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A CONVENTIONAL NARRATIVE. THE RHETORICAL SHAPE OF MARTIN LOUGHLIN'S *FOUNDATIONS OF PUBLIC LAW*

INTRODUCTION: A CONVENTIONAL NARRATIVE

A particularly striking narrative concerning the trajectory of the modern state, as it appears to some important thinkers and those they have influenced, goes like this[1]. Over the course of the twentieth century the state became extraordinarily, even all powerful. It fought « total wars on an intercontinental scale », provided « for its subjects in a previously undreamt of manner » so that they were no longer at the mercy of the vicissitudes of fate, but showed itself capable of controlling them « in ways that were deeply troubling to liberals who valued above all the freedom of individuals to decide on the good for themselves[2]. It is thus that « [t]he twentieth century may be said to have witnessed the apotheosis of the state[3] ».

If this narrative recalls a set of thematics that « were staple topics of twentieth-century social and political thought » it has also been suggested that the juridical dimensions of the topic have been rather neglected, even as from the turn of the twentieth century thinkers began to realise « that the requirements of the modern state put increasing pressure on accepted understandings of law[4] ». How so? First, law became increasingly « made or legislated », and in this way assumed a « positive » as distinct from a « natural » appearance. This development of state-made positive law « threatened the connection that was previously assumed between the law and the basic values or mores of the community[5] ». On the older conception, law reflected custom. Now, not only custom but also « other traditional forms of social cohesion » were « losing their force », putting a premium on law « being called upon to do more by way of legitimating the government apparatus[6] ». This intensification of the role of law in validating state authority compounded the expansion of state-made law driven by the extension of state regulation over social life. Here is the crescendo that brings this set of claims together:

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[1] D. DYZENHAUS & T. POOLE, « Introduction », in *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law*, Cambridge, Cambridge University Press, 2015, p. 1-10.

[2] *Ibid*, p. 1.

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid*., p. 1-2.

[6] *Ibid.*

This sense of juristic disorientation was heightened by the specificity of the new functional rule making. As law seemed to become regulation, increasingly a matter of detail and of technique, it became unclear what space remained for the image of law as anchor of basic principles and brake on overweening or arbitrary political action. If the *Rechtsstaat* is meant to embody general liberal principles, how can it abide a particularistic core[7]?

How one evaluates the processes of state formation in the twentieth century and from what standpoint is more complex than the conventional narrative just sketched suggests. Is the alleged apotheosis of the state referable to all or only some of: Nazi Germany, the Stalinist Soviet Union, George W Bush's USA before or after the invasion of Iraq, to all or only some of the liberal democratic European welfare states? And, at what precise point in their development?

Yet, in broad terms this argument characterises the narrative arc of Loughlin's *Foundations of Public Law*[8]. At least by the last two parts of this compendious text we get something very similar in character to this argument. Loughlin makes it seem that the « rise of the social » must imply such an apotheosis of the state. Since it is difficult to argue against the historical trajectory of the « rise of the social » without invoking an impossibly nostalgic standpoint, this this seems like a form of negative historicism, namely the proposition that an historical development as complex and as politically contested as the rise of the social must inevitably lead in a certain direction, one that undermines the juristic autonomy and integrity of the state.

In what follows, my stance is that of a political and social theorist, and my focus is on ideas, especially on rival ideas. In good part I am calling into question any historicist narrative that masks its doctrinal commitments through the appearance of a history that rolls out over time. In particular, this historicism masks the normative significance of public law as an achievement of the early modern state, which embodies the subjective freedom of the citizen. Loughlin loses sight of this achievement because, whether by default or design, he permits a liberal constitutional understanding of negative liberty to overwhelm the immanent relation between state and freedom.

The early modern discovery of the idea of the state

Loughlin begins his account of the foundations of public law in the early modern era, presenting public law as the legal dimension of « a set of institutional arrangements » that constitutes the state, or the office of the sovereign[9]. Bodin is key for Loughlin in this regard, representing the shift in

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[7] *Ibid*., p. 2.

[8] Hereafter: *FPL*.

[9] *FPL*, p. 91.

focus promoted by early modern juristic and political thinkers from the idea of the prince as a single individual ruler of a domain, a seigneurial conception, to the idea of the prince as a system of public office[10]. Seigneurial government implied that the prince could treat crown land and jurisdictional rights « as part of his private patrimony, subject to ordinary legal rules of inheritance, succession, seisin, and sale, a doctrine that later jurists such as Grotius, Pufendorf, and Vattel would call patrimonial kingship[11] ». As Daniel Lee highlights, Bodin's juristic-political thought was trenchantly anti-seigneurial or anti-feudal, rejecting « the idea that the sovereign ruler of a state was also its ruler [Fr. s*eigneur*, L. *dominus*] and, therefore, was legally entitled to govern the state just as if it were an object of private property held *in patrimonio*[12] ».

In arguing that the prince does not have « the proprietie of the publike demaines », and that « propertie of the crowne lands [demesne] is not the princes, » but instead, « belong[s] unto the commonweale[13] », Bodin presents a public domain that is something other than patrimonial private property, a public domain in other words that is not to be thought of as analogous to a household (*oikos*). Where a household requires management, a public domain is constructed in terms of the immanent requirements of sovereign rule[14]. To rule this public domain, then, the prince has to assume an entirely different role to that of a private owner who can do with it as he pleases. While for Bodin seigneurial government was government by the sovereign's arbitrary will, rule of a public domain required lawful government: « What made lawful government possible on this analysis was the use of law, rather than one's arbitrary will, in discharging the functions and powers of government[15] ». It is in this conception of lawful government that we find the *idea* of law. It refers to the construction in law of the state

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[10] As D. LEE, « "Office is a Thing Borrowed": Jean Bodin on Offices and Seigneurial Government » (*Political Theory*, 41, 3, 2013, p. 409-440) points out.

[11] *Ibid.*, p. 413.

[12] *Ibid.*, p. 412.

[13] J. BODIN, *On Sovereignty: Six Books of the Commonwealth*, quoted from D. LEE, « "Office is a Thing Borrowed": Jean Bodin on Offices and Seigneurial Government », *op. cit.*, p. 413.

[14] A public domain that is constructed in terms of the immanent requirements of sovereign rule *must* have a functional aspect concerning how this domain is resourced, a point that Loughlin appears to understand when he speaks of crown privileges and rights as required to meet the costs of governing (see below). However, later in *FPL*, Loughlin allows himself to be converted by Oakeshott's wholesale view of the prince's domain as « the "unpurged relic of 'lordship'" (Oakeshott, quoted from *FPL*, p. 162) ». The full passage reads: « Here, the "unpurged relic of lordshiphidden" in the office of modern monarchs and which the successors to kings inherited and have shown no inclination to relinquish' has been exploited and the modern European state recognized as a domain, its territory an estate, its government a form of estate-management, and its laws as rules that are instrumentally orientated to the success of this enterprise » (*ibid.*). This view also enables Loughlin to interpret modern state prerogative powers as a relic of patrimonial monarchical power.

[15] D. LEE, « "Office is a Thing Borrowed"… », *op. cit.*, p. 416.

as a system of public office. This is law understood as the structuring principle of this system, or as Bodin put it:

To change the laws which concern the estate, is as dangerous, as to remove the foundation or corner stones which uphold the whole weight or burden of the buildings; in which doing the whole fabric is to be sore shaken, and beside the danger of falling, receiveth more hurt by the shaking thereof, than it doth good by the new reparation, especially if be now old and ruinous[16].

In order to ensure that the prince or sovereign power is something other than arbitrary will, that this power is bound by fundamental law understood in the sense just given, Bodin argued that in « ordinary matters of government and administration of state », « public power must be delegated to others, acting as agents or "keepers in trust" of the sovereign power[17] ». It is this « legal scheme of delegation and agency » that constitutes a system of public office[18].

Loughlin's use of Bodin in *Foundations* is conceptually consistent with Lee's account, but the normative aspect goes missing. Fundamental law for Bodin is not as the medieval meaning had it, customary law, but rather refers to « the rules that define the nature of the office » of the sovereign[19]. Loughlin continues: « Bodin seeks to establish the office of the sovereign as a permanent and perpetual institution », which being so means that the sovereign « is not free, as under patrimonial kingships, to bestow the crown on whomever he desire », nor free to sell off the royal estate[20]. Instead crown privileges or rights – « rights to public lands, rents, fines, tolls and such like – exist to meet the costs of governing, and if that endowment were depleted the future authority of the office would be diminished[21] ». Accordingly, Loughlin emphasises, « the fundamental rules are constitutive of the office and exist to ensure that absolute authority is continuously and permanently established[22] ».

Loughlin recognises, then, that in this account of sovereign power we have something other than a conception of patrimonial kingship. But he does not emphasise, as Lee does, the *normative* significance of Bodin's rejection of seigneurial authority, and of his insistence on its alternative – sovereignty conceived as the state or as public authority.

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[16] J. BODIN, *On Sovereignty: Six Books of the Commonwealth*, quoted from D. LEE, « "Office is a Thing Borrowed": Jean Bodin on Offices and Seigneurial Government », *op. cit.*, p. 417-8.

[17] *Ibid.*, p. 419.

[18] *Ibid*.

[19] *FPL*, p. 67.

[20] *Ibid*.

[21] *Ibid*.

[22] *Ibid*.

What is this normative significance? In her account of the era of French juristic thought to which Bodin belongs, Blandine Kriegel argues that these anti-feudal thinkers are rejecting the condition of slavery or servitude in which feudal authority places those who find themselves in subjection to the patrimonial ruler. Kriegel argues these thinkers give a resounding « no » to three questions: must subjects be treated as slaves? Must human beings be treated as things? Do political relationships derive from property relationships[23]? Thus Bodin rejects seigneurial rule because in such a condition the subject cannot be free:

Whatever goods or chattels a subject held, in fact, really belonged by right, to the princely seigneur who permitted the subject to make use of it, « so long as it shall please » him. In this way, then, the material well-being of the subject in a seigneurial regime was fully dependent upon the sovereign's permissive will – literally, the sovereign's « benevolence[24] ».

It is this condition of being dependent on the arbitrary will of another that Quentin Skinner, in reference to the Roman doctrine of *patria potestas*, and following the usage of Roman moralists and historians, calls *obnoxius*, namely « the predicament of anyone who depends on the will – or, as we say, on the goodwill – of someone else[25] ». In their normative rejection of this relational mode of being human, the early modern juristic and political thinkers reconstitute the status of the human subject as a free being, and, thus, as the kind of being for whom authority has to be other than patrimonial mastery or feudal rule. Authority, in short, has to assume the features of a system of rule that orders relationships between human beings in such a way that they can be free, both in relation to one another, and in relation to their inner being (which at this time centers on confessional freedom).

The rationale for sovereign power thought of as an anti-seigneurial form of rule, a system of public office that is constituted in public law, resides in how it provides for a human mode of being that can be termed free. Such a mode is inherently relational so that, in institutionally securing and enabling freedom, this system of rule is oriented to the freedom of each on an equal basis. The public good then has a precise meaning that is not adequately conveyed by Loughlin's repeated use of Cicero's phrase *salus populi*, which refers to the health or good of the people. Rather, the public good denotes a shared condition of being free that is given positive expression both in the institutional order of the state and in the political body or association that those individuals who share this condition of being free comprise.

« Society » in this conception is « political society ». Political society represents a distinctive order of artifice that is coeval and co-extensive with the artifice that is involved in the institutionalisation of sovereign power.

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[23] B. KRIEGEL, *The State and the Rule of Law*, Princeton, Princeton University Press, 1995, p. 25-26.

[24] D. LEE, « "Office is a Thing Borrowed"… », *op. cit.*, p. 414.

[25] Q. SKINNER, *Liberty Before Liberalism*, Cambridge, Cambridge University Press, 1998, p. 42.

Thus « society » does not pre-exist the state, but is constituted as a jurisdiction of free persons through the state. At the same time, political society denotes a mode of being and acting as a free subject that is structured by an obligation to obey the sovereign authority. In this way, it might be said that political society *produces* sovereign authority.

The idea of the state, in this account, takes on both institutional and subjective-phenomenological dimensions. This is what Hegel means by the state as ethical life. This same understanding extends to the meaning of « law ». Law is irreducible to its formal expression and extends to an ethos of law, thus permitting a two-way dynamic relationship between formal law and this ethos. Such an approach calls into question Loughlin's view of the juridical and the regulative aspects of governing as mutually exclusive.

Loughlin does refer to the early modern rationale for sovereign power, but in doing so converts it into a standard dogma rather than carefully investigating it as a set of rich ideas. His reference to the doctrine of *salus populi* or the good of the people as the normative referent for the early modern idea of rule is, as I have said, insufficiently precise. In contrast, when discussing Spinoza, he does relate this idea of public good to the proposition that the true aim of government is liberty:

A slave « is one who is bound to obey his master's orders, though they are given solely in the master's interest », whereas a subject « obeys the orders of the sovereign power, given for the common interest, wherein he is included ». The object of government « is not to change men from rational beings into beasts or puppets, but to enable them to develop their minds and bodies in security, and to employ their reason unshackled ». The « true aim of government is liberty[26] ».

The early modern juristic and political thinkers view the state and public law as the necessary condition of freedom understood as a relational or social condition. To be sure, Hobbes insists that the right of nature, namely, « the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature » can never be surrendered[27]. The individual retains her right to personal security even when she finds herself a subject of sovereign power. For personal security (Blandine Kriegel's apt rephrasing of the right to self-preservation) is « the ground » of sovereign power, which means that sovereign power cancels its own rationale should it threaten personal security[28]. Of how Hobbes constructs natural right, Kriegel says: « Personal security is the end and object of all social

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[26] *FPL*, p. 105, internal quotations referring to Spinoza's *Tractatus Politicus.*

[27] T. HOBBES, *Leviathan*, Cambridge, Cambridge University Press, 1991, p. 91.

[28] Here I work with Jeff Malpas's (J. MALPAS, « Ground, Unity, Limit », in *Heidegger and the Thinking of Place: Explorations in the Topology of Being*, Cambridge, Mass. and London, MIT Press, 2012, p. 83) understanding of « ground »: « The point can be made quite generally, in a way not restricted to Kant: to determine that in which the possibility of something rests, is, at one and the same time, to determine what is possible for it – to determine ground, is also to determine limit ».

transactions » and it cannot be surrendered[29]. Thus, if the state should act in such a way as to threaten personal security, Hobbesian individuals have the right to resist it.

Outside the artifice of the state/political society, as Hobbes insisted, natural right is merely virtual. Blandine Kriegel's commentary makes the point clearly:

The right to personal security, then, has pride of place among all individual rights. It is the only one that is nonnegotiable. More importantly, it is the only civil right. In the state of nature, personal security is merely the object of a desire, an aspiration of the individual, but never a reality. *Homo homini lupus*: the anarchical and collective law of force poses a constant threat to each person's physical safety. In the civil state, by contrast, the sovereign's confiscation of all acts of war, his monopoly on the sword of justice, brings about individual security by means of the rule of law. The civil state confers reality on a right that remained virtual in the state of nature[30].

Freedom does not precede the state and public law, and therefore it makes no sense to propose, as many liberal-constitutionalist thinkers do[31], that the rationale for the state and public law resides in protection of an individual's inherent right to freedom *against* the tendency of public power to exceed its remit. Such a tendency can be conceded but it should be thought of differently, not as the violation of an already existing individual freedom but rather as the corruption of public authority, and as some kind of reversion to seigneurial power, that is, the assertion of power as a form of private rather than public right. We can make these points a little more carefully with reference to Hobbes, a thinker who followed and elaborated Bodin's conception of sovereign power, and is drawn on by Loughlin to establish the early modern territory of public law.

Hobbes, to reiterate, posits freedom in terms of an early modern idea of natural law, this being « the right of nature » or « Liberty each man hath to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto[32] ».This, it seems to me, is a fundamentally anti-feudal posit: it is the idea that, as an individual, each human being has her own integrity, and should be free to use her « own power » to express, and serve, this integrity. This is the meaning of the « individualism » that we associate with Hobbes's thought. It is decidedly not the monadic individualism of the Robinson Crusoe kind, for which liberal thinkers are often criticised. Hobbes (as Samantha Frost brilliantly analyses) is quite clear: the human

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[29] B. KRIEGEL, *The State and the Rule of Law*, *op. cit.*, p. 40.

[30] *Ibid.*

[31] Explored by *FPL*, in chapter 12.

[32] T. HOBBES, *Leviathan*, *op. cit.*, p. 91.

condition is one of interdependence[33]. Put another way: in using our own power and translating it into action, we constitute each other's environment. Hobbes's argument concerns how this environment is structured. If it is privately ordered, that is directed by private arbitrary will, then we find ourselves in an *obnoxius* condition – we are either subjected to the will of the presently stronger party, or we manage temporarily at least to be this stronger party, thereby subjecting the will of others to our own. On the other hand, if this environment is publicly ordered, then it is possible for each to enjoy security for their existence as a free being, at least as far as institutional authority can provide for such.

It is Hobbes's genius to show how a feudal private ordering of relationships appears from the standpoint of an early modern conception of freedom. It appears as a condition of chronic fear and insecurity for all, where it is impossible for arts and industry to flourish. But Hobbes emphasises that this state of affairs suits those whose sense of honour requires that they engage in war[34]. The ethical problem that feudalism poses is thus disclosed only from the standpoint of the principle of subjective freedom.

Having demonstrated that a private ordering of the human condition vitiates the right of nature, Hobbes is able to argue that only a public ordering of the same can enable the right of nature to be something other than a virtual right, that is, to become real. This means that freedom is immanent within the public ordering of social life, a point that Loughlin takes from Spinoza. The passages of *Foundations* I have in mind read as follows:

Given that individuals in their natural state are marked by inequalities, some type of institutional framework is required before relations of equality can be formulated. […] Spinoza is critical of scholastic expressions of right, whether objective, as the expression of a prior, divinely inspired order, or subjective, as the expression of a universal human characteristic of autonomy. An individual's right is simultaneously an expression of power. Individuals live in a relation of mutual independence, in that one is able « in

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[33] S. FROST, *Lessons from a Materialist Thinker: Hobbesian Reflections on Ethics and Politics*, Stanford, Stanford University Press, 2008.

[34] Vickie Sullivan discusses how the aristocratic families that supported Europe's monarchies were a problem for Hobbes: « Trained to seek honor on the battlefield, they are likely to advocate for war abroad; disposed to view themselves as superior in strength and resolve, they are likely to defend their honor vigorously, even violently from insults and slights, and are, as a result, a source of disturbance within the realm. Their way of life, their passions, and their virtues are obstacles to Hobbes's goals of peace and stability ». Sullivan continues: « As much as the aristocratic few pose formidable obstacles to Hobbes's purposes, he does not so much attack them as a class as condemn proud individuals. Because these proud individuals are likely to be conscious of their status, wealth, and education, ready proponents of war, and eager for rule, Hobbes leaves no doubt from which class the most troublesome are drawn » (V. SULLIVAN, *Machiavelli, Hobbes and the Formation of a Liberal Republicanism in England*, Cambridge, Cambridge University Press, 2004, p. 98).

general to live after his own mind », and dependence, in that he is « rightfully dependent on another ».

Given this mutuality, we can see why Spinoza does not regard sovereign power and individual right as inherently antagonistic, especially since « if two come together and unite in their strength, they have jointly more power […] and the more there are that have so joined in alliance, the more right they all collectively will possess ». The individual is to be seen « not as an obstacle to the sovereign's power (*potestas*) but an active, constituent element of the power (*potentia*) of the state ». The immanent relations of sovereignty evolve as the dynamic of dependence-independence generates « real » power, a power generated from limitations and functional differentiations intrinsic to the process[35].

Here Loughlin affirms the insight that *potestas* and *potentia* are reciprocally constitutive. The state that conforms to the idea of a constitutive condition of a free mode of being is a legitimate state: sovereign power or *potestas* can be granted its full majesty. At the same time, in their manner of obeying sovereign power, free individuals turn this majesty into effective power. As Hobbes puts it: « in the act of our Submission consisteth both our Obligation and our Liberty[36] ».

Hobbes argues that in the construction of a common power that imposes a civil peace each gives up their natural rights, and specifically their natural right to govern themselves in matters bearing on their security. Thus in establishing a public collective entity to which each belongs, individuals transform the nature of their being from « natural » to « civil ». In Hobbes's words,

> [t]his is more than Consent or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such manner, as if every man should say to every man, *I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner*.

Hobbes continues: « the Multitude so united in one Person, is called a COMMON-WEALTH, in latine CIVITAS[37] ».

The remarkable clarity of this passage demonstrates a thoroughly anti-patrimonial politics. To suggest that, in becoming part of a public collectivity that acquires lawful agency in the form of sovereign power, the individual must surrender the private right of self-government rejects not just the feudal conception of authority in terms of private power but also the liberal understanding of freedom in terms of a pre-existing right of self-government.

Quentin Skinner suggests that in this conception of « liberty before liberalism » we find something quite other than the « liberal analysis of

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[35] *FPL*, citing Spinoza, 2010, p. 105.

[36] T. HOBBES, *Leviathan*, *op. cit.*, p. 150.

[37] *Ibid*, p. 120.

negative liberty [38] ». Indeed so. As he suggests, these two distinct conceptions of liberty lead to quite different conceptions of the state, and it must follow, of public law[39].

Liberal thought justifies state authority in terms of liberty understood as an already-constituted mode of being. State authority, then, is limited to formal recognition and protection of a pre-existing state of affairs. In this framework, any elaboration of state authority, as occurs especially with the historical transition from a patriarchal household society to a modern differentiated society, must appear problematic. For instance, when the employment relationship is no longer contained within a patrimonial household economy, but is placed within the relationships of civil society, now understood in its modern, rather than early modern sense, as a sphere of private associational action, the question of how the employment relationship is to be constituted appears as something that has to be dealt with. For the social liberal thinker it makes sense for the state to consider the employment contract as something other than a purely contractual or privately transacted relationship, as a relationship that needs to be situated within political society in the early modern sense of the word[40]. For the liberal thinker the employment contract as a privately transacted relationship should be respected by the state, and the bias is against state interference in this relationship.

The liberal thinker's suspicion of « state intervention » in private transactional relationships makes it inevitable that s/he will be suspicious of state power, seeing it as inherently likely to exceed and undermine state *potestas*. Yet, as indicated, the terms of the early modern conception of the reciprocal constitution of *potestas* and *potentia* can be carried over into « the rise of the social » and how this affects our understanding of the state and political society. The question becomes how the extension and intensification of the idea of freedom requires a more elaborate understanding of the state/political society ensemble of relationships under post-patrimonial conditions. In this conception, the test of state authority (considered as both *potestas* and *potentia)* is how it is or continues to be constitutive of freedom, understood as a shared and relational mode of being.

Thus what I called at the start the conventional account of the development of the state in the epoch of the rise of the social is driven essentially by a liberal, if not a liberal-patrimonial, point of view or value orientation. The only point I need to make here is that there can be an alternative account that develops the early modern conception of the state

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[38] Q. SKINNER, *Liberty Before Liberalism*, *op. cit*., p. 112.

[39] *Ibid*, p. 119.

[40] This is how T.H. GREEN argues in his « Lecture on "Liberal Legislation and Freedom of Contract" », in *Lectures on the Principles of Political Obligation and Other Writings*, Cambridge, Cambridge University Press, 1986. It also relates to Durkheim's argument concerning the « non-contractual » elements of contract in *The Division of Labor in Society*.

and freedom. What we find in Loughlin's narrative in *Foundations* is a refusal to see such an alternative account and to investigate its implications for a conception of public law.

The problem, in short, is that Loughlin's own insights (especially but not only via Spinoza's thought) into the immanent relationship between freedom and the state are eclipsed over the course of *Foundations* as a liberal idea of the state and its constitution begins to take hold.

The liberal idea of the state

Precisely because the early modern anti-feudal thinkers are so profoundly aware that a state of non-liberty is the historical condition their thinking is designed to ethically problematise, their claim that liberty is a right of nature (as Hobbes has it) is ethical in import. The. It is not a claim about human nature, but a claim about the potential of being human for living a free life. Since this claim comes into being as an ethical response to an already existing historical state of affairs that denies liberty, its character is historical rather than ontological. Hegel follows this line of thinking in associating the development of the principle of subjective freedom with the historical phenomenology of Christianity[41].

On this matter there is a profound equivocation in liberalism. Liberal thinkers tend to ontologise freedom or liberty by making it a characteristic of the human as such[42]. Arguably this follows from their privileging an already existent freedom, which in relation to a derivative public authority that is established in order to recognise this pre-existing freedom, retains its private, and thus on Hobbes's terms, its « natural » character. In this way, freedom as an ethical claim cedes place to freedom as a naturally given condition.

Instead of being thought of as immanent to a politically constituted mode of association, freedom becomes immanent to a civil society now understood in the modern sense of a transactional sphere of individual conduct, that is, as a set of relations that are structured in terms of their instrumental value for natural persons. As Loughlin makes clear in his account of Thomas Paine's idea of inherent rights, this sphere is given to and precedes the state[43].

Liberals accept that this private ordering of relationships is not self-sufficient. It has to be completed or overlaid by « the rule of law » understood as legally enforceable rules that concern « the propriety of

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[41] See G.W.F. HEGEL, *Elements of Philosophy of Right*, Cambridge, Cambridge University Press, 1991, § 124, 151-152.

[42] Thus *FPL* (p. 163) invokes Oakeshott's idea of « the existence within human nature of two equally powerful but contrary dispositions: the desire to be autonomous and the desire to be a participant in a common venture ».

[43] *Ibid.*, p. 346-349.

conduct[44] ». These rules concern, as Oakeshott puts it, adverbial conditions of conduct, adding to conduct the quality of conformity to law[45]. And yet liberal thinkers abandon any idea of a public collectivity. They are deeply suspicious of attributing substantive features to the public or political association (the state) that supposedly enable the freedom of those who come under its jurisdiction. Instead, liberal thinkers attempt to give the rules or conditions of such association a formal and substantively empty character (this is political association thought of as *societas*, a term that Loughlin borrows from Oakeshott). Otherwise they fear that they run the risk of prescribing the content of free action, or more precisely, the logic of the situation is that someone will have to decide the content of free action, which must necessarily represent the return of the arbitrary will.

Liberals are thus compelled to offer a formulation that posits the rules or conditions of free conduct as distinct from the exercise or practice of free conduct. This then leaves the liberal thinker in a quandary. Even if he is clear that free conduct is not possible except as it enjoys such conditions or rules, he has to make free conduct appear to precede or reside outside these conditions or rules, whereas, on the early modern conception, an understanding (both political and juridical) of the status of being a free person has to inform the exercise of freedom[46]. For the liberal way of thinking, the idea that the state might act on behalf of personal security understood as a condition of holding the status of a free person must lead in an illiberal direction. Thus, if state action on behalf of personal security is inherently problematic, it is because such action will be driven by considerations other than those which bear on the question of subjective right. This is precisely how Loughlin's argument unfolds.

In his chapter on constitutional rights (chapter 12) Loughlin thus comes to adopt a liberal frame of reference. The early modern conception of sovereign power is reinterpreted from a liberal point of view, the effect of which is to problematize natural right as the « ground » of the state. As I understand it, his argument goes like this. If, he says, natural right is understood in liberal fashion, as inherent « subjective » rights, preceding the construction of the authority of the state, determining whether state action is

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[44] M. OAKESHOTT, « The Rule of Law », in *On History and Other Essays*, Indianapolis, Liberty Fund, 1999, p. 139.

[45] I agree with Dyzenhaus's suggestion that Oakeshott, a subtle thinker, offers a « Hobbesian » account of freedom which, on the terms of my argument, brings Oakeshott closer to the early modern conception perhaps than the designation of him as a liberal thinker suggests (see D. DYZENHAUS, « The End of the Road to Serfdom », *U.T.L.J.*, 2013, p. 310-326 and D. Dyzenhaus and T. Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law*, Cambridge, Cambridge University Press, 2015). Nevertheless I think Oakeshott understood himself as a liberal thinker, and he certainly embraced the antinomies of liberal thought.

[46] This is the argument that I can practice freedom only if I understand at least on some level what it means to be a free being. This is obviously something quite other than ownership of private property, even as the idea of private property is different depending on whether it is framed by a seigneurial, liberal, or « early modern » understanding of the subject.

legitimate or not, and limiting state authority, then we have an account of state legitimacy and power that preserves a private sphere of freedom for the individual, « a zone of private autonomy »[47]. For Loughlin this is not without problems. First, such rights, if they are enshrined in constitutional law, must be interpreted, and there can be no ultimate criterion for determining the basis of such interpretation[48]. Secondly, Loughlin argues that the classical liberal conception of « the society/government relationship has nowhere come close to existing in a stable form[49] ». Society is not self-regulating in the way that liberals suggest it is, and the constitutive rules « that establish and regulate governmental power » by no means exhaust the scope of state action, which, over time, becomes more regulatory than juridical[50].

If, on the other hand, natural right is understood as realized « only through the constitutional order that authorizes the office of government », then rights « are no longer conceived as defining a zone of individual autonomy freed from governmental interest[51] ». The full passage reads:

In modern constitutional settlements, the basis of rights theories has dramatically shifted. Rights are no longer conceived as defining a zone of individual autonomy freed from governmental interest. Rights are now conceived to be part of the objective organizational principles of the constitutional order that has been instituted. Rather than being treated as pre-political rights that specify the limits of government, constitutional rights emerge from and obtain their realization only through the constitutional order that authorizes the office of government. […] Instead of being treated as a natural condition – the product of pre-political social processes – liberty becomes a political condition that is itself institutionally shaped and normatively ordered[52].

Loughlin argues that the logic of this situation is one in which rights become conditional « on a perception of their utility in ensuring the realization of the public aspirations of the political nation (which aspiration must, of course, remain highly contestable)[53] ». Not only that, he goes onto say, but « their existence and exercise increasingly appears to depend on positive action by government[54] ». Essentially, government is positioned as the arbiter of rights, and this must lead in the direction of functionalising

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[47] *FPL*, p. 368.

[48] However, Loughlin argues, if this is openly acknowledged, then the door is open for « the practical necessities », for « the methods of *droit politique* » to become the reference point for decision (*Ibid.*, p. 365-366).

[49] *Ibid.*, p. 369.

[50] *Ibid.*, p. 339.

[51] *Ibid.*, p. 369.

[52] *Ibid.*

[53] *Ibid.*, p. 369-70.

[54] *Ibid.*, p. 370.

rights, that is, making them subservient to the government's interpretation of electoral, social and/or economic utility.

Loughlin is in no doubt that the historical trend is for functionalism to overwhelm the first, liberal, possibility: « With the emergence of modern regimes of government, the concept of subjective rights, strictly conceived, has been superseded[55] ». Loughlin thus evaluates the development of the late modern and especially the administrative state of the twentieth century using the liberal conception of rights. The early modern conception of right recedes, or rather it is made over in the image of the idea of « objective law » where constitutional rights become both conditional and functionalised[56].

The Twentieth Century State – the narrative of « the triumph of the social » and the displacement of political right by regulatory power

Liberal thinkers consider themselves anti-feudal because of their attempt to find a mode of ordering relationships that is free from the domination of the arbitrary will. This mode is the transactional relationship that is oriented in terms of how individuals themselves decide what it is they want and value, and where the transactional relationship acquires a legal quality through how the rule of law ensures its propriety[57].

As we have seen, within this frame of thinking, any substantive determination on the part of the public authority of what enables individual freedom comes under suspicion. In Loughlin's narrative it is either the relic of lordship from the feudal era, which he sees as underlying the prerogative powers of the state, or it is the expression of the disciplinary-pastoral conception of the state, which originates in Calvinism, or it is an inherently metaphysical conception of the substance of freedom, which being so is in the modern secular era contestable, arbitrary, and subjective.

The difficulty with liberal thought is that it cannot accommodate the rise of the social, as becomes evident in Loughlin's account of the implications of the rise of the social for public law. But on the terms of my account of the early modern conception of freedom, an alternative exists: here the rise of the social requires of the state/political society ensemble of relationships that the status of the free being be further considered and elaborated.

In its reliance on formally ordered transactional relationships, liberalism is unable to show how personal security (the early modern conception of

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[55] *Ibid.*, p. 369.

[56] Loughlin reads Hegel as a theorist of this idea of objective law rather than as I see him (in *The Philosophy of Right*) as the last great thinker in the early modern tradition of political right.

[57] In Part I of *The Philosopy of Right*, Hegel criticizes this expression of freedom as « abstract » precisely because it presupposes an opposition between the universal aspect of right (the rule of contract) and the particular, arbitrary will.

freedom) is possible within privately ordered and asymmetrical relationships of power (e.g. between employer and employee). In the private domain of an individual, action is structured either as formal norm (such as the formal legal rules that constitute freedom of contract) or as decision. From this vantage point any substantive use of public authority to constitute the status of a free being comes under suspicion.

In this frame of reference, we lose sight of the early modern idea of sovereign power as a system of public office. The nature of public office cannot be thought of in terms of the conjunction of formal constitutive rules and private decision. This is so for two reasons: first, the nature of things public has substantive ethical features that bind those who serve in public office; secondly, it is the nature of such service to require the public official to assume an ethical persona whose field of action is quite distinct from that of a private individual.

Let me take these two points in turn. On the first, we need to consider further the significance of Kriegel's account of early modern juristic-political thought as an anti-feudal ethics. I interpret Kriegel to be saying that if individuals are not to be left in thrall to the vicissitudes of privately ordered power, then their status as free beings has to be constituted by means of public authority or sovereign power. This status is an artificial construct. Thus the citizen as a « free subject » in Bodin's words can be regarded as a type of office, and when the individual conducts herself as a citizen she is assuming an official persona[58]. This persona is just that, one aspect of individual conduct that obtains in relation to two situations: the issue of the standing or status of the individual in relation to other individuals; and the issue of the standing or status of the individual in relation to public authority. In both cases, the persona requires of the individual that she assume the obligation to obey both the letter and the ethos of the law in requiring her to know what it is to be a free being who is capable of recognising others as free beings too.

On the second point, the nature of the ethics of public office as a specialized vocation, Paul du Gay's work is helpful. As the early moderns insisted, office cannot be the private property of those who hold it. By the same token these individuals have to bracket their personal or private feelings, value commitments, and relationships, when they serve in public office. They have to assume a specific ethical comportment where they are « willing and able to live up to the ethical demands placed upon them within their location within particular life-orders », in this case the life order of public office, where their conduct combines « practical rationality with ethical seriousness[59] ». It is clear that this account of office cannot be

[58] For Bodin it is the relationship between prince/system of public office and the subject that constitutes both the obligation of the subject to obey the prince and the status of the citizen: « It is therefore the submission and obedience of a free subject to his prince, and the tuition, protection, and jurisdiction exercised by the prince over his subject that makes the citizen » (J. BODIN, *On Sovereignty: Six Books of the Commonwealth*, USA, Seven Treasures Publications, 2009, p. 42).

[59] P. DU GAY, « Is Office a Vocation in "Post-Bureaucratic" Public Management? » in A. YEATMAN (dir.), *Neoliberalism and the Crisis of Public Institutions, Working Papers in*

reconciled with the liberal assumption that decision is inherently subjectivist, an assertion of the arbitrary will.

Public office as a specialized vocation is a term that covers a range of distinct offices: the bureaucracy, the judiciary, the elected official, and the military. Each of these types brings with it a specific persona that the official is to assume, a specific ethical comportment the official is to live up to. What they have in common is an ethos which du Gay (owing a debt to Max Weber) characterises as « strict adherence to procedure, commitment to the purposes of the office, abnegation of personal moral enthusiasms », and separation of the conduct of public office from the private interest of the official[60]. I would go further here. Since the reason for this system of public office is the constitution of the status of persons as free beings, the purpose of the office has to be oriented accordingly.

The conception of the status of the person as a free being is historically and contextually specific. As I have said, it is entirely different when a patrimonial household economy is operative than when « the economy » has become socialised in the sense of being placed outside the household and in the domain of civil society. Moreover, the conception of the status of the person must always be interpreted in relation to the practicalities of a system of relationships between free persons as it operates at any one time. The idea of the status of the person as a free being belongs thus within this system. It concerns how to enable and to protect the personal security of individuals, to ensure that their condition is not *obnoxius*. Such considerations have justified ideas of e.g. compulsory universal schooling[61], a minimum wage, a public corrections system in which prisoners are also treated as « clients[62] », refuges for victims of domestic violence and of publicly funded services for men who are perpetrators of domestic violence, and obliging disability service providers to adopt a practical ethic of respect for the « voice » of their clients even if this requires positive action in enabling or facilitating the voice of people whose disability is such as to make it impossible for them to assume voice on their own.

On this approach, policy and regulation do not substitute for law but complement it[63]. Policy and regulation are understood to belong to the

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the Human Rights and Public Life Program, Whitlam Institute within Western Sydney University, 2, December, 2015, p. 41.

[60] *Ibid.*, p. 42-43.

[61] Here it is important to remember that this discussion is one of *ideas*. In historical practice, the case for public education that found its way into public policy was an uneasy coming together of different arguments, only one of which concerns how education is necessary if people are to enjoy the status of a free being.

[62] « The fact of being positioned in an involuntary relationship to a human service does not disqualify the individual from being considered a client of this service » (D. GURSANSKY & A. YEATMAN, « Are Prisoners Clients? The Individualization of Public Correctional Services », in A. YEATMAN *et al*., *Individualization and the Delivery of Welfare Services: Contestation and Complexity*, Palgrave Macmillan, 2009, p. 235).

[63] John Braithwaite's regulation pyramid is a good example. He and his team developed this in considering how to bring nursing home operators within the spirit as well as the letter of the policy and the legislation that governed nursing homes in Australia. Clearly how

domain of the ethos of law, thus enabling law to be developed in relation to the practical exigencies of this domain, while ensuring that policy and regulation are developed in an open, transparent, politically as well as legally accountable way.

To reiterate, this idea of the status of a free being finds specification in law and public policy (understood not just in their formal aspect, but also in the ethos out of which this formal aspect grows and to which it returns) and concerns the world of public office. In other words, it reaches to and no further than a public ordering of conduct. Just as the ethic of public office requires those who serve it to leave their personal and private preferences and attachments at the door, the public aspect of conduct concerns the standing of individuals both in relation to one another and the state, but not their entire personality, nor other kinds of ethical commitment, whether to family, religion, business, and so on. A practical ethic of freedom, in other words, goes along with an ethical pluralism, as well as a clearly made differentiation between public and private life. Not only is such an ethic entirely irreconcilable with the twentieth century totalitarianisms, it is also irreconcilable with any exercise of state power that denies the standing of those subject to it as free beings.

Finally, the account I offer of how the early modern idea of sovereign power can be further developed to accommodate and respond to the rise of the social returns us to the idea of the public domain that is not to be thought of as analogous to a household, but is constructed in terms of the immanent requirements of sovereign rule. This domain obviously has to be resourced, and it is here we find the case for both public ownership and a progressive taxation system.

If I understand his argument correctly, Loughlin's *riposte* to this alternative account of the rise of the social and its implications for the juridical conception of the state would go something like this: Indeed it is true that the rise of the social means that a legally constituted sphere of private transactional conduct cannot be thought of as self-regulating. Instead its many inadequacies place demands on government, but these are demands for government regulation. Regulation is an inherently administrative rather than juridical activity:

[T]he rise of civil society does not lead to the decline of government. Since the workings of markets and individual action possess the power to destroy as well as create, such operations stand in need of regulation by government. For government to realize these responsibilities, an extensive administrative apparatus is needed: the modern state becomes an administrative state[64].

From this point of view, Loughlin might say, it does not really matter whether the conception of political right is more liberal than early modern.

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nursing home clients are treated by the staff is an excellent example of whether the status of a free being is sustained in a context where the former are deeply dependent on the latter for not just their quality of life but their survival.

[64] *FPL*, p. 435.

The essential point is that the idea of political right as the ethical foundation of public law has as its ground some notion of what it is to live as a free being, and in a community or society of free beings. The idea of liberty before *or* after liberalism is implicated in the conception of law as the modality of rule. To this conception belongs the entire « constitutionalist » family of concepts: separation of powers, representative and responsible government, judicial review, and a clear public/private distinction. His argument is that this juridical conception of the state as the embodiment of political right has been overtaken by an entirely different conception of the state thought of as the management of the social, which returns in force the idea of the state as a public version of the *oikos*/household economy[65].

Loughlin traces this alternative conception of the state to eighteenth century Cameralist thought and its science of police[66]. Here the state is thought of in terms of a household economy where the task is good economic management on behalf of the members of the household. State administration then is thought of in terms of the functional requirements of such management. The protection of the economic interests of the state is inseparable from the tasks of maintaining social order, regulating the national population, and socialising the subjects of the state into normalised behaviour of a kind that a well-ordered and prosperous state depends on. In this frame of reference, state administration is expressed as the power of regulation, and with the extension of governmental power understood in the eighteenth century sense as police power, regulatory power extends its tentacles over social life. The *potentia* of the state grows and has very little to do now with the *potestas* of the state, for the justificatory criteria for the exercise of state power are functional in nature and reference is made to liberty or freedom only to the extent this is required within a functionalist conception of social order and wealth generation. In other words, a socio-economic functionalism displaces the idea of political right.

Loughlin's real concern is late twentieth century extensions of the regulatory power of the state and of this functionalist approach to state power. It is from this perspective that Loughlin discusses « bureaucracy » as the bearer of regulatory administrative power. He does not consider the ethical nature of bureaucratic public office framed in terms of the idea of political right. Instead he generalises the term « bureaucracy » to cover what du Gay would call post-bureaucratic as well as classical-bureaucratic phenomena[67]. A more nuanced and historically specific account of the trajectory of modern state bureaucracy is lost. We also lose the possibility that the administrative state may be made adequate to a juridical perspective

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[65] In Oakeshott's binary conception of the state as either *societas* or *universitas*, this is the state as *universitas*, as a community of purpose.

[66] See *FPL*, chapter 14.

[67] P. DU GAY, « Is Office a Vocation in "Post-Bureaucratic" Public Management? », art. cité.

as intended by various approaches to « administrative reform » in the twentieth century[68].

Loughlin argues that « the disciplinary mechanisms of police' now extend to the central questions of government: « fiscal rules devised in the regulatory framework discipline ministers, monetary policies laid down by central banks constrain governments, audit regulations structure the programmes of public bodies, and performance targets established through these arrangements structure the ways in which they undertake their responsibilities[69] ». An entire new army of public and private, national and international regulatory agencies and consultants to such agencies are involved in the administration of these disciplinary mechanisms. In this context, law is reconceived as « a set of techniques – signalled through statutes, regulations, and enforcement policies – which are designed to realize certain practical objectives[70] ». The essential criterion of legal instruments is their functional value. Loughlin gloomily concludes:

All governing bodies now claim their authority not from some original conferral of jurisdiction but from their ability effectively to discharge public (ie, social) tasks. This undermines the public/private distinction: if government is conceived as forming an elaborate network geared to the realization of social objectives, then once those objectives are adequately specified the mode of delivery is determined by the metric of efficiency and effectiveness, and this is likely to involve a mix of private and public agencies. The public/private distinction ceases to be one of clear institutional specification. It is the concept of the social that now seems to determine regulatory objectives and to shape the variety of techniques (some public, some private) required to ensure their realization. Once the network metaphor is set in place, the foundational elements of public law need to be reconsidered. The triumph of objective social law would signal an overcoming of the tensions between *potestas* and *potentia*, and mark the destruction of the modern edifice of public law[71].

Moreover, those who determine the substance of what counts as social objectives can do so as though the early modern political settlement never happened. They do not have to be aware that their determination is necessarily driven by their subjective valuation or belief, nor that public law

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[68] For example, in the Australian context, P. WILENSKI, *Public Power and Public Administration*, Sidney, Hale & Iremonger, 1986; G. HAWKER, *Who's Master, Who's Servant? Reforming Bureaucracy*, Sydney, London and Boston: George Allen & Unwin, 1981. More generally, A. YEATMAN, « Democratisation and the Administrative State », in *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State*, Sydney, Wellington, London, Boston, Allen & Unwin, p. 36-61, 1990; and W. WIRTH, « "Responding to Citizens" Needs: From Bureaucratic Accountability to Individual Coproduction in the Public Sector », in F-X. KAUFMANN (dir.), T*he Public Sector: Challenge for Coordination and Learning*, Berlin and New York, Walter de Gruyter, 1991, p. 69-87.

[69] *FPL*, p. 452.

[70] *Ibid*., p. 457.

[71] *Ibid*., p. 462.

was « founded not only on the drawing of a distinction between the political and the social, but also between the discourses of public reason and religious truth »:

As its early-modern founders fully appreciated the most basic purpose of public law was that of maintaining the civil peace against a backcloth of (often violent) competing truths. Public law is born of a compromise effected between antagonists who cannot defeat one another and it is in this sense that it becomes « the organising schema of a *de jure* fragmented public space assuring unresolvable confrontation[72] ».

CONCLUSION

Loughlin's melancholic and pessimistic conclusion as to the current fate of public law sustains the conventional narrative to which I referred at the beginning of this essay. I have argued that this narrative is driven by essentially liberal-conservative presuppositions where it is impossible to reconcile the rise of the social with the idea of law. Since the rise of the social is inexorable, this position requires us to adopt a view that is generally biased against the state in its late-modern incarnation(s). I have argued also that this view is not just insufficiently nuanced, but that it represses the knowledge that Loughlin most certainly has of a conception of freedom as the ground of political-juridical authority that is not liberal, but early modern. It is this early modern idea of freedom as immanent within sovereign power that permits an alternative account of the challenges that the rise of the social poses for the state thought of in Hegelian terms as ethical life: as both the system of public office *and* political society. In the suggestions I have offered as to how this alternative approach might work, I have sought to suggest an evaluative criterion by which we can distinguish when the state's responses to the rise of the social are congruent with the early modern understanding of the conditions of being free and when they are not. I have suggested that on this approach, regulation and juridical modes of state agency do not have to be thought of as in opposition but that on the contrary they can be thought of as complementary approaches, where one is able to do what the other cannot. Human rights, understood on this approach as the most recent iteration of the idea of the status of a free being, can be viewed as a late modern expression of political right to which both regulation and juridical modes of agency are to be held to account[73].

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[72] *FPL*, p. 465 (citing M. GAUCHET, *The Disenchantment of the World: A Political History of Religion*, Oscar Burge, tr. Princeton, NJ, Princeton University Press, 1997, p. 192).

[73] See Cartier's suggestive discussion of New Zealand Chief Justice Sian Elias's view of this set of relationships (G. CARTIER, « *A Simple Common Lawyer: Essays in Honour of Michael Taggart* ed. By David Dyzenhaus, Murray Hunt, and Grant Huscroft (review) », *University of Toronto Law Journal*, 64, 2, 2014, p. 301-302.

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