Making Up for What?

Slavny on Corrections and Compensation

Adam Slavny, *Wrongs, Harms, and Compensation*, Oxford: Oxford University Press, 2023, pp. 240.

Adam Slavny opens his magisterial *Wrongs, Harms, and Compensation* by writing that "This book is concerned with corrective duties: their content, grounds, and the legal or non-legal practices and institutions they justify" (Slavny, 2023, 1). I am going to question that affirmation. I will suggest that Slavny's critically important reflections concern a domain of duties that is much trickier to put together under a common name. But that does not make Slavny's analysis any less relevant to the debate on wrongs, harms, compensation, and their legal treatment. Or the book any less enjoyable, also thanks to Slavny's analytic prowess and engaging prose.

Before I elaborate on these comments, let me give a summary of the work. The book is part of the new OUP series "Oxford Private Law Theory." Yet, it is not primarily a book about private law. And it is by no means a book purely of interest to private law theorists. It is instead a book about a set of duties that play a fundamental role in interpersonal morality and that are also commonly used to justify or make sense of some legal practices; specifically, the law of torts in common law systems and all those legal practices and institutions that deal with interpersonal damages and compensation.

Slavny adopts a methodology he dubs "foundationalism" to explain the relationship he envisages between moral duties and legal obligations. Speaking about the law of torts specifically, he argues that "what emerges from a foundationalist perspective is neither a wholesale defense of nor attack on the tort system. If it can be made to work fairly and effectively, it can be justified in some form. But where it deviates significantly from our moral duties, exacerbates background injustice, and presents huge barriers to access, tort law, or at least a large portion of it, is an expensive mistake" (5). What emerges from this limpid passage is that foundationalism is inflexible in demanding that legal obligations are justifiable before the tribunal of practical reason. A tribunal, I must add, that is not as rigoristic as the phrase might indicate – Slavny's foundationalism is a form of pluralistic moralism where what determines the justifiability of legal obligations is a *balance* of moral reasons, combined with the appropriate pragmatic considerations.

Chapter 2 is dedicated to defending foundationalism against the alternative approach in legal philosophy, "interpretivism." The author is here deploying a classic dialectical move in

philosophy: bringing together a plethora of distinct positions – usually seen in mutual opposition – under a common denominator, so to better emphasize the novelty of one's approach. If this move may sometimes feel trite, it is not the case with Slavny's foundationalism, which is indeed a unique perspective in the philosophy of private law.[1]

Most philosophically inclined private law theorists are reluctant at taking altogether *external* principles to justify particular features of the law.[2] By contrast, they "take current law as their theoretical starting point" (12). Slavny quotes at length the most prominent philosophers of private law – especially Jules Coleman, Ernest Weinrib, Arthur Ripstein, and the couple John Goldberg-Benjamin Zipursky – and shows persuasively that their intent when offering a philosophical account of private law is, primarily, hermeneutical: the principles that inform any justificatory discussion of the law – the "theoretical" ground – must be retrieved in the law itself. Sometimes this is explicit – as in Weinrib's affirmation that "the 'juridical' conception of corrective justice always works backward from the doctrines and institutions of private law to the most pervasive abstractions implicit in it" (Weinrib, 2012, 26-27); other times it is concealed behind the attempt to reconstruct legal doctrine in the light of an overarching moral theory.

As Slavny observes, interpretivism leaves one question wide open. Even assuming we can indeed interpret some legal doctrines in light of a unitary principle, what is the normative status of the principle itself? An immanent justification is necessarily incomplete as it misses, Slavny continues, a "comparative" element. "Interpretivists," Slavny writes, "are rather like lawyers, and their client is the law itself. They can give the best possible case for their client, but we cannot make an informed choice until we have heard the case for the other side" (16). The law, I agree with Slavny, owes it to us, as independent moral agents, to justify its coercive impositions in ways that are sufficiently sensitive to the best reasons there are, and primarily to the best *moral* reasons. And it is somewhat peculiar that we agree this is indeed the case in many areas of legal intervention but not in private law. Slavny mentions criminal law and punishment but we can notice the same with taxation: whether there is a unitary principle that makes sense of a state's sum of fiscal imposition is immaterial to the core question in the philosophy of taxation, namely whether and how the state should ask us to pay our due. It should by now be evident how I find this methodological revolution refreshing.

[1] Although it is, by contrast, the prevalent approach in the law and economics movement, as private law doctrines are there assessed according to a criterion presumably external to private law itself, i.e., the maximization of aggregate wealth.

[2] Recent exceptions, however, can be the contractualism of Gregory Keating (Keating, 2023) and John Oberdiek's relational perspective (Oberdiek, 2020)(Oberdiek, 2021).

Chapter 3 is the crucial one, substantively, as it contains Slavny's presentation of corrective duties in general. In fact, however, the core passage is in the Introduction. The "four-fold" scheme at p. 3 already displays what seems to me the most salient feature of corrective duties in Slavny's analysis, namely their irreducibly pluralistic nature. According to Slavny, corrective duties can emerge following wrongdoing, when "A violates a duty not to harm B [and] incurs a secondary duty to respond by giving greater regard than was previously sufficient to the values that grounded A's primary duty," but also "conditional permissibility," when "A's conduct is […] such that its permissibility is conditional on compensating B in the event that B is harmed." And, beyond these grounds which pertain to prior conduct that is in some way directed from the duty-bearer to the recipient of corrections, Slavny posits two further grounds that have different, outcome-oriented grounds. Those are "outcome responsibility," when "A harms B [and] has a duty to reduce the amount of harm caused overall, typically by compensating B" and "distributive fairness," when "A harms B [and] the party who (i) is the primary beneficiary of A's conduct and (ii) could have avoided the harm at the lowest cost has a duty to compensate B."

The opening of Chapter 3 is illuminating: "we need to know what a corrective duty aims to do. An initial answer is that it aims to compensate for harm (41)." In the same paragraph, Slavny writes that "from a moral perspective, it is intuitive that those who inflict wrongful harm ought to undo or repair what they have done, and that compensation seeks to do this as far as is practical." The view seems to be that corrective duties are, in all relevant respects, *compensatory*: we cannot talk about correction, in general, without bringing compensation to the fore.

It is precisely because of this ultimate reduction of corrective duties to duties of compensation that Slavny can dedicate a good portion of the chapter to a distinction he introduced in a widely cited paper of a decade ago (Slavny, 2014), that between *negating* and *counterbalancing* a harm, where the first means making "a person's future wellbeing identical to what it would have been if not for that event, and counterbalancing renders it equal to what it would have been if not for that event" (41). A negated harm is one that has no effect on a victim's wellbeing: the victim's wellbeing is not only of the same *amount* as before the harm but also of the same *shape* and *quality*, which means that the person did not suffer a sudden decrease and later increase in wellbeing (a change in shape) and did not suffer additional harms, "including physical pain, reduced ability to pursue her projects, the effect of the injury on her emotional life, and so on" (44). Slavny develops the distinction focusing on the second of the grounds he identifies for corrective duties: conditional permissibility. Indeed, if certain harmful acts are permissible only insofar as they can be compensated, then the better the eventual harm can be compensated, the

easier it is to make it permissible. Harms that can be negated, for instance, are easier to justify than harms that, even when corrected, will leave negative traces in the person's wellbeing. But that does not mean that *all* negate-able harms are permissible; further moral considerations can be brought in to explain why certain harmful acts are impermissible regardless of the consequences.

This is also one of the most analytically rich parts of the book and it leads Slavny to some important reflections about the normative irrelevance of control to justify a right against interference (*contra* Ripstein). However, I want to devote more attention to the second half of the chapter, where Slavny offers what initially may appear as his unifying explanation of why corrective duties emerge and how they concretely operate – in the words I have used in prior work, their "ground" and "content."[3] Slavny takes issue first with the continuity thesis, named and popularized by John Gardner, which holds that corrective – or "secondary" – duties are continuous in ground with the original obligation that went unsatisfied. Slavny suggests an alternative ground for corrections, which he calls Responsiveness: "When someone violates a primary right/duty, they pay insufficient regard to the values that underpin it, and thus incur a duty to respond by paying proportionally greater regard than was previously sufficient to those values" (63).

I find Slavny's arguments against continuity mostly persuasive so I want to focus on Responsiveness itself. There are some claims Slavny makes in defense of Responsiveness that I believe are worth highlighting. Firstly, Slavny claims that "wrongdoing demonstrates a failure to appreciate the way […] values constrain our conduct" and that "the extent of this failure is determined by the severity of the wrong" (69). But, almost immediately after, he affirms that "culpability is not the only determinant of the severity of wrongdoing […]. Another is the *impact of the wrong*, including both the material harm it causes and perhaps any setbacks to non-material values" (70). But the "impact" of the wrong may have nothing to do with the regard one agent pays to a particular value! Sometimes a few seconds' distraction – which is a rather minor way of disregarding a particular value – can cause an entire valuable object to disappear. The impact of the wrong is in this case huge while culpability is minimal. Which duties are then incurred by the negligent actor? Slavny has an answer to that in the next chapter but I found it surprising that he had to include this apparent contradiction immediately after presenting Responsiveness. I call it "contradiction" because Responsiveness seems to imply that wrongdoing is to be explained *purely* in terms of regard to values and that corrective duties are

[3] (Fornaroli, 2023) (Fornaroli, 2024).

proportionate to that alone. And yet, we are told that the extent of the harm itself matters in determining both wrongdoing and correction.

An even more puzzling affirmation is at the end of the chapter when Slavny writes that "the duty to apologize, to provide an explanation of one's conduct, to make oneself available for accountability processes, […] are all examples of non-corrective responses that wrongdoers have reasons and sometimes duties to undertake. It is a virtue of the responsiveness thesis that non-corrective responses do not need an additional ad hoc explanation" (73). I agree that the duty to apologize and to explain oneself after wrongdoing can be easily explained through Responsiveness. But why are these duties not corrective? I suspect that the answer has to do with the fact that they are not supposed to compensate (although I am not even sure about this – my wellbeing is definitely affected by others' apologies and explanations so why not say that apologies and explanations can at least aspire to counterbalance?). But, then, it is worth emphasizing that at this point in the book we have not been given any argument as to why compensation is the paradigm of correction.

The following chapters are dedicated to specific areas of corrections, namely correction for negligent activity (Chapter 4), correction for harmful outcomes that one had not intended or could have predicted (Chapter 5), corrections for reasons of fairness alone (Chapter 6). These chapters contain many thought-provoking reflections which, however, do not help dissipate the doubts about the defining features of corrective duties in general.

In the chapter on negligence, Slavny persuasively shows how we do not have any principled reasons to compromise on "capacity sensitivity" and "cost sensitivity" in determining liability for negligent action. Capacity sensitivity means that nobody is deemed liable for negligent action unless they had the capacity to do otherwise, cost sensitivity means that the attribution of negligent liability is sensitive to the costs that each individual agent would have to incur to avoid acting negligently. The rationale is the same as in Chapter 2: the law cannot impose coercively enforced burdens that deviate too widely from what morality requires. And morality does not demand from agents that they do something that they cannot in any case do or that it is too costly for them to do, considering the specific circumstances in which they operate. The objective standard of care in the law, which seems to be only minimally capacity sensitive and is most definitely cost insensitive, is therefore inconsistent with the best moral reasons.

So far so good. Except that, in the next chapter, dedicated to responsibility for non-culpable harm imposition, Slavny seems to raise precisely the opposite conclusions. He starts by dismissing various arguments in favor of what Tony Honoré dubbed "outcome responsibility,"

i.e., the idea that we can sometimes be attributed responsibility for some unintended or even unpredictable consequences of our actions, purely because they emanate from our agency. I do not want to reiterate these arguments as I broadly agree with Slavny they are ultimately unsuccessful but I will just notice how they all fail insofar as they try to derive strong normative implications – in terms, for instance, of which duties we have – from observations *à la* Bernard Williams regarding the importance to each agent of one's external agency. After having dismissed these arguments, however, Slavny reaches an even more controversial conclusion, namely, that not only we can be attributed responsibility (in an "allocative" sense) for unintended and unpredictable consequences of our action but that any compensatory duties assigned to the unfortunate harm creator is one way for them to avoid doing harm.

How does Slavny arrive there? Mainly, through the literature on self-defense. Starting with Judith Thomson, many philosophers who have explored self-defense have found it plausible that non-responsible threats are both liable to attack and subject to a duty to minimize the impact of their harm. More precisely, the argument goes, the costs that a non-responsible threat needs to incur to minimize the harm they are causing are higher than the costs a mere bystander is required to incur. From there it follows, according to Slavny, that, if you do cause harm non-responsibly and you have not incurred those costs that would have been necessary to minimize its impact, you are still subject to the same normative pressure *ex-post* and it is now your duty to compensate, so long as this does not exceed those costs that you would have been required to incur *ex-ante*. Continuity is thus resuscitated; a corrective duty is, in case of non-responsible harm, the continuation in different terms of the duty to do no harm: "the basis of outcome responsibility is that we have reason to prevent ourselves causing harm, and though we cannot always do this *ex ante*, we can often do it *ex post*" (122).

My disagreement with the author is quite deep so I will build my reply progressively. Firstly, if non-responsible threats must indeed incur higher costs than mere bystanders to minimize the impact of the harm, that is most plausibly because they are the agents contingently in the best position to do so. But there might be exceptions. Suppose a non-responsible threat could perform action A, at cost C, which would decrease the impact of their assault on the victim's wellbeing by value V. Alternatively, a bystander could perform action B, at cost C+1, which would decrease the impact by value 2V. The cost for the bystander in this case is slightly higher but I do not find it outrageous to imagine it should be them and not the non-responsible threat that ought to intervene, due to the double efficiency of their intervention. In my view, non-culpable threats are analogous to specially situated bystanders; they are as innocent as bystanders

are but they are in a *particularly* bad place at the bad time which makes them, usually, particularly fit for mitigating interventions. If one buys my intuition here, Slavny's conclusion cannot follow. For it would not be true any longer – or at least not true in all circumstances – that agents who have harmed others faultlessly were once in a position where they held a duty to the victim to minimize the impact of their harms. So we cannot explain any longer the compensatory duty through a duty they previously held to minimize harm.

But I am here interpreting Slavny in an overly charitable way because Slavny in fact never talks about a duty to minimize harm but of a duty to "avoid doing harm" which is itself based on the classic doctrine of doing and allowing, described as holding that, "from a first personal perspective, I have more reason not to cause harm than to prevent it" (118). I have always found the doctrine of doing and allowing dubious or at least not obviously true. But I find it particularly suspect here, especially due to Slavny's further gloss that "on the view advocated above, the 'I' includes not just the exercise of our agential capacities, but the non-voluntary movement of our bodies" since "it would be oddly rationalistic to think that, insofar as the Doctrine of Doing and Allowing is concerned, the only causal upshots that I bring about are those rooted in my agency" (118-19). What makes the gloss particularly puzzling in the context of the chapter is that, if it is indeed "oddly rationalistic" to demand that the doctrine of doing and allowing only applies to voluntary conduct, then why not accept outcome responsibility *tout court*? But, more generally, I just do not see the appeal of a deontological doctrine that holds I have more reason (not) do something than something else, when that something can include the involuntary movement of my muscles. How can I have reason to do something I cannot in any case control? And, even more importantly from a moral perspective, why should I be so peculiarly obsessed about what my body does, independently of my agency? Notice that I am not advocating here the "oddly rationalistic" view according to which the strongly voluntary is the only part of our agency we should be concerned about. I am simply saying that, *if* strong deontological principles such as the doctrine of doing and allowing have a role to play in our ethical life, their domain of application must be constrained to the voluntary alone. Raising deontological conclusions from Williams-like observations about agent-regret is quite a stretch.

But, even if I were wrong here and we could indeed derive a duty to compensate *ex-post* from the duty not to cause harm *ex-ante*, I am not sure about the relationship between this kind of duty, which is derived through continuity from the duty to avoid harming, and the other corrective duties previously explained through Responsiveness. Why should we call a duty not to harm corrective? Not only does the compensatory duty, in this case, not seem to make up for a

previous failure but, if it is indeed just a continuation in other terms of the duty not to do harm, it is not even, in any meaningful sense, secondary.

Chapter 6 reinforces the suspicion that the domain of duties to which the book is dedicated is much more heterogeneous than we might initially think. Slavny here defends the view that, sometimes, compensatory costs can be borne by "a party in proportion to how much they benefit from the risk-creating activity" (the Benefit Principle) or by "by the party for whom it was less costly to avoid the risk" (the Avoidance Principle) (p. 129). Although Slavny does not use this terminology, the Benefit Principle seems no other than the beneficiary pays principle.[4] The Avoidance Principle, on the other hand, seems a variation of a principle familiar from the law and economics movement, according to which the actor for which the avoidance of risk is cheaper should be the one required to compensate, so as to incentivize agents to adopt the socially efficient conduct.[5] Slavny shows that the principle can be defended in strictly moral terms: if an agent has chosen to disregard a particular risk they could have avoided at a reasonable cost, they should also be burdened with the negative externalities of their choice.

One could imagine that Avoidance is justified by reference to Responsiveness; after all, agents who deliberately assume risks they could have avoided cheaply may be accused of being unresponsive towards the value of others' safety. But Slavny thinks that both Avoidance and Benefit can be justified instead for reasons of fairness alone. Indeed, in pure luck-egalitarian fashion, he writes that the combination of the two principles "allocates liability so as to effect a fair distribution of the burdens and benefits of risky activity, but in a way that is suitably choice-sensitive" (149).

I find it uncontroversial that fairness, as such, may generate individual duties. And I find it very plausible that compensation may respond to criteria of fairness; in fact, I have gestured elsewhere to the possibility that compensation may respond *solely* to fairness.[6] I am not sure, however, why Slavny did not further add to his taxonomy a Capacity Principle, according to which the agent required to compensate is, more simply, the one who has the greatest capacity to do so, considering the resources at one's disposal. It may be, I suspect, because this third actor – who we may simply call the "wealthy agent" – is completely external to the damage itself (by assumption) whereas the agent picked up by Avoidance is either the victim or the perpetrator and the one picked by Benefit has some kind of connection to the damage, although one that could be purely fortuitous. But, if our concern is with fairness *per se*, why should we care? Why

[4] See for its defense (Butt, 2014)(Caney, 2010) (Parr, 2016) (Barry & Wiens, 2016).
[5] See (Calabresi, 1970) (Posner, 1972).
[6] See both papers mentioned in footnote 2.

assume that the pool of the agents who may incur the cost of compensation is restricted to the perpetrator, the victim, and the possible beneficiary?

If it is fairness – i.e., distributive justice – that we are talking about, why are we concerned about fairness about two or three parties at most? Why not take the distributive question from the beginning as a question concerning a plurality of agents, who are connected to each other thanks to their common membership in a particular type of social unit? That, after all, is the usual starting point for distributive justice. With that, I do now want to say that fairness among two or three people is irrelevant but I do think that, to make fairness morally salient among a discrete group of individuals, there must be something special around them; they might be friends playing a game for instance or siblings who compete for their parents' attention.

The final two chapters move gradually from moral philosophy to legal philosophy and even public policy. They concern the relationship between distributive and corrective justice (Chapter 7) and the implications of the theses previously defended for the law of compensation (Chapter 8). I am sympathetic to most observations raised by Slavny there.

In Chapter 7, the author persuasively shows how corrective and distributive justice are independently valuable and mutually irreducible; which of the two acquires priority in specific circumstances is a complex question which can hardly be decided in the abstract. This sets the stage for the final chapter, where Slavny surveys three possible articulations of a general system of compensation: the current tort system, with its presupposition that the agent liable to compensate is the one causally responsible for the harm, a fault insurance system where "those who impose wrongful risks, whether they cause harm or not, pay a fee into a centrally administered fund" and a no-fault insurance system, where "victims receive compensation from a centralized fund without having to prove they were harmed because of another's fault" (177). Slavny is not prejudiced against the current tort system – although he emphasizes how it would turn deeply unfair if it were not accompanied by the possibility of insurance in many contexts where negligence-caused damages are frequent. But he also shows that all arguments usually canvassed to show the moral superiority of the current system are either flawed or much more limited in scope than usually understood. Regarding the popular idea according to which there is some kind of "performance value" in letting damage creators discharge their corrective duties to victims, Slavny notices, *inter alia*, how "performance value can be achieved by other means, such as an admission of liability or an apology" (185), thus echoing tort-skeptical or tort-reformist views already expressed by Linda Radzik (Radzik, 2014) or David Enoch (Enoch, 2014). Similarly, arguments about the advantages of the tort system in terms of victims' accountability are

shown to be replete with limitations and arguments from causation alone are shown to be more attuned to a fault-based insurance system (when we give due relevance to causation for risks as such). Slavny concludes the chapter by noticing how his theses do not recommend a complete rejection of tort law but are incompatible with many features of the torts system as it is now, which could therefore be justified, if at all, only through pragmatic considerations.

Let me try to sum up my thoughts, in the immodest hope that they may be of help to possible readers. In terms of scope and ambition, this book is remarkable. Few have attempted to do what Slavny has done here, namely, offer a theory that covers all normative responses to damages and wrongs. Regarding foundationalism as a general approach in legal philosophy, I have already expressed my admiration for it. But, at points, I have the impression that these two strengths of the work can turn into liabilities.

Take foundationalism first. I agree that pure doctrinal analysis is normatively inert. But there is also a risk in excessive moralizing when doing political and legal philosophy.[7] At points, Slavny could be accused in engaging in a moral version of what Marx famously called *Robinsonnades*, sophisticated representations of the moral relations between individuals which abstract from crucial details concerning the rest of society. Of course, Slavny is happy to reintroduce all societal details in the non-ideal-theory stage, when devising, that is, normative solutions for the here and now. But that means that great part of the argumentation relies on intuitions about imaginary cases alone. Which is a pity, because entire arguments can thus be rejected *ab initio*, if one does not buy the specific intuition the author is inviting us to consider. Just to give an example, at p. 162 Slavny presents the following story:

> *Parenthood 1*: Two men are warned not to smoke around their pregnant partners. Both ignore the warnings. One baby is born with brain damage while the other is healthy.

He then notices that "philosophers will split on whether the two fathers are equally blameworthy, but those who think the father of the brain damaged child is more blameworthy should at least see the intuitive pull of the opposite view." What happens if, at it is indeed the case with me, one does not see even the intuitive pull of the opposite view? It seems one is prevented from seeing any appeal in the rest of the argument.

[7] For just two articulations of this problem – part of a now burgeoning literature – see (Enoch, 2018) and (Queloz, 2024).

Coming now to the book's scope and ambition, my worry is that, in the attempt to give a general normative analysis of a plurality of practices usually referred to as "corrective," Slavny ends up advocating for a set of duties that lacks unity. Wait, one could say, but isn't compensation what brings everything together? I agree that indeed compensation seems to be what the author is primarily interested in. But, then, the claim at the outset according to which the book is fundamentally concerned with corrective duties and the "legal and non-legal practices" surrounding them turns out to be much less obvious. Because it is at least controversial whether the domains of compensation and correction are so easily reducible to one another. Say that we define corrective practices as all those that have to do with making up for a particular failure (I acknowledge this might be slightly circular and uninformative). Then, it is far from obvious why certain non-compensatory practices – i.e., practices that do not aspire to either negate or counterbalance a harm – might not nonetheless aspire to correct in a broader sense, apologies being the immediate example.

Moreover, it is not always transparent to me whether Slavny believes that there is a unitary value or principle underpinning compensation in general. At some point in the final chapter, he writes that "the most important value underpinning compensation is the negation or counterbalancing of harm" (184). If that is true, compensation is valuable because it makes victims whole after a damage they were subjected to through others' negligence, recklessness, or malice. Except that, when we look at the various principles that are deployed to justify compensation, we notice that they do not all to seem centered on victims and their legitimate welfare interests. Responsiveness, with its requirement that agents pay proportionately more regard to a value they had previously failed to respect, seems peculiarly wrongdoer-centered and first-personal; it is concerned with what wrongdoers should do in light of their faulty engagement with value. Similarly, the duty to avoid doing harm, like all strong deontological principles, mentions the victim but only, in Michael Thompson's memorable phrase, as "raw material for wrongdoing" (Thompson, 2006, 352); what ultimately matters is the moral agent's relationship with the moral law (or maybe their conscience). Hence, even if compensation is what gives unity to the various normative requirements described in the book, I am not sure whether Slavny wants to claim that, at the foundational level, compensatory duties are unitary.

These are, in essence, my critical points. Which do not detract from the immense value of the book in advancing our understanding of a host of practices we ordinarily engage in. Although the greatest strength of the work might actually lie, despite my reservations about moralism, in its practical implications. By subjecting the law of compensation to strict moral

scrutiny, Slavny invites us to look at alternative legal solutions when dealing with damages. Alternatives that do not just respond to some abstract and possibly parochial criteria but that we can prove lead people to behave more justly towards one another and to live worthwhile lives.

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