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Transgender women in prisons

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Abstract. This paper deals with transgender women who, because their personal documents marked them as male, have been placed in men's penitentiaries, in which they are possibly exposed to violence and sexual abuse. The obvious discrepancy between their outer presentation as women and their identification documents, by which transgender women are officially still listed as male, requires a search for solutions as to their specific treatment in the prison system. This paper aims to compare legal models of best practices, as well as answer basic questions on accommodating transgender women according to their desired gender identity, their protection from violence, responding to the need of transgender women to continue hormone treatment started prior to beginning their prison sentence, and their application to begin the process of gender reassignment surgery while serving their sentence. The paper focuses on various solutions to protect the human rights and dignity of this specific prison population, such as separated wards – for example, GBT pods for their protected housing – or protective, non-discriminatory treatment within general prison population.

Keywords: trans women in prison, sexual violence, human rights of transgender women, special prison wards – GBT pods, protective treatments, Rickers Island, Solicciano

1. Introduction

The term *transgender*² includes a range of behaviors, looks and experiences; people who identify in this way often live outside of traditionally accepted gender norms and thus face daily the

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² The World Health Organization defines the term *transsexualism* in its International Classification of Diseases (International Statistical Classification of Diseases and Related Health Problems [Tenth Revision], ICD 10) as “the

repressive nature of gender binarism due to their gender presentation (external appearance or behavior), which may annoy or anger those around them. The term *queer* is often used to indicate different gender non-conforming people: cross-dressers, drag kings and queens, genderqueers, transsexuals, FTMs (an acronym standing for “female to male” – that is, women transitioning to become men), MTF (male to female; men transitioning to become women), and so on. This text focuses on the possibly higher exposure to violence and sexual assault faced by transgender women who have been placed in men’s prisons because of their documents, which mark them as male.³ Being “a woman among men” in a detention facility means a lower social status in a situation in which hyper-masculinity dominates; it likewise exposes these women to constant humiliation and perpetual marginalization in relation to other convicts. The male prisoners call them “mounted” women, and the transgender women refer to themselves as “non-biological” – i.e., cisgender women⁴ – since they were not born female. Their adaptation to prison conditions is reflected in their acceptance of male dominance and heteronormativity, the class and racial prejudices that dominate in the wider men’s prison population, as well as their daily compliance with various discriminatory imbalances that exist in the prisons.

Transgender women are clearly “wrongly imprisoned,” and there is a high probability that they will experience sexual violence because of the combination of their genitalia and outer presentation. They are victimized because of their sexually attractive female characteristics, but also because they cannot defend themselves against such brutality, as is typical in male violence against women (Janness, Fenstermaker, 2014: 39). Both prison staff and other prisoners commonly view transgender women as unsuccessful/unrealized men (Janness, Fenstermaker, 2014: 32), even “traitors,” “miserable (no) men” who have abandoned their manhood. Because they do not comply with the extremely heteronormative and hyper-masculine culture typically found in jails, prison staff perceive transgender inmates as potential sources of trouble and disorder within the prison. In addition to outright sexual violence, they are far more likely than

desire to live and be accepted as a person of the opposite gender, which is usually accompanied by a feeling of discomfort and maladjustment with their anatomical sex, and desire to be assisted by surgery and hormonal therapy to achieve greater physical correspondence with the desired sex.”

³ Although the category of transgender persons includes transgender men (persons transitioning to be men after being born as a female), most of the issues with transgender prison inmates involve transgender women. Problems faced by transmen convicts in prisons are almost non-existent in the reviewed literature.

⁴ Cisgender persons are persons whose masculine or feminine gender corresponds to their biological male or female characteristics; their identity coincides with their anatomical, physical, biological affiliation.

other prisoners to be exposed to various forms of ongoing sexual abuse, whether these situations happen against their will or because they allegedly “chose” these situations in order to prevent other unwanted risks in prison. In fact, some transgender prisoners talk about prostituting or “protective pairing,” a practice that involves “voluntary” sexual relations with one convicted person to avoid violence by many others. Such prison dynamics are also a type of sexual abuse, albeit not committed by explicitly physical force. This abuse often goes unnoticed by prison authorities because neither victims nor witnesses report it (Janness, Fenstermaker, 2014: 43). The obvious difference between transgender women’s external female presentation (which reflects their inner identity) and personal identification documents, by which they are still officially marked as men, requires finding answers to some important questions; for example, where should transgender women be placed – in a prison for women or for men? What if they require gender reassignment surgery (a “sex change”) while serving a prison sentence? How is the system able to ensure that they can continue their necessary hormone treatments while serving their prison sentences?

Housing is only one of the initial elements in the complex situation transgender prisoners face while in prison. Besides accommodations, there is the issue of prison treatment – involving the way personal searches are performed, the possession and use of specific items, prison clothes, and site-specific health care before, during and after gender reassignment processes. Accommodation, prison treatment, and medical care are three complex, mutually intertwined processes that link the needs of transgender prisoners with prison rules and security requirements, and also the rights and needs of other prisoners. Comparative legal analysis of this situation in various countries reveals possible ways of addressing these issues, but it also emphasizes the experimental nature of these solutions – which not infrequently leads to their failure and abandonment (e.g., Project Empoli in Italy).

2. The situation of transgender women in men’s prisons

The conditions in jails and prisons are often dangerous places with threatening situations and relationships, and they can be particularly traumatic for transgender people and those who are gender non-compliant (whose sex and gender do not conform to traditional notions or characteristics) (D.Tourjee, 2015). Transgender inmates often allege that they are discriminated

against not only by other prisoners but also by prison staff, who do not accept their lifestyle or understand their medical and other needs, who treat them with open contempt and public ridicule, and who may attempt to impede or reverse their transition (Jenness, S. Fenstermaker, “Forty Years After,” 2016: 14-29). Transgender prisoners share a stigmatized space with other “social undesirables,” such as various types of sex offenders – for example, pedophiles, child molesters, rapists, prisoners with mental disabilities, and prison informants. Most often it is assumed that transgender women are in fact homosexuals, and as such, they are scorned by the other prisoners and prison staff. Prison administrations know this, and therefore commonly separate transgender people from other prisoners for their own protection and security (Prisons and Criminal Justice). Therefore, many transgender persons are placed in solitary confinement or similarly separate prison areas for months or even years, just because they are transgender. The level of violence against transgender prisoners in some countries is such that some authors describe it as a “war” – for example, in the report “Hundred Years War: aetiology and status of rape transgender women in men’s prisons” (Stohr, 2015: 120), which reflects the violent conditions that confront transgender women in men’s prisons. They are faced with countless specific difficulties, misapplied procedures, ignorance and abuse. Due to historical rigidities in terms of gender issues and a basic lack of concern for those who, because of their gender identity, are on the margins of society, incarcerated transgender women exist in a high-risk environment of continuous exposure to scorn, attacks, mistreatment, and rape.

3. The prison experiences of transgender women (Peek 2004: 5-38)

Gender non-conforming people are consistently among the most vulnerable members of the LGBT community – among those most likely to be beaten, raped, and murdered; most likely to be criminalized and labeled as deviant; those most likely to end up in psychiatric hospitals and prisons; most often denied housing, employment and health care; among those who, in their youth, were usually rejected and abused; and among those who are most likely to have their own children taken away (Minter, 2013: 727). The treatment of transgender women in prisons is an example of how societal rigidity around gender identity has additionally maligned people who are already marginalized; similar stigmatization is felt among poor people, immigrants, people

from racialized communities, people who do not have access to health care and/or education, and people who simply “do not pass” (Hunt Jerome and Moodie-Mills Aisha C., 2012: 29). Since their visible gender identity does not fit the genitals they have (or had, if surgically removed), their conflict with the law has specific consequences. First, they will likely be sent to the “wrong” prison; once in prison, they are often subjected to treatment that can only be described as torture: forced de-transition, the denial of medical care and of hormones used before imprisonment, solitary confinement, rape, and other forms of abuse by other prisoners and periodically by prison staff (Landstreicher, 2012: 20). Cruel and unusual punishment of transgender inmates is brutal and significant – it has become increasingly difficult to legally justify placing someone in solitary confinement for a year or more, for no other reason than them being transgender. How does this fit globally accepted norms of proportionality between crime and penalty? It is difficult to understand how the choice between rape or solitary confinement can be justified.

Ashley, Linda, Ana, Jolanda, and Ophelia are transgender women inmates in men’s prisons in the United States. Like many transgender people in prison, they have been placed there because of “survival crimes” – illegal sex work and some petty offences – but they have been treated more harshly because of transphobia in wider society, as well as among police and judges (Landstreicher, 2012: 21). Linda cannot find work due to her transgender identity; in her own words, she is “too feminine for construction work or oil fields, but too masculine to prostitute.” She was not even able to access accommodations at a homeless shelter due to her gender identity. She was sentenced to seven years in prison for stealing to survive. Jolanda, who has worked the streets since she was ten, has spent a year and a half in a men’s detention center while awaiting trial for an act that was allegedly an attack on a police officer while trying to escape – but was in fact self-defence against attackers who told her that she was just another “drag queen” who will soon be dead. Once in custody, she was not allowed to continue with her regular prior hormone therapy. She said, “When I was denied estrogen, I wanted to tear off the top of my head and just get out of my skin.” Ophelia is serving a prison sentence of 67 years for attempting to rob a bank in order to pay for her gender reassignment surgery. These women’s experiences were published after being filmed in documentaries and videos (SJ Ellis, J. McNeil, L. & Bailey, 2014: 355).

Ana is serving four and a half years in a men's prison. She describes her experience of being in solitary confinement: "I sat there almost a year, closed in for 24 hours. It is a small room, just a bare room, there is nothing there, there's nothing except a bed, and windows that cannot be opened, so you cannot even breathe, you feel like an animal ... and it's fun for them to see that a person is slowly going insane in that room ... all of them who have passed, all laughing, all hahaha, beautifully entertained – 'Hey, please see the faggot, see the homo'" (Carmignani, 2012: 4).

4. Prison models for the alternative treatment of transgender women

Alternative treatment of transgender inmates requires regulating specific situations that are different than those of other inmates. The primary (or minimum and initial) goal is to protect transgender inmates from various forms of violence and discrimination, to preserve their human dignity, and to create prison conditions that uphold their right to their authentic gender identity. It is necessary first to distinguish between two categories of transgender convicts: those who have completed gender reassignment surgery (sex change), and those who, in the broadest sense, can be called "preoperative" and are in various stages of hormone therapy. For the first category there is generally no doubt that they should be treated in accordance with their acquired gender, especially in countries where the transition process is followed by the modification of personal documents. However, the second group – those whose gender identity differs from their anatomy and who may be in the process of transition; those who may have typical male genitalia but who, by their presentation and gender identity are women – constitute a larger population and present the most difficulty in terms of identifying procedural solutions.

Until now, existing models for accommodating transgender inmates who have not had gender reassignment surgery can be classified into three main types: 1) the placement of transgender women in women's prisons – which exists but is still extremely rare and experimental, applied only in some local jails in Washington, D.C. and rarely in some Scottish prisons on the decision of a special panel of experts; 2) the organizing of special prison facilities for transgender inmates, known as GBT (gay, bisexual, and transgender) pods; 3) various flexible approaches in general prison arrangements, which involve the separation, protection, and specific treatment of transgender inmates whose gender identity differs from their anatomy.

Within the second and third types of treatment, there may exist the possibility of undergoing gender reassignment surgery – e.g., in California, Scotland, Canada, and, in selected cases, in Spain and Germany.

5. Special prison wards for transgender inmates – GBT pods

Prison accommodation policy is unfortunately often based on an individual’s official documentation, with all the consequences that transgender women may experience by being “a woman in a male prison.” Finding the ideal alternative to this worst-case scenario is complicated, and often consists only of experiments with different impacts. It is difficult to protect anyone in a prison environment, but even harder to protect those who are seen as irritatingly different – as transgender women are, by both the staff and other convicts.

One option for accommodating transgender women (and gay) inmates is “GBT pods.” These are special wards/wings, often known as the “wing for gays,” “queerentine,” “gay tank,” “queen tank,” or “softie tank.” This option has been highly acclaimed by the Los Angeles media as a penitentiary solution with great potential to increase transgender inmates’ security and to protect them from violence (Hess, 2015). However, within these pods, it has been noted that levels of violence are almost the same as in other types of prison situations, and security in these departments is no less problematic than anywhere else. In addition, it has been shown that male inmates were ready to not only to forcibly break into the GBT pods if these were physically within the framework of the same prison facility, but also to falsely present as gay in order to possibly to be placed with transgender women. Therefore, in order to ensure the proper placement of all inmates, prison authorities often inquire in local gay bars about the new inmate’s “gay reputation” and actual community involvement. But prison staff members have also continued to abuse the transgender women and gay men, so the GBT pods appear more or less as only one ghetto, a prison within a prison, and they do not guarantee safety and protection from violence for transgender women. They are instead one more measure of isolation and segregation.

Prison authorities’ explanation that they cannot prevent the smuggling of attackers into GBT wings does not seem convincing. However, if the facility accommodates a sufficient number of gay and transgender inmates, they may feel less isolated and ghettoized. It is likewise

generally known that the biggest threat to people in these special units is still prison staff, not other inmates. Therefore, proper selection of and additional training for prison staff is necessary in order to familiarize them with the typical culture of the gay and trans communities and to gain respect for the inmates' dignity.⁵

While the majority of transgender inmates are still located with men in prisons, jails, detention centres, and other institutional settings, some institutions have changed their accommodation policies, such as Rikers Island in New York. In mid-November 2015, the prison reopened a special unit for transsexual women that had previously existed but had closed in 2005 for safety reasons (Mathias, 2014/2016); the reopening (Humm, 2016) was announced as one of many reforms to reduce violence in that troubled institution.

It is significant that the second largest prison in the United States has committed to such a historic effort to protect transgender women from violence, rape and abuse (Mathias, 2016). New York's Department of Corrections has stated that the new Rikers Island unit has an initial capacity of 30 beds, which is considered sufficient for the current number of transgender women in Rikers. Because not all prisoners are the same, though, the prison will also open specialized units dedicated to specific groups of prisoners. Before the opening of the special departments, transgender women in Rikers were either placed with men in the general prison population – where they faced disproportionately high rates of violence, rape, and abuse by staff and other inmates – or into protective custody, which essentially involved being locked in a solitary cell for 23 hours a day. The new prison unit was developed in consultation with several groups representing the rights of transgender persons (e.g., the Sylvia Rivera Law Project), who had been calling for reforms; in their reports, these groups had indicated the existence of a strong “culture of violence” in all facilities for adolescent and adult inmates.⁶

The Rikers Island department is specifically designed for transgender women who have not undergone gender reassignment surgeries, and inmates are housed in that unit voluntarily (previous policy had dictated that such accommodations were without the possibility of individual choice). On January 15, 2016, the first transgender inmates were placed in the

⁵ But the fact remains that these units are segregated from the general prison population and thus can become a space of discrimination – inmates in these GBT pods may be stigmatized as “abnormal”, being isolated from other, non-violent prison populations, while having limited or no access to various prison programs, employment activities and other resources that are available to general prisoners.

⁶ The Sylvia Rivera Law Project primarily targets transgender women outside of prisons.

department and, going forward, any prisoner who identifies as transgender may apply to be placed there.

However, the assumption that all transgender people want to be placed on the basis of their gender identity is not entirely correct. Namely, when prison authorities asked transgender prisoners their thoughts on the special prison units, about half of them said they would like to be placed there, but the other half would rather remain housed with cisgender men. When it comes to the safety of transgendered people in prison, they themselves often know best where they are safest. Many transgender women have spent their lives in the systems of shelters and of penal institutions – either as juveniles in detention centres, or in various prisons – and feel more comfortable in and accustomed to the men’s departments, as they have always been there: a case in which the evil they know is better than the one they do not. And some want to remain where they have fought for a place for themselves rather than to go to a new department and possibly have to fight such a struggle again (Humm, 2016).

The inmates in the specialized units on Rikers Island should likewise be allowed to attend the same programs as other prisoners and to use resources such as prison law library. However, their access to such programming is still limited for various logistical reasons, including the transportation of teaching staff due to the distance of the unit from the main Rikers complex. The GBT pods are therefore not the ideal solution, and two transgender inmates reported that from the launch of the unit in November 2015 until January 2016, they were harassed by staff and sexually abused by other inmates.

6. Department D of Sollicciano Prison

Sollicciano (Dias, Ciuffoletti, 2014: 209-249) is one of several Italian prisons in which informal (extralegal) regimes of prison accommodation have been established for persons conditionally characterized as members of the third gender (*tertium genus*⁷). Up until late 2009 in Italy, a large number of transgender inmates were placed in so-called “Protected Mode” in the prisons of Alba, Belluno, Bergamo, Bollate, Firenze Sollicciano, Milan S. Vittore, Naples, Poggioreale, Rimini, Rome, and Rebibbia NC; about 80 transgender inmates were located in those facilities until October 2009. In Italian prisons today, transgender inmates are classified according to

⁷ *Tertium genus* (third gender) is the Latin term for the “third way,” something between two fixed realities.

whether they have undergone surgery. Those who have undergone gender reassignment surgery in order to obtain legal recognition of their acquired gender are placed in women's departments, while those who have not have gender reassignment surgery are placed in special wards designated for transgender women.

The Italian solution for accommodating preoperative transgender women is to place them in special protective units (as specified in Article 32 of the Decree of the President of the Republic 230/200), but still within the larger context of male wings.⁸ This procedure was formalized through a memorandum of the departments (Protocol no. 500422) in 2001 called "The so-called 'protected' departments – the criteria for the accommodation of inmates," which states that the secure units were "established in order to address the need to protect special categories of inmates due to objective reasons, although they are sometimes based on subjective characteristics of these persons (for example, on transsexuality)."

The practices of "Department D" in the Sollicciano Prison in Florence⁹ are considered representative of the informal system of prison accommodation under European and Italian models, through using various strategies for "avoiding risks." The layout of Sollicciano comprises two macro-areas: the department for men and the department for women; the latter includes an isolated facility, Department D, which is used to accommodate transgender inmates. This solution has become typical practice despite the lack of relevant legislation.

After the reorganization of the institution itself at the end of 2005, a new approach was adopted to automate the accommodation of inmates on the basis of their genitalia while continuing the institutional separation of women and men. Department D is located in the women's department, over the unit that houses inmates with mild mental illnesses. The department is separated from the cisgender women's section, which occupies the vast majority of the wing. Since its beginning, this space was not able to function autonomously – thus, there are significant gaps and structural shortcomings, such as a lack of rooms for socializing or for meetings with lawyers and professionals like social and health workers. The inmates have voiced that the structure is the most problematic aspect of life for transgender persons in the prison.

⁸ The discussion focuses on male wards because the main problems involving the accommodation of transgender inmates was (and still is) mainly characterized by those transitioning from male to female.

⁹ Department D: Prison accommodation of the third gender (a Tertium Genus of Incarceration).

The introduction of the department for transgender inmates led to theoretical and practical changes in the handling and treatment of inmates in Sollicciano. The change was primarily motivated by the desire to create a space separated from the male department, in order to reduce the risk of “promiscuity,” and simultaneously to be largely autonomous and independent of the administration of the women’s department (as evidenced by the selection of officials assigned to that department). Overall, Department D was developed due to a lack of existing structures within the prison that could officially be defined as accommodating the “third gender” (*tertium genus*), and, as in other cases, the managerial style of the department is often a regulatory compromise between the demands of security, filed complaints, and the administrative stipulations of inmates’ treatment. Currently, among the staff of Department D, men predominate in the security structure, and women in the administration.¹⁰

The lack of legally defined criteria on how to decide who is and is not a transgender person, and the lack of clear guidelines and procedures regarding the accommodation of transgender inmates in the prison has aggravated identity conflicts within Department D. Thus, there are cases of self-identified transgender people who were not assigned to the department due to a lack of primary outward signs of transgenderism in the ways understood by the prison registration service. In addition, there have been cases of transgender persons transitioning from female to male who were not accommodated in the department, even while exhibiting visible external signs indicating dominant male gender identity characteristics. Other problems have included transgender prisoners complaining that the clothes distributed in Department D are for men, that personal hygiene items are inadequate and insignificant, that hairdressing services are largely inaccessible, and that the staff of Department D continue to use masculine pronouns for the inmates.

In addition to these problems, the department has faced overcrowding, which was supposed to be temporary but became permanent after the abolishment of the Empoli Project. This overcrowding has led to security problems, and the practice of having occasional joint activities with transgender women and cisgender women inmates was cancelled. Relations with cisgender women inmates are often strained because they essentially do not accept transgender women, while the problems of relationships with male inmates involve sex, violence, extortion,

¹⁰ In summer 2014.

and various abuses. And since Sollicciano disavows the hypothetical option of “mixed prisons,” this possibility has been lost.

The fact is that transgender inmates themselves have no unanimous position on what for them constitutes the most desirable prison accommodation and treatment. They do not want a special prison, because that would lead to further ghettoization and them being classified as “abnormal” – a term that creates much friction within the transgender community (as is typical of all marginalized groups). All inmates mentioned feeling scared of being hypothetically locked up within such a limited, closed community without any “others,” voicing that this would worsen interpersonal conflicts and tensions among them. The idea of a centralized “assembly” of all transgender inmates in Italy in one institution was seen as alarming.

7. Conclusion

The absence of legislation in Serbia on changes of gender status in the personal documents of those who have undergone gender reassignment surgery prevents the placement of transgender people in institutions in ways that reflect their acquired gender – despite their changed anatomy, physical appearance and lifestyle in accordance with their acquired gender roles and relations. The Law on the Execution of Criminal Sanctions (LECS) stipulates that men and women inmates are to serve their sentences separately (Art. 46., p. 3). This law allows for the accommodation of transgender people in prison facilities only in accordance with their biological sex, not based on their desired sex and gender; it thus prevents exceptions for any transgender people who have and who have not undergone gender reassignment surgery. The provisions of Article 52 (LECS) stipulate that individuals may be later transferred to another facility under the board of directors’ authorization if further examination reveals that treatment will be more successfully implemented at another institution, or due to security reasons. This provision can thus be taken as a legal basis for transferring a transgender inmate from unsafe or otherwise unfavorable accommodations. However, this is dependent on interpretation, as Article 46 of the LECS may lead to the possibility of relocation to a facility based on the transgender inmate’s biological sex, not to one of their desired gender identity.

Nonetheless, a practical solution is possible, legally and logistically, through using the newly renovated section of the fifth pavilion of Pozarevac’s Zabela prison, which is adapted to

the needs of older inmates and those with disabilities (Stefanovic, 2016). A further way forward would be the systematic adoption of the Gender Identity Act, which, in Article 2, p. 5, stipulates the relevance of the acquired gender of persons with gender dysphoria as well as those who are in the process of transitioning or who have undergone gender reassignment surgery. The law also regulates changes in the civil registry of births, names, and gender markers for persons with gender dysphoria, as well as changes in other personal documents, as stipulated by the provisions of Articles 10, 11, 13, 14, and 15. Overall, the best comparative legal solutions for transgender people have happened in those countries in which gender status is legally able to be changed in accordance with desired gender identity, with or without surgical transition.

Transrodne žene u zatvoru

Apstrakt. Predmet rada su transrodne žene u muškim zatvorima gde su smeštene osnovu svojih ličnih dokumenata u kojima su označene kao muškarci a u kojima postoji mogućnost izloženosti nasilju i seksualnoj zloupotrebi. Očita razlika između njihove ženske spoljašnjosti i ličnih identifikacionih dokumenata po kojima su transrodne žene još uvek zvanično muškarci, zahteva traženje specifičnih rešenja njihovog tretmana. Cilj rada je da prezentira i argumentuje komparativnopravne modele dobrih praksi, kao odgovore na bazična pitanja smeštaja transrodnih žena (prema anatomskom ili željenom polu), njihove zaštite od nasilja, odgovor na potrebe transrodnih žena da nastavu sa hormonalnim tretmanom započetim pre početka izdržavanja zatvorske kazne, kao i na njihovo apliciranje za započinjanje procesa hormonalno operativnog prilagođavanja pola za vreme izdržavanja zatvorske kazne. Osnovne teme obuhvataju različita rešenja zaštite ljudskih prava i dostojanstva te specifične zatvorske populacije, kao što su posebna odeljenja za njihov zaštićeni smeštaj ili zaštitni, nediskriminišući tretmani u opštoj zatvoreničkoj populaciji.

Ključne reči: trans žene u zatvoru, seksualno nasilje, ljudska prava transrodnih žena , posebna odeljenja, zaštitni tretmani, Rikers Ajlend, Soliđijano

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