homesteading. Thus, the temporal dimension of possession is simply another continuum, or sorites, problem to be contextually resolved.⁵

Though a strict adherence to Locke's paradigm is not a justification for a philosophical proposition, the convenient byproduct of accepting a temporal dimension in property retention is a system of property rights more in keeping with Locke's original parameters than the perpetual retention position, which does not allow for adverse possession in any form. Specifically, Locke's disdain for unused "surplusage" and waste, as expressed in both treatises of government, suggests that some provision for appropriation of neglected property is a desirable feature of any property rights system rooted (either loosely or strictly) in a Lockean paradigm of natural rights.⁶ Thus, insofar as conflicts between modern homesteading

⁴ Proudhon's (1840) mutualism, in which users are necessarily owners, would lie at the other end of the spectrum of temporal attitudes.

⁵ See Casey (2012) on the sorites problem inherent in the transition from possession to ownership of property.

⁶ Radin (1986) admits of this possibility in her characterization of Locke ([1764] 2005) as a theory of property acquisition rather than retention. Roark (2012), in contrast,

theory and its origins in Locke exist, they are greatly diminished by accepting a temporal element in the retention of ownership. This convergence is, however, secondary; the argument is meant to pertain primarily to modern libertarian understandings of property rights as originating from Locke and is, therefore, not a re-evaluation of or direct appeal to Locke qua Locke. Likewise, I only attempt to resolve the much-discussed tension between the Lockean proviso (as a broader and thornier issue than his attitude toward simple wastage of resources) and extensive private property rights insofar as a legal system including adverse possession better embraces the proviso than a system that does not.⁷

My purpose is also not to offer a protracted defense of a Lockean-libertarian property rights system as in, for example, Nozick (1974) or Rothbard ([1982] 2003). Though Nozick (1974, 150) is deliberately ambiguous about the parameters of “justice in acquisition,”⁸ the topic of adverse possession is, nevertheless, particularly important for any historical theory of distributive justice, in which present distributions are evaluated based on their origins rather than a time-slice desideratum for present resource allocation.

Lastly, it is important to note that the typical parameters for the present application of adverse possession law are only a practical approximation of the theoretical principle described in the paper; in practice, a property right can be wholly re-established by the original owner via formal reassertion of that property right at any time during the period before adverse possession rules apply.⁹ Thus, the argument presented does not endorse any particular version of adverse possession as currently in place, but rather relies on the concept as the most comparable, widely understood legal principle to which the philosophical tenet of a temporal element in homesteading can be

advocates applying a Lockean proviso in both the acquisition and use of previously unowned resources.

⁷ Schmidtz (1990) argues that the Lockean proviso mandates appropriation of resources to avoid a “tragedy of the commons,” whereas Sanders (1987) argues that the proviso is self-defeating and better ignored altogether.

⁸ Though Nozick (1974) raises objections to the labor-mixing paradigm, including his well-known tomato-juice example, Miller (1989, 49) notes that Nozick seems to tacitly accept this criterion for just appropriation nonetheless.

⁹ If, for example, the law specifies a twenty-year window to establish ownership via adverse possession, the current owner can reassert her property right by fiat after nineteen years and eleven months with no consideration for any (philosophical) claims of partial ownership via labor mixing, etc., by the would-be homesteader.

compared. Moreover, the common concept of squatter's rights only applies here insofar as the squatter has made substantial improvements upon the land such that a property right would be in order *were the land to have been unowned* at the squatter's initial habitation. Mere occupation of land is not to be conflated with the type of conscientious labor mixing that would both bestow and, more to the point of the paper, transfer rights of ownership.

II. Introducing a Temporal Dimension to Property Retention

Throughout this section, I employ the original criterion espoused by Locke ([1764] 2005) in establishing property rights—namely, the mixing of one's labor with previously unowned resources. However, the entropy-based argument in favor of adverse possession is equally valid whether one's criterion is labor mixing, adding a requisite degree of value (regardless of the labor component), or the more general idea of forging an objective link between owner and resource.¹⁰ The labor-mixing paradigm is employed in particular because it is distinctly Lockean *and* typically libertarian as well as being more easily understood in concrete terms than, for example, the creation of an objective link.

Before proceeding with a summary and critique of the non-temporal approach to property rights retention, I begin by clarifying the difference between “abandoned” and “neglected” property. For my purposes, the important distinction is whether the rightful possessor of the property asserts any claim of ownership. If the former owner renounces his property rights through either word or deed (e.g., in the latter case, leaving a table lamp next to his garbage can on trash-collection day), the property can be considered abandoned and immediately becomes homesteadable. The owner of neglected property has, in contrast, ceased to mix his labor with his property but has not renounced his ownership.¹¹ Utilitarian objections to the homesteadability of abandoned property notwithstanding,¹² I fully accept its validity and focus instead on the subject of neglected property.

¹⁰ Hoppe (1989, 23) endorses this criterion.

¹¹ Neglected property may also be seen as having been steadily diminishing in added value, thereby rendering it homesteadable. Alternatively, a situation in which one's objective link has not been reasserted through action during a specified period might qualify as neglected property. Thus my argument applies equally to rival conceptions of original appropriation.

¹² See Posner (2007, 36).

The customary labor theory of property rights can be distilled into the following two assertions: (i) an individual acquires ownership in land by mixing a sufficiently large quantity of labor (call this quantity L) with a sufficiently small quantity of land (call this quantity H); (ii) homesteaded land becomes the unqualified property of the homesteader into the infinite future.¹³ Libertarian notions of property rights that accept assertion (i) overwhelmingly adopt assertion (ii) as a logical consequence.¹⁴ Indeed, Rothbard ([1982] 2003, 64) explicitly allows for unqualified idleness in property once homesteaded. I shall argue, to the contrary, that assertion (ii) is only one extreme in the range of temporal attitudes toward homesteaded land. Whether or not deviations from this perpetual retention position are accepted as libertarian, I shall argue that a system of property rights that allows for transfer of title to neglected property through a similar means to original appropriation (the common law principle of adverse possession) is both logically consistent and more in line with Locke than the perpetual retention alternative.

To illustrate the temporal aspects of homesteading, consider the following scenario: a tract of wild (unowned) land is cleared, plowed, and sown by a homesteader. He mixes sufficient labor with the land to acquire a property right. After the homesteader dies, the field is neglected. Five hundred years later, the field has returned to a state indistinguishable from that of nature. Thus, through the application of labor, the homesteader has *temporarily* removed the field from the state of nature, because the means by which the property right was first established dissipate over time. Nonetheless, the perpetual retention position would grant exclusive control of the property to the heirs of the original homesteader. However, this infinitely protracted resource privilege is inconsistent because it grants *permanent* ownership of land despite the *temporary* means by which land is originally appropriated.

In some circumstances, land may indeed return to a state indistinguishable from that of nature. Such total deterioration of prior

¹³ For a detailed exposition and justification of assertion (i), see Locke ([1764] 2005, Book II, Chapter V). The issue of whether private land deliberately kept wild for the purposes of hunting, recreation, etc., is homesteadable, while a worthwhile topic, is peripheral to my argument here. Though one could argue that fencing off and advertising land as private is sufficient for a property right, I will deliberately evade the question by assuming *some* value to L without being at all specific about that value.

¹⁴ Though not typically classified as libertarian, the most notable exception is Proudhon's (1840) philosophy of mutualism, referenced previously.

homesteading efforts is not necessary, however, to render neglected land homesteadable. Note that even under a perpetual retention position, the original homesteader may or may not encounter truly virgin land (supposing any land can be presumed to have had no previous labor mixing employed whatsoever). Indeed, fresh homesteading could be undertaken on any piece of land whose original developer fell short of the requisite L units of labor needed to establish a property right. Thus, the residue of previous homesteading efforts should not rule out such land as not rehomesteadable. Rather, the requisite degree of neglect leaves residual improvement somewhere between L and total dissipation of all development to the property in question.¹⁵

Though agrarian examples most readily illustrate both the homesteading paradigm and my exposition of rehomesteadability, the philosophical principle easily translates into industrial property as well. If, for example, a vacant warehouse has not been maintained for a protracted period and the value of the property (with abandoned warehouse) is less than or equal to that of a comparable vacant lot, the market value of prior improvements has dissipated entirely and the land is rehomesteadable just as previously cultivated farmland would be. The argument would also readily apply to (non-abandoned) brownfields, where previous industrial pollution of a land parcel has essentially increased the quantity of labor needed to homestead the property well beyond that of any virgin commons.

The more fundamental objection may arise that once homesteaded, land cannot, by definition, become homesteadable. Apart from being tautological in its reasoning, drawing such sharp distinctions between homesteaded and non-homesteaded land defies the physical realities of homesteading itself. Consider the application of $L + \varepsilon$ units of labor to H units of land, where ε is arbitrarily small. With sufficient neglect, the H units of land will assuredly return to a state as natural as that which existed before homesteading was completed (when only $L - \varepsilon$ units of labor have been

¹⁵ Rothbard ([1982] 2003, 65) starkly distinguishes between virgin land and that which has the “mark of former human use.” However, if a labor-mixing paradigm is to be meaningfully distinguished philosophically from first possession, the division between land that has been utilized sufficiently to bestow a property right and homesteadable land is not so wholly apparent. This ambiguity still, in accordance with Rothbard, places the onus on the would-be homesteader to discover whether such *ostensibly* neglected land is indeed homesteadable, regardless of whether adverse possession is deemed permissible; to assume homesteadability is to risk reassertion of property rights and eviction by a pre-existing owner.

applied). Thus, a sliding scale of development exists between homesteaded and homesteadable land. To draw both a permanent and stark distinction at *L* is to imbue this last unit of homesteading labor with qualities bordering on the magical.

This is not to say that advocates of a perpetual retention position ignore the physical entropy of human improvements upon land or other property. Rothbard ([1982] 2003), as the preeminent modern example, rules out the permissibility of adverse possession but makes no significant attempt to justify precisely why property rights, once established, are unqualifiedly perpetual. That land, having once been taken out of the commons, is permanently private is, as I have previously argued, fundamentally tautological. In his attempt to rule out the (pragmatic rather than theoretical) continuous use doctrine of Ingalls, Rothbard ([1982] 2003, 64) likens all owned but idle resources to a watch sitting in a drawer.¹⁶ If we return, however, to the example of a tract of land cleared and left idle centuries ago, the notion that such resources are, because of previous homesteading, non-appropriable is far less obvious at an intuitive level.¹⁷

Beyond the intuitive appeal of this extreme rehomesteading case, a significant merit of the labor-mixing paradigm in establishing property rights is that the physical reality of homesteading is reflected within the conceptual framework; mixing what is private (one's labor) with what is unowned creates privateness. While there is no reason why the particulars of a property rights system must necessarily overlap with physical reality, a more direct derivation of intangible rights (property and otherwise) from the tangible world and its characteristics is less intellectually precarious than rights created outside of or in opposition to objective reality. In this instance, we are presented with two alternatives in property retention, namely (i) that land once homesteaded is perpetually private and (ii) that land once homesteaded remains private by

¹⁶ For a summary of Ingalls's philosophy, see Liggio (1981). The author is in no way attempting to justify mutualism or continuous use in their most extreme and absurd sense nor to rest any element of his case for adverse possession on the pragmatics of reappropriating idle land (except subordinately and where explicitly inferred from Locke).

¹⁷ It is parenthetical but worthwhile to note that Kinsella (2008, 30) grounds his argument against intellectual property in its non-scarcity and potential for unlimited usage. Where we can both use the same good simultaneously (such as an ebook), conflict over rights to exclusive use (i.e., property rights) obviously do not obtain. Though not directly applicable to the case of adverse possession (in scarce resources), the same principle of usage is the yardstick by which property rights may be passively transferred from nonuser to user.

some measure of use by the owner. The latter is, as I have previously detailed, in better keeping with the criterion by which the land was initially made private (labor mixing). Placing the means of property acquisition and the means of retention under the same labor-mixing criterion makes for a more coherent system overall. Additionally, supposing the term “inalienable rights” is not a redundancy, property rights need not automatically imply unqualified rights in perpetuity. Thus, there is no reason to take perpetual retention as the default position, with the burden of justification upon those who would contest it. To assert that quasi-virgin land homesteaded a century ago remains private because of long-since-dissipated labor mixing is, to borrow a phrase from *The Ethics of Liberty* (p. 64), “so much empty verbiage and fantasy.”

Indeed, even adherents to the perpetual retention position are faced with a temporal dilemma in property rights: the necessary speed by which land must be homesteaded for the homesteader to maintain an exclusive right to do so. Consider, for example, a man who wanders into a patch of thick wilderness and, every year, cuts the limb off of one tree. By any reasonable standard, he is not homesteading the land with sufficient speed to prevent others from clearing the wilderness and acquiring the right to its use. Were the same man to cut down a limb every ten minutes, the scenario would be drastically changed. As noted by Block (2004), the total quantity of labor may also vary by geography. For example, an acre of meadowland is more easily cleared than an acre of forest. Thus, the necessary homesteading criterion is not simply the quantity of labor but rather the conditional improvement that must be rendered (by labor) in some reasonable period.

Homesteading of land is, therefore, a matter of (loosely) continuous rather than episodic application of labor to nature. Accordingly, continuous ownership should require some measure of continuous mixing between labor and property. I qualify the previous statement with “some measure of continuous” to rule out the extreme position that any abatement of labor mixing would render land immediately rehomesteadable. Just as the timeframe of homesteading must adopt some reasonable period by which nature becomes privately owned, so must the prevailing temporal attitude follow some guideline of what is situationally reasonable.

Given previously discussed inconsistencies regarding the necessary validity of assertion (ii), I proceed with the description of a modest alternative. Having mixed a sufficiently large quantity of labor with a sufficiently small quantity of land over a sufficiently short period of time, the homesteader acquires exclusive ownership of that land for T periods into the future. The value of T is roughly proportional to the ratio L/H , reflecting the fact that more labor applied to the same quantity of land implies a more pronounced removal from the state of nature and thereby a greater temporal

ownership claim. Having been homesteaded, the land can be continually rehomesteaded by the original owner through the continued application of labor.¹⁸ If sufficiently little labor is applied for a sufficiently large number of periods, the land returns to something like a state of nature and may be rehomesteaded.¹⁹

Whether or not such revision of homesteading theory can be branded as libertarian, this conception of property rights nonetheless adheres to the spirit of John Locke's treatment of property, wherein wastage of resources is given nearly as much attention as the just acquisition of resources from nature. In Book I of his treatises of government, Locke makes a case for the natural right of the needy to the surplus of the rich: "God the Lord and Father of all, has given no one of his children such a property in his peculiar portion of the things of this world, but that he has given his needy brother a right to the surplusage of his goods; so that it cannot justly be denied him, when his pressing wants call for it."²⁰ Even at its most non-egalitarian, the previous passage would clearly grant the legitimacy of other (needy) homesteaders' claims to any unused property "surplusage" that, within the context of this discussion, can be very clearly (but conservatively) identified via the chronic neglect of the original owner.

In addition, the granting of perpetual property rights through continuous rather than episodic use ensures that, loosely speaking, resources will be better used to their capacity, in accordance with the following passage from Book II:

It will perhaps be objected to this, that if gathering the acorns, or other fruits of the earth, etc. makes a right to them, then any one may *ingross* as much as he will. To which I answer, Not so. The same law of nature, that does by this means give us property, does also *bound* that *property* too. *God has given us all things richly*, 1 Tim. vi. 12. is the voice of reason confirmed by inspiration. But how far has he given it us? *To enjoy*. As much as any one can make use of to any

¹⁸ The quantity of labor continuously applied to the land need not equal *L*. For example, occupying a house requires far less labor than building one, yet the occupancy of a house would, by any sensible scheme of property rights, constitute adequate usage of the land it is built upon.

¹⁹ Note that this proposal does not rule out some form of compensation to the original homesteader or his heirs by the rehomesteader. However, practical applications of adverse possession would likely leave little remaining value in land or property that is capable of being rehomesteaded. If, to take an extreme position, land must return to a truly natural state to become rehomesteadable, the question is irrelevant.

²⁰ Locke ([1764] 2005), Book I, Chapter IV.

advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others.²¹

The previous passage also provides a less problematic qualification to private property than the much-debated Lockean proviso taken alone. Those who allow their property to “spoil” have negated their “bond” to these resources and thereby forfeit this property. Supposing the Lockean proviso is not contradictory in and of itself, this qualification to ownership may therefore be recast as the principle of taking only as much as one can productively use, as evidenced by *one’s own actions* so that “enough and as good” of *unused* resources are available to others. The common law principle of adverse possession adapts this philosophical argument to the realm of everyday legal practice.

III. Clarifications to a Revised Theory of Property Retention

Because homesteading theory is most readily applicable to land, I have focused solely on this resource in the previous section. Portable property such as cars, machinery, and so on can only be produced by applying labor to land. These objects have thus, by definition, been removed from the state of nature. That which is not part of the state of nature (and is therefore never homesteadable) could also not, by the logic of perpetual retention, be obtained other than by sale, gift, or explicit abandonment. If, however, one accepts the notion of “forestalling” in property rights, the argument for adverse possession previously described would apply to both property and land.²²

One may also object to anything but a perpetual retention position on the grounds that such amendments to homesteading theory would rule out the possibility of savings. However, to save is merely to increase future consumption at the expense of present consumption. As such, savings implies nothing of use. To require some use of savings is to expose such savings to nontrivial risk and thereby create a positive obligation to risk.²³ Insofar as such savings are not held in readily perishable assets, they are also impervious to transfer of ownership by rehomesteading. In short, savings in nonperishable assets with incidental and somewhat trivial use value (such as

²¹ Ibid., Book II, Chapter V.

²² For a detailed exposition of the question of forestalling, see Block (2004).

²³ I refer to such trivial risks as the theft of one’s savings (which is tautologically untrue of consumption). Thus, by savings I mean (conceptually) risk-free placeholders of wealth, such as titles to gold.

gold or diamonds) is perfectly compatible with a conception of property rights that admits of adverse possession on strictly philosophical grounds.²⁴

Lastly, one might conclude that a conceptual framework wherein labor mixing retains a right to property would grant the renter of a property an eventual ownership claim. As I have previously discussed, this conclusion is incorrect under all but the most extreme, mutualist-type interpretations of “continuous use.”²⁵ When a sharecropper farms land he does not own or a renter occupies a housing unit he does not own, he utilizes such land under the dispensation of the landowner, whether directly or indirectly. Embedded in the notion of neglect is an absence of attention, which certainly cannot be said of those who delegate their land and resources to others at their best use value. A child sent to boarding school is not neglected by his parents, even though the child is not under their immediate care. Thus, use of land extends to contracted surrogates with no ownership claim whatsoever in the land they use or occupy.

IV. Conclusions

I have briefly argued for the necessity of a temporal dimension to property rights on libertarian rather than utilitarian grounds by appealing to the nature of original acquisition rather than enforcement costs or legal traditions. As such, the duration by which neglected land or property becomes homesteadable is simply another continuum problem to be settled on a contextual basis, much like the necessary speed of homesteading, the necessary amount of labor per unit of land to establish a property right, and so on. Ellickson’s utilitarian framework for adverse possession law, rooted in subjective costs to adverse possessor and original owner, is thereby supplanted by a libertarian framework rooted in the objective rate of deterioration to improvements that originally brought (and kept) the land out of the commons. As a matter of public policy, such a reimagination of the foundations for adverse possession law is likely to extend the prevailing timeframe (typically ten to twenty years) for transfer of property rights.

²⁴ While the holding of land strictly for the purposes of speculation may indeed be a form of savings, the original ownership of such virgin or near-virgin land is incompatible with the labor mixing necessary to bestow the property right upon the original speculator. Thus, a strict adherence to any Lockean-libertarian system of property rights actually renders the issue inapplicable.

²⁵ Typically, squatters seeking transfer of ownership via current adverse possession law must be occupying land without the original owner’s awareness of their presence.

To view competing systems of individual property rights along a single temporal dimension fuses the left-libertarianism of Proudhon with the right-libertarianism of Rothbard and Nozick. In the former view, resources remain one's property insofar as they are used by the would-be owner. In the latter, resources remain one's unqualified property into the infinite future. A legal system that permits adverse possession (though potentially adopted on practical rather than philosophical grounds) simply takes a middle position. The inclusion of a temporal element thereby fortifies the whole of libertarian property theory; to the extent that libertarian and utilitarian positions overlap, utilitarianism fills in contextual gaps where principle would otherwise be ceded to pragmatism. In its aversion to waste and spoilage, a continuous use theory of property rights also meshes better with Locke, the forerunner of libertarian homesteading theory, than the perpetual retention position.

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