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# Boylan's Agency Justification for Natural Human Rights and Group Rights

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*Natural Human Rights: A Theory* is Michael Boylan's argument in favor of his particular brand of agency justification for natural human rights.<sup>1</sup> At the heart of Boylan's theory is his claim that human rights should be focused on enabling people to carry out purposive action in the world. Part of Boylan's theory is that groups cannot be in possession of human rights. The primary reason this is the case, for Boylan, is that only individuals (and not groups) can carry out purposive action in the world; that is, only individuals, and not groups, have the kind of agency that triggers human rights. The heart of Boylan's rationale for why groups do not have the kind of agency that triggers human rights is that they are not "primary substances," in the Aristotelian sense. For Boylan, only individuals, and not groups, are Aristotelian "primary substances," which means that only individuals, and not groups, are capable of purposive action. To demonstrate, through practical application, the usefulness of his theory, including his claim that group-based human rights are not possible, Boylan examines three policy questions: political speech, "war rape," and LGBTQ rights.

My goal in this comment is twofold: first, to demonstrate that there is room in Boylan's agency justification for natural human rights for group rights that are also human rights,<sup>2</sup> and second, to show that Boylan's theory would be improved by including group-based human rights within the realm of natural human rights. To accomplish this goal, first I will explain the theoretical context Boylan provides for his claim that group-based rights are not human rights; after which I will highlight a key flaw I see in Boylan's theory. Specifically, I will show that Boylan unjustifiably relies on the idea that groups are not "primary substances," in the Aristotelian sense. After that, I will provide the key components of Boylan's treatment of the policy question of "war rape,"

and then discuss how examining this policy question through a lens that accepts group-based rights as natural human rights results in a more responsible treatment of the policy question than Boylan provides. I will then close with some concluding reflections.

## Boylan's Theory

**"Homo Sapiens"** Boylan's agency-based justification for natural human rights is rooted in what it means to be a human being, including what the good life looks like for such an entity. In virtue of being "Homo Sapiens," for Boylan, all people have an equal claim to be able to commit purposive action, and all humans have certain concomitant natural rights. Boylan's theory, then, equates being human with a certain kind of agency that he thinks provides a firm grounding for human rights.

**The "Table of Embeddedness"** Boylan's theory also contains what he calls "the table of embeddedness."<sup>3</sup> Like Martha Nussbaum's table of central capabilities, Boylan's table of embeddedness is intended as a schematic depicting a hierarchy of goods key to human rights.<sup>4</sup> Whereas Nussbaum's list is organized around human "capability," Boylan's list is organized around the idea that the "most basic goods" are those that are "necessary for human action."<sup>5</sup> Although the central idea behind both lists is the same (connecting human rights to social goods and, ultimately, to human agency), the lists are derived differently. While Nussbaum's list is generated through consensus, Boylan's list is generated through what Boylan sees as a direct correlation between his list and what it means to be a human being. Most centrally, Boylan thinks of his list as *objectively derived*, and Nussbaum's list as *subjectively derived*.

**"Ontological Commitments"** The components of Boylan's theory most central to this comment, however, are the "ontological commitments" Boylan says are integral to, and ground, his theory. In summary,

1 Boylan (2014).

2 I will use the phrases "group rights that are also human rights" and "group-based human rights" interchangeably in this comment.

3 Boylan (2014): 186.

4 See Nussbaum (2000): 78-80 and Boylan (2014): 155.

5 Boylan (2014): 185.

Boylan articulates “ontological commitments” to (1) metaphysical naturalism, at least as regards human rights, (2) moral realism, oddly based on human consensus, and (3) an epistemological intuitionism, that allows him to connect the two. Together, he calls these “realistic moral naturalism.”

**“Primary Substances”** Part of Boylan’s theory is that only individuals, and not groups, possess human rights. For Boylan, this additional ontological commitment is rooted in Aristotle’s conception of “primary substance.” For Boylan, individuals (and not groups of individuals) are the “primary substances in the world.”<sup>6</sup> “Collections,” on the other hand, according to Boylan, are just “assortments of primary substances” and are not primary substances themselves.<sup>7</sup> A community, then, for Boylan, is “nothing but the members who make up the community....”<sup>8</sup> and can never be in possession of human rights. A community is not a primary substance, according to Boylan, because it is dependent upon individuals for its existence. “It has no existence on its own,” Boylan writes (Boylan 2014, 204).

This reference to Aristotelian primary substances is meant to convey a kind of ontological primacy for individuals. Boylan writes, “[O]nly individual people fundamentally are defined as desiring to execute purposive action in order to fulfill their vision of what is good. Communities do not act in a proper sense.”<sup>9</sup> A bit later, Boylan writes, “Because of these ontological differences, one cannot talk accurately about denying human rights to African slaves, for example.”<sup>10</sup>

## Critique of Boylan’s Theory

**Aristotle’s “Primary Substance”** As mentioned above, Boylan’s view that groups cannot be in possession of (natural) human rights is rooted in his view that they are not “primary substances” in the Aristotelian sense. Boylan’s take on what an Aristotelian “primary substance” is, however, not without challenge in the relevant scholarship.

Aristotle gets into the specifics of what he calls *primary* substances in the central books of the *Metaphysics*; and these books contain some of the most dense and the most difficult paragraphs in Aristotle’s known work. “It is not merely that the detail of [Aristotle’s] arguments are often uncertain,” writes one scholar. “[T]he general drift of his thought, the general thesis or theses towards which he was tending, the

overall metaphysical position which he was inclined to accept – these things themselves are subject to scholarly dispute.”<sup>11</sup>

Aristotle’s full account of what a *primary* substance is, is conceptually preceded by his account of what a substance more generally is. Some scholars think there are at least three questions contained in the question of what Aristotle means by a substance.<sup>12</sup> First, what does it mean to *call something* a substance? Second, what must things “look like” in order to be “ontologically primary” in the requisite way? Third, what sorts of items turn out to possess these qualifications?<sup>13</sup> Regarding the second question (“what must things ‘look like’”), Barnes says Aristotle is pulled in opposite directions. On the one hand, a substance must be an “individual” item, but on the other hand a substance must be “definable.”<sup>14</sup> Regarding Aristotle’s requirement that a substance is “individual,” Aristotle says a substance is “one in number,” or “one item which can be identified and distinguished from other items.”<sup>15</sup> By way of explanation, he says substances are “separable,” which Barnes says means, or should mean, that their existence can be explained without invoking the existence of anything else.<sup>16</sup> At first blush, this seems a simple enough idea, however, it is not altogether clear how we are to identify anything at all that can be explained without invoking the existence of anything else.<sup>17</sup>

At a certain point, Aristotle begins to use “primary substance” (instead of just “substance”) language: “For primary substances are those substances which are peculiar to an individual and which do not hold of anything else; but universals are common, since we call universal that which is of such a nature as to hold of more items than one.”<sup>18</sup> For Aristotle, then, universals exist, it’s just that their existence is derivative.<sup>19</sup> Forms also exist for Aristotle, although their existence, too, is derivative. For Aristotle, a substance is a composite entity whose component parts are matter (stuff) and form (shape).<sup>20</sup>

Getting back to the third question, what sorts of things count as substances, for Aristotle? The

6 Boylan (2014): 203.

7 Boylan (2014): 203.

8 Boylan (2014): 204.

9 Boylan (2014): 205.

10 Boylan (2014): 205.

11 Barnes (1995): 90.

12 Barnes (1995): 90.

13 Barnes writes, “Does it emerge that Anaxagorean stuffs, or Platonic Forms, or Democritean atoms are substances and the primary items in the universe? Or do all these early answers turn out to be mistaken, leaving room for a brave new Aristotelian world?” Barnes (1995): 90.

14 Barnes (1995): 90-91.

15 Barnes (1995): 91.

16 Barnes (1995): 92.

17 Barnes (1995): 92.

18 Barnes (1995): 96.

19 Barnes (1995): 97.

20 Barnes (1995): 97.

answer is “ordinary middle-sized physical objects,” most paradigmatically “natural” objects like “horses, hydrangeas, goats, and geraniums.”<sup>21</sup> On the question of why these sorts of objects are more “basic” than, say, *parts of* middle-sized physical objects or even atoms, Aristotle has something very odd to say indeed: He says that physical parts of a body are *less basic* than the body itself: “[A] finger is defined by reference to the whole body – a finger is such-and-such a part of a man. Hence the parts which are of the nature of matter and into which, as its matter, a thing is divided, are posterior to it.”<sup>22</sup> “Parts are essentially parts *of wholes*; fingers are essentially fingers *of bodies*. In order to explain what it is to be a finger we must make reference to bodies; and for there to be fingers is precisely for bodies to be such-and-such a condition. Fingers are not fundamental.”<sup>23</sup> Why “wholes” (which are composed of “parts”) are substances, but not collectives (which are also composed of parts in the form of members) is unclear.

At least from this preliminary sketch of what Aristotle meant by “substance,” then, and how he differentiated it from “primary substance” and on what basis, it seems that the jury is out on just exactly what Aristotle meant by “primary substance.” It is not at all clear that Boylan’s position that groups of persons cannot be Aristotelian “primary substances,” is necessarily the case.

**Agency** However, even if Boylan’s take on what Aristotle meant by “primary substance” is accurate; that is, even if, for Aristotle, groups of persons cannot be “primary substances” such that they are incapable of purposeful action *on that ground*, there may be other ways to ground group agency such that groups can be said to be capable of the kind of purposive action contemplated by Boylan’s theory. Anna Moltchanova has argued, for example, that groups can have moral agency, that is, they can be moral agents in their own right with rights and responsibilities.<sup>24</sup> Focusing on rights to collective goods claimed by groups against non-members, Moltchanova makes a distinction between what she calls “primary” and “derivative” collective (group) moral rights. “Derivative” group rights are held individually, only capable of being exercised by a member of a group, and the interest of no single member is sufficient to justify imposing duties on others. “Primary” group rights (or “collective rights”), by contrast, are those that belong to collectives as such. According to Moltchanova, for the purpose of classifying rights, we ought to stipulate that *collective agency is present in any group that shares a common set of beliefs*

*about membership and an understanding of the goals of the agent in relation to non-members, as well as the relevant collective interests.* Anthony Appiah and Adina Preda both take a similar approach to collective rights.<sup>25</sup>

**Ontological Interdependence** A way of thinking about group agency that steps a bit further afield of Boylan’s account, but is nonetheless a powerful argument in favor of thinking about group agency as on par with individual agency, is an account that is grounded in the ontological interdependence of the individual and the groups to which the individual belongs. For Victor Segesvary, for example, the individual human being and the groups to which the human being belongs are “*ontologically interdependent*” (emphasis in original).<sup>26</sup> The human being and the social groups to which the human being belongs are “two parts of the same universe, correlated to each other, in constant functional interaction”<sup>27</sup> Segesvary’s conception of human nature (or to put it in Boylan’s language, “what it means to be a Homo Sapien”) is very different from Boylan’s. For Segesvary, what is especially unique about human beings is their capacity to create “coherent and consistent worldviews,”<sup>28</sup> to distance themselves from their environment, to engage in “transcendence.”<sup>29</sup> Segesvary writes, “community and individual are entirely interlocked.”<sup>30</sup> In other words, so-called individuals are part of what is known as “the lifeworld” or directly experienced social reality. For Segesvary, drawing on Rousseau, when human beings entered into the social contract, “[i]t was forgotten that the substitution of *societas* to the medieval *universitas* completely left out of the view that the human community was conceptually and biologically prior to the society founded by so-called autonomous individuals.”<sup>31</sup> This ontological interdependence between the individual and society “clearly means that the life and destiny of the individual and community are inextricably intertwined.”<sup>32</sup> Segesvary elaborates, “...[T]he community is not only the sum of the individuals who constitute it; it is *more* because its institutions, mental and symbolic orders and traditional values represent the accumulated experiences and cultural treasures of past generations.”<sup>33</sup> In other words, communities can be understood to have an ontology that is more than the individuals that comprise them.

25 Appiah (2011), Preda (2012).

26 Segesvary (1994): 93.

27 Segesvary (2000): 55.

28 Segesvary (2000): 72.

29 Segesvary (2000): 72.

30 Segesvary (2000): 72.

31 Segesvary (2000): 94; Rousseau (1978).

32 Segesvary (1994): 93.

33 Emphasis added, Segesvary (1994): 93.

21 Barnes (1995): 98.

22 Barnes (1995): 99.

23 Barnes (1995): 99.

24 Moltchanova (2009).

**Group Rights and Group Identity** Many scholars ground group rights in group identity. For them, certain experiences of individual group members may be so related that a kind of reification or solidarity is generated by these experiences that forms the basis of legally cognizable group rights.<sup>34</sup> This subjectivity-based argument in favor of group rights grants group rights to members when the people in the group understand themselves as bound together as members of a group.<sup>35</sup> The key is a strong sense of intra-group solidarity. While the fact of understanding themselves as a group is subjective, on this view, the shared understanding is nonetheless based on objective factors such as a common history or social condition, or shared interests.<sup>36</sup> While the link between group identity and group rights may be easily made, however, the questions relevant to this comment are whether group rights thus defined rise to the level of *human rights*; if so, whether group rights thus defined rise to the level of *natural* human rights; and if so, whether group rights thus defined are compatible with Michael Boylan's agency justification for natural human rights. The work of James Nickel may be able to provide the necessary links. Nickel has argued that group identity and agency are closely related.<sup>37</sup>

**Group Rights and Oppression** Perhaps the most convincing case for group rights as natural human rights grounds group-based human rights in oppression.<sup>38</sup> Peter Jones argues, for example, that a right is a group right if it is a right held by a group rather than by its members severally.<sup>39</sup> He calls this the "collective conception" of group rights. Following Joseph Raz, Jones accepts an "interest theory" of (group) rights, according to which an entity (individual or group) has a right if it has an *interest* that provides sufficient reason for holding another or others to be under a *duty*. On this Razian view of rights, rights and duties are not merely correlative, but rights actually *ground* duties.<sup>40</sup> Although interest-based and not directly linked to agency, a theory of group rights grounded in oppression may well work with Boylan's theory. For Boylan, rights claims are particularly salient, for example, where there is a clear specification of what he calls the "against whom."<sup>41</sup> Where the entity having a duty in virtue of the right is identifiable, in other words, a (human) right can be said to exist. Clearly, minority group rights based on a history of legalized oppression (e.g., slavery, Jim Crow laws, laws implementing

the subjection of women, laws denying the LGBTQ community the fundamental right to marriage, etc.) have an identifiable "against whom" in the form of, say, federal or state governments.

### Boylan's Analysis of "War Rape"

For Boylan, the policy issue of "war rape" is a human rights issue rooted in what he calls the "level-one basic good" of "protection from unwarranted bodily harm."<sup>42</sup> He describes the history of "war rape" and its contributing factors. Among the contributing factors, for Boylan, are "the perception males have of women's position in the world," that is, "[w]omen are objectified and seen as set on earth for men to dominate."<sup>43</sup> This perception, for Boylan, is shared by "a very high number of males whose personal worldview accepts rape as a valid option for them – so long as they can get away with it."<sup>44</sup>

The picture Boylan paints of "war rape" is one in which males at large have a proclivity for raping women at large, absent societal constraints against the practice.<sup>45</sup> "This is true in war and peace," he says.<sup>46</sup> He cites statistics in support of this claim. For example, "One study of college males in the United States claims that 35 percent of all college-aged men would rape their classmates if there were no consequences (such as jail time)."<sup>47</sup> In war time, particularly when "rebel insurgents" are involved, the consequences are not there; hence, "war rape" runs rampant.

Boylan's account of "war rape" also includes a description of the various forms that sexual violence can take in times of war, what "planned strategic rape" is in wartime, and the common fate of rape victims (they are frequently scorned, lose social status and are often exiled). Boylan also adds a list of common traits of "the male war rapist" (e.g., a mind-set of hyper-sexuality that expresses itself in exaggerated, hyper-masculine, swaggering behavior, upbringing in a family where violence is prevalent, youth), and the environmental conditions that contribute to war rape (e.g., "us versus them" mentality).<sup>48</sup>

Without providing an obvious connection between the depiction of "war rape" as mass sexual violence against women in times of war and his conclusion that "war

34 See, e.g., May (1987).

35 Galenkamp (1998); Segesvary (1995).

36 May (1987).

37 Nickel (1997).

38 See, e.g., Cudd (2006).

39 Jones (1999).

40 Jones (2000): 356, Raz (1986).

41 Boylan (2014): 29.

42 Boylan (2014): 225.

43 Boylan (2014): 226.

44 Boylan (2014): 226.

45 This is known as the "biological" understanding or account of the phenomenon of rape.

46 Boylan (2014): 226.

47 Boylan (2014): 226.

48 Boylan (2014): 229.

rape” is an individual human rights violation, Boylan then proclaims, “Obviously, rape is wrong. It deprives individuals of a level-one basic good: protection from unwarranted bodily harm.”<sup>49</sup>

Boylan concludes that the way to address the problem is “full gender integration of the military around the world.”<sup>50</sup> For Boylan, the way to end “war rape” is to “[achieve] parity in fighting forces between males and females.”<sup>51</sup> Boylan explains, “This is because (a) women are biologically more empathetic than males –especially to those of their same sex; and (b) women do not fit the profile of the aggressive young male.”<sup>52</sup>

In summary, for Boylan, despite the overwhelming evidence that he himself cites that rape in times of war happens overwhelmingly to women qua women (and is perpetrated by men against women), for Boylan *individuals*, and not women, possess a natural human right not to be raped in time of war. Moreover, for Boylan, the way to enforce this right is to create full gender integration of the military around the world. The idea seems to be that if women worked alongside of men during times of war, men would stop raping women en masse during armed conflict.

This solution, for Boylan, addresses the public policy question of “war rape” without committing what, for Boylan, would be the error of rooting the solution to the problem in theoretically unsupportable group-based human rights.

### “War Rape” and Group-Based Human Rights

The main purpose of the following critique of Boylan’s analysis of the policy issue of “war rape” is to demonstrate that the problem of “war rape” is more responsibly solved by pointing out that the natural human right at issue is group-based, and in the form of the right *of women* not to be sexually violated by men. I also hope to show in the process that the (natural) human right at issue in policy issues where the rights of members of marginalized, oppressed, and subjugated groups are involved, is group-based.

The root of the problem with Boylan’s analysis is that it is insufficiently attendant to the fact that “war rape” is, by Boylan’s own admission, primarily experienced by women. More specifically, “war rape” most often happens to women *qua women*. “War rape” is an act of power and control, in which the female victim is humiliated, degraded, and left with feelings of shame,

guilt, and anger. In other words, the human rights violation is not “bodily harm” but degradation, and the kind of degradation in which women are the primary victims.

The shared understanding among women, an intersubjective experience, of being the primary targets of “war rape” *in virtue of their status as women* is arguably the glue that holds them together as the kind of group that has rights *as a collective* and not just as a group of individuals. This commonly shared understanding, in other words, arguably makes women normatively bound together *vis-à-vis* the topic of rape. But, more important for Boylan’s agency-based justification for human rights, women *as a group* may very well have the kind of irreducible moral status (they may constitute a “primary substance”) that Boylan’s agency-based theory requires. The right not to victims of “war rape,” in other words, could be the kind of right that belongs to the collective as such, following Moltchanova, and not to the individual members of the collective severally.<sup>53</sup> This irreducible moral status could be based on group experiences that may be so related that purposive action *as a group* becomes possible in virtue of the kind of solidarity that is generated by these experiences.<sup>54</sup> The idea here is that the group possesses both responsibilities and moral rights that cannot be reduced to the rights of individual members of the group. It is *womankind* that is the target of “war rape,” in other words, not individual women; and so it is *womankind* that has a natural human right not to be raped in times of war.

Thus, if Boylan’s accounts of what rape is, and what the human rights violation at stake in “war rape” is, are both off base, then his solution to the problem of “war rape” is likely also off base. If rape is not a crime against individuals, but (primarily) a crime against womankind, and if “war rape” is not the denial of the “level-one basic good” of “protection from unwarranted bodily harm” but the denial of women’s human right not to be sexually violated, then remedies should be focused on specifically protecting women (rather than “individuals” at large) from being sexually violated.

It seems unclear whether “full gender integration of the military around the world” would address the problem of “war rape.” On the one hand, feminist scholars have made the argument that since rape is an abuse of power, eradicating power imbalances between men and women would help eliminate rape.<sup>55</sup> On the other hand, if, as Boylan would have us believe, rape is *biologically* and not *socially* motivated, changing the social environment may have little or no effect on

49 Boylan (2014): 231.

50 Boylan (2014): 231.

51 Boylan (2014): 232.

52 Boylan (2014): 232.

53 Moltchanova (2009).

54 See May (1987).

55 See, e.g., Whaley (2001).

the problem. If rape is biologically motivated, another body of research suggests that the way to stop rape is to provide severe penalties for the crime, for example.<sup>56</sup>

However, empirical research on “war rape” suggest that it is not biologically but socially motivated.<sup>57</sup> On this view, rape in times of war is not motivated by irresistible biological urges (combined with opportunity) but by misogyny.<sup>58</sup> “Under this theory, men in patriarchal societies are conditioned to distrust, despise, and dominate women.” Warrior rapists “vent their contempt for women...while enforcing and perpetuating patriarchal gender arrangements from which all men benefit.”<sup>59</sup> If this account of “war rape” is the more accurate view, then it seems that successful remedies should be directed more toward the *proactive elimination of misogyny* rather than the mere inclusion of women in the military ranks.

## Concluding Reflections

So far, I have demonstrated that there is theoretical room for group-based natural human rights in Boylan’s agency justification for natural human rights, and that the policy question of “war rape” may be more responsibly addressed through thinking about the problem of “war rape” in terms of group-based rights than individual natural human rights.

What is left to complete the case for group-based natural human rights in the Boylanian sense, I think, is to address the question *what the utility is* in identifying certain kinds of group-based rights as specifically *human* rights. This is the focus of these concluding reflections.

The metaphysical (and ultimately moral) stakes of answering this question are high. However we come out on the question of whether group-rights can also be human rights, the real question is whether the “human” in “human rights” includes merely those aspects of “Homo Sapiens” that are shared across gender, race, sexual orientation, ability status, socioeconomic status, and other marginalized, oppressed, and subjugated identity markers (as Boylan would argue), or whether “human” also includes those particularized aspects of human existence that provide complexity, variation, nuance and richness to human flourishing.

One thing to think about in this regard may be whether what we’re really getting at when we label some aspect of human existence “human” (or “universal” or the like) is “worth our time and consideration.” As the term “human” works in the world, and in Boylan’s

theory in particular, all “human” may mean is “what is valuable to me and people like me.” This higher status for that which is human is posited against what is important to “special interest groups,” which is code for “not important or worthy of our time and consideration.”

Taking a look at Boylan’s Table of Imbeddedness, what is interesting is that Boylan thinks his list is “universal” and necessary for purposive action. Contained in the list, however, are value judgments masquerading as “universal” or “natural” truths about what “purposive” means and even why “purposiveness” is central to what it means to be a human being in the first place. Similarly, Boylan writes as if his ontological commitments are not just voluntary commitments but necessary, “natural” truths to which everyone (if thinking rightly) should commit. In particular, Boylan writes as if rooting things in a concept originated by Aristotle (*any* concept originated by Aristotle, but, in this case, the concept of “primary substance”) sufficiently grounds the concept so as to add a level of objectivity and universality that makes it beyond challenge.

Nonetheless, Boylan’s intentions seem good. Particularly since two of the three policy issues offered up for analysis pertain to the concerns of members of marginalized, oppressed, and subjugated groups (women, the LGBT community). Based on these choices, it is arguably clear that Boylan shares the concerns of those who support group-based human rights, or at least a concern for the *members* of the groups. But, to add sophistication and accountability to his concern, he should arguably consider the issues in terms more tailored to the experiences of oppression of the members of the marginalized groups themselves.

In closing, I think Boylan’s instincts are right that *whatever (natural) human rights are*, they should be sufficiently tied to *what it means to be a human being* so as to make them widely applicable to the largest number of persons possible. I just think that Boylan’s account of the basis for the agency required for his theory, as well as his conception of what it means to be a human being are both underdeveloped and problematically mired in Enlightenment thinking.

However, if Boylan were to include within his conception of natural human rights group-based rights of groups with (1) a solid group identity, (2) a decision-making process that gives voice to the will of the collective, and (3) a clear identification of the “against whom” Boylan thinks is required for the assertion of a right, his agency-based theory of natural human rights otherwise works well.

56 See, e.g., Shields and Shields (1983).

57 See Barstow (2000), Sajor (1998), and Stiglmeier (1994).

58 Gottschall (2004).

59 Gottschall (2004): 130.

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