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# THE JURISTIC FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY

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As we scan the world about us we seem to be confronted on every side by lawlessness. Rebellion and insurrection, guerilla raids, kidnappings of public officials, hijacking of ships and airplanes with the consequent death of numerous innocent victims, bombings of public utilities with the ensuing threat of epidemics attacking entire communities, vandalism involving the destruction of property going into billions of dollars, sabotage, riots and looting, in a word, defiance of law seems to be the order of the day. Schools, colleges and churches are not spared. The leaders of these acts of depredation are often teachers, students and clergymen. Rebels with or without a cause, their behavior constitutes a challenge to the legal system which is the basis of civilization. These acts of violence and lawlessness pre-suppose, consciously or unconsciously, a theory of the meaning of law and order in civilization. Vague and unformulated though it be, this theory seems to be one of Nihilism. At the very best it would seem to be predicated upon a subjective notion of law which is deemed to exist above the positive law, and which any individual may interpret according to his own passions and prejudices.

In the long history of human thought there have been theories of this kind. One immediately thinks of the so-called philosophical anarchists, such as Godwin, Hodgskin, Proudhon and Kropotkin, enemies of the concept of political authority, and of the law proclaimed by government. More recently, in the present century, the earlier views of Harold J. Laski seem to justify and institutionalize rebellion and disobedience to the laws on subjective grounds.

It would therefore seem to be of interest, especially at this grave moment in history, to reflect upon a scholarly theory of jurisprudence which is progressive, and yet which upholds the necessity of the state as an authoritative legal institution without which the very notion of law itself would be inconceivable. Such a theory is that of John Dickinson, a contemporary American scholar who died prematurely in 1952. The juristic doctrine of John Dickinson falls within the general movement of thought known as the school of sociological jurisprudence associated with the names of Roscoe Pound and Justice

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Cardozo. It is to an exposition of the legal doctrine of John Dickinson, for whatever light it may be able to throw upon the meaning and function of law and political authority, that the balance of this paper will be devoted.

Law is of course a mode of social control. It is not, however, the only agency of social control. Side by side with law, there is custom as well as morality and religion which exercise an influence upon the individuals who compose society. Anthropologists and sociologists tend to lump together into one conceptual bundle these various institutions devoted to social control. This failure to differentiate the specifically legal phenomenon from other agencies of control is bound to result in the confusion of categories. Law is a mode of social control, but not every form of social control is necessarily law.

A study of primitive groups reveals that while custom and religion dominate in the early stages of these societies, eventually under the stress of some crisis or other, a new principle of control emerges. A peaceful group may find itself attacked, thus obliged to organize itself militarily for defense; a prolonged drought or other meteorological catastrophe may render it necessary for the group to change its habitat. Crises of this kind lead to the coming to the fore of a hitherto unknown agency or principle of control. This new principle is one of secular and political authority. This new organ of secular authority continues to function side by side and in conjunction with the older religious agency, but it goes beyond it in its operation. It is more mobile and flexible than custom, and it adds to the religious sanctions of magic the element of force, especially when the interest of the group as a whole seems to be in jeopardy.

Under conditions favorable to its development this new secular authority entrenches itself and grows. By the use of a multiplicity of variable factors such as shrewdness, tact, and courage, the governing leader or leaders inspire the passions and emotions of large numbers of followers within the group, acquiring their obedience and acquiescence. This is the embryonic beginning of government in the secular and political sense as distinguished from the primitive rule of custom and religion in early societies.

At first this new governmental authority rules by isolated, sporadic decisions. Conflicts between individual members of the group are decided on the merits of each case on whatever grounds the leader may at the moment think proper. Inevitably the decisions vary from case to case, and the result is a chaotic medley of conflicting and contradictory decisions. They lack predictability. Individuals are at a loss to know what is expected of them, and how to behave in relation to others. The result is frustration. It is felt to be intolerable. And doubtless there were then many individuals, called reactionaries and conservatives, who looked back with nostalgia to the

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legendary earlier halcyon days when custom reigned supreme, and everybody knew what to do and when and how to do it.

In those communities, however, where the disparity in wealth and power between the governed and the government is not too wide, this intolerable situation of capriciousness or arbitrariness on the part of the government is corrected by the mass of the people who successfully demand that the government, in its dealings with the individuals under it, should act with uniformity and regularity. They demand, in other words, that government should reach the same decision with respect to one individual as with respect to another in a like case. They succeed in their demand that in the place of arbitrariness and caprice there should be rules, which could reasonably be counted on in advance, and not sporadic decisions.

At this point, it may be said that law in the modern sense emerges, law envisaged as a body of rules of conduct which the government is expected to follow.

Law is thus seen to be an offshoot and expression of political authority or government. Government is required to act through law, and at the same time it is the agency through which law is constructed and moulded and formulated.

As Europe struggled through the Dark Ages into the medieval period, it found itself subject to numerous conflicting jurisdictions. There were the feudal barons, the King, the Holy Roman Emperor, the Pope, each exercising conflicting and over-lapping sway often over the same communities. From a legal point of view this intolerable condition may be called "medieval anarchy". Where, from a variety of sources, there are many rules which over-lap and conflict in the same jurisdiction, it is tantamount to no rules at all; and this may be called a condition of anarchy.

By the beginning of the sixteenth century, which the emergence of the territorial nation-states under the hegemony of a King or Sovereign, medieval anarchy finally came to an end. With the triumph of the Kings, the word "sovereignty" came to be used to denote a single definite organ or organization within each territorial community, having final authority to define and pronounce the law therein, and having likewise final authority to adjust rivalries and allot jurisdictions among all minor law-enforcement agencies. To this meaning of the term "sovereignty", Bodin gives systematic expression in his book *Six Livres de la République* (1576). It is Bodin's concept of sovereignty which in Dickinson's opinion constitutes the *idée-mère*, the archetype and parent cell of all subsequent developments of the idea. It is to his meaning of sovereignty that Dickinson, among others, gives the name of the "juristic conception of sovereignty". [1]

Following Bryce, Dicey, W. W. Willoughby, and McIlwain, Dickinson emphasizes the distinction between "political" and "legal" sovereignty. He

[1] John Dickinson, "A Working Theory of Sovereignty", in *Political Science Quarterly*, vol. 42 (1927), p. 529.

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takes pains to stress that "legal sovereignty" must be recognized to be a postulate rather than the statement of the existence of an historical fact. Those scholars who like the Pluralists, for example, criticize the doctrine of sovereignty, indirectly perform a great service by showing realistically that sovereignty is not something inherent in the nature of things —that it is not something, as Austin is wrongly supposed to have thought, which exists and must exist at all times and in all places. Legal sovereignty, on the contrary, is a concept which must be posited as a pre-supposition of any system of order according to law.

A system of law purports to be a body of general rules which produce like decisions in like cases, and are capable of being known with some degree of accuracy in advance. But if there is to be this uniformity in the rules applied to a whole community, then there must be a final source of law which all inferior tribunals and officials within the community recognize as speaking with ultimate authority, and to whose pronouncements they will therefore voluntarily conform their own separate acts and degrees.

In the absence of such a center of ultimate legal reference, each tribunal would be a law unto itself. This must lead inevitably to conflicting rules and conflicting decisions which, *ex hypothesi*, there is no authoritative higher power to resolve. Sooner or later these conflicting rules or decisions are bound to clash when they happen to impinge on the same *res* or the same parties.

Where such a conflict occurs, each tribunal faces the alternative of either attempting to make its own decision prevail by force or by threat of force, or else of abandoning the effort to enforce it. Neither horn of the dilemma is compatible with a *régime* of law and order. Whichever is chosen in a particular case, the outcome of that case will be dictated by accident rather than predictable rule.

A condition of anarchy and not of law is thus the necessary consequence of the co-existence side by side of a number of competing authorities subject to no common superior with legal power to define their respective jurisdictions and to reconcile their differences. It is therefore clear that as a prerequisite of the existence of legal order in a community there must be somewhere within the community an organ or system of organs with supreme power to choose between competing rules of law, and to place its stamp of validation upon the one which is to be authoritative. And furthermore there must be a like agency for delimiting the boundaries between the competing jurisdictions of all inferior officials and tribunals. Only so can government prove efficient as an instrument for settling and adjusting human differences. Without a unified organization of authority within the community it is impossible to have a system of legal order.

From a strict and harshly logical point of view, in order to define the juristic meaning of the term "sovereign", it would not matter which particular organization is recognized as having ultimate law-making authority, so long

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as one and only one such organization is recognized within the community, in order that all the rules entitled to be called "laws" may form a harmonious and unified system. A logical definition of this kind, formal and bloodless though it seem, ear-marking the ultimate law-giving organ by attaching to it the word "sovereign", has the great value of enabling us to keep the idea of "law" distinct from the other kinds of rules and imperatives of social control which have an influence upon human conduct and relations.

The need for such a distinction between law and other rules of social control arises from the fact that men recognize and obey in greater or lesser degree a large number of different kinds of rules of conduct emanating from a variety of sources. For example, historically there are social conventions of a given class, like duelling; there are religious customs and rituals; as well as ethical codes governing business and labor unions. There is of course no inherent reason why the term "law" should not be applied to any of the above-mentioned rules. Inasmuch, however, as they spring from wholly independent sources, there inevitably will be contradictions and conflicts between their precepts. For example, there is a conflict between the social convention and the religious precept on the subject of duelling. Religion condemns what the social convention extols. We are thus back to a condition of anarchy. Either one set of rules must be accepted as of supreme validity in cases of conflict, in which event this particular set will alone be entitled to the name of "law", or else there must be some higher set, emanating from an independent and still higher source which will over-ride all other sets of rules and resolve their contradictions.

In the actual fact we know from experience that such a higher source of precepts does exist at the present time. It is the political organization or the "state", which comprehends all narrower and more specialized groups and centers of authority in the community. It exists primarily for the purpose of reconciling their competing claims and interests for the common advantage.

So compelling is the logic which makes for legal sovereignty, that even Harold J. Laski, one of the most eloquent, prolific and popular champions of Pluralism, for whom the concept of sovereignty is a *bête noire*, finally in his more mature work had to acknowledge that "the co-ordination of functions is the sphere in which, to that end, the state must operate... Clearly a function of this kind ... involves a pre-eminence over other functions... To satisfy the common needs, it must control other associations to the degree that secures from them the service such needs require". [2]

Juristic sovereignty, it is seen, denotes the existence of a definite organ for drawing the line between what is and what is not law. What then, it may be asked, is meant by political sovereignty in contradistinction to legal sovereignty. Political sovereignty, according to this theory, refers to some of the popular forces which impinge upon the legal sovereign and influence

[2] H. J. Laski, *Grammar of Politics*, pp. 69-70 (1925).

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its legal pronouncements. In addition to political forces there are also moral forces and physical forces and a variety of conceivably other forces which influence the minds which compose the sovereign organ when they engage in the process of defining the law.

The legal sovereign is, to be sure, the ultimate source of law. But this does not mean that it is an uncaused cause or an unmotivated author. It is the supreme and ultimate source of law in the sense that only that which passes through it has the force of law. And it is only after having passed through it and received its stamp of validity that it becomes law. The legal sovereign may be envisaged as a organ which acts like a funnel through which the forces of fact, motive, power, desire and ideals transmute themselves from ineffective formlessness into the form of specific rules which by that process acquire the status of rules of law.

Far from thereby losing its claim to being called sovereign, it may be urged that the more sympathetically, the more accurately, and the more universally the legal sovereign permits itself to respond rationally to all the extra-legal forces which impinge upon it, the more adequately does it perform its legal function as a sovereign.

It is tempting, doubtless, by an association of ideas, to equate the doctrine of legal sovereignty with Austin's well-known and often misunderstood theory that law is a Command. For Dickinson, on the contrary, law is decidedly not definable as a command; and he strongly rejects the notion that law and the command of a sovereign are synonymous. Emanating from the legal sovereign, law is more properly seen to be a Pronouncement which acquires its title to legality from the fact precisely that it is determined by the sovereign. The idea of a command seems too frequently to have carried with it to the minds of many thinkers the notion that a law must somehow be an arbitrary expression of the sovereign's unmotivated or purely selfish "will" or caprice; —that it must be evolved in his inner consciousness out of nothing, and without regard for the customary or ideal notions of right and wrong which men ordinarily consult in determining their conduct.

Arbitrariness and caprice are the very negation of a legal order, and nothing could be more repugnant to a theory which sees in the legal sovereign the guarantee of regularity and predictability. "I hope", says Dickinson, "it will be noted that I do not rest the case for juristic sovereignty on the "imperative" theory of law — i.e. that law is a command; I rest it on the need for a single source of authoritative formulation".[3] Where legal sovereignty prevails, it makes no arbitrary commands as a master to his slave. Sovereignty, it bears repeating, is merely the condition precedent, the *sine qua non* of a *régime* of law. It makes possible the formulation of law into the approximation of a rational, just, harmonious and therefore predictable system, instead of a jumble of conflicting rules.

[3] John Dickinson, *A Working Theory of Sovereignty*; cit., pp. 525-6; also, *Administrative Justice and the Supremacy of Law*, p. 119 (1927).

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Granting for the sake of argument that law is not an Austinian command; is it not obvious, however, that it is based on force? Certainly it cannot be denied that a person who violates the law is punished or in some way coerced. The sovereign or the state, even the juristic state, employs force against those who defy its laws. How then can it be claimed by the theoreticians of juristic sovereignty that the state is not based on force?

The answer to this is that in order properly to fulfill its function the sovereign must retain a reserve of power sufficient to maintain its authority when that is threatened. The earliest and indeed the chief object of governmental intervention was, and must always remain, the adjustment of interest-conflicts. There are times when the private resort to force can be prevented only by the actual or threatened use of greater force. Therefore the right to use force is clearly a necessary attribute of governmental power if it is to discharge its task. But it is an attribute only.

It would be a grave misconception to infer from the fact that force is a necessary ingredient of sovereignty, that therefore sovereignty is founded on the possession of supreme physical force. It is conceivable that in many instances the sovereign's laws will be respected only or chiefly because it has the actual power to compel obedience. But by the same token it may be found that the laws are completely respected simply because no one ever thinks seriously of questioning them.

The recourse to force alone by the sovereign would be of no avail against recalcitrant individuals or groups, unless acquiesced in, and if need be, supported by the preponderance of the impartial elements in the community not directly concerned with the controversy. It is only in extremely rare instances that such acquiescence and support can be procured by terrorization of the whole community. Where such a condition prevails, as in the military government of a conquered province, the result is not a typical manifestation of political life.

The normal relations of government to the community is organic, in the sense of reciprocal. Government normally enlists obedience by deriving its purposes, and the standards which determine its judgments, from tendencies at work within the community, and not by forcefully imposing external and alien standards on an inert and unwilling group.

It is not overwhelming brute force, therefore, on which sovereignty is based, but rather on the obedience of the community. Numerous are the causes which may produce obedience to the sovereign. Habit, reverence, imitation, rational conviction, as well as the fear of compulsory sanctions may motivate obedience. Regardless of how obedience arises, the relevant point in regard to the flourishing of legal sovereignty is that such sovereignty cannot function except in an atmosphere where obedience, that is, acquiescence in the sovereign's determinations is the normal and habitual condition; and where disobedience is abnormal and temporary.

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Far from being based on force, sovereignty depends on the common willingness of the underlying community, on the part of all groups and individuals, to support in by voluntarily acknowledging its authority. Not physical force, but a "general will" permeating the community with a desire for legal order provides the foundation of sovereignty. Sovereignty can thrive only on a social compact; on an explicit or implicit agreement to abide by the conditions essential to the existence of a *régime* of law.

If sovereignty is based not on force but on the general acquiescence of the underlying community, does it not follow that when we speak of legal sovereignty we are really referring to what has been called "popular sovereignty", the supreme and ultimate power of the people? Since the people in a democracy, that is, the universal electorate, have the power to elect the law-making officials, it would seem, would it not, that they thereby limit the legal sovereign, and hence to that extent curb its ultimate sovereignty.

To attribute sovereignty to the electorate, maintains Dickinson, is to confuse legal with political sovereignty. Historically it can be seen how this confusion arises. The notion of popular sovereignty is the outgrowth of the political struggles of the seventeenth and eighteenth centuries, precisely as the juristic conception of sovereignty is the product of the struggles of the fifteenth and sixteenth centuries.

These earlier struggles had achieved juristic sovereignty only because they had made the king politically absolute. Therefore no distinction was drawn by writers like Bodin between juristic sovereignty and royal absolutism. Sovereignty was identified with the extremely broad and loose concept of "supreme power". And this was exactly what the "people" during the next two centuries thought they were striving to take away from the king, and vest in their own hands. In this way the conflict came to be described as a struggle for "popular sovereignty". When this struggle was successful and the responsibility of governments to the "people" had been established, "popular sovereignty" became the conventional phrase to express the result. It is "sovereignty" in this latter sense that Dickinson, following Bryce, Dicey and W. W. Willoughby, seeks to distinguish from juristic sovereignty by calling the one "practical" or "political", and the other "legal". These two ideas, the "political" and the "legal" are distinct, and should not be confused.

It is undeniable that from the standpoint of a loose conception of general "power", an organ which is removable by the people is not "ultimate" in the sense of "absolute" as it would be if it were irremovable. But it does not follow that the absence of ultimate or absolute "power" in this loose sense, necessarily prevents such an organ from being the ultimate law-declaring agency in the community. Suppose that in a given instance an elective legislative organ enacted a statute declaring the law to be "X". The electorate disapproves of this law, and refuses to re-elect the members at the next election, and return an entirely new membership. This legislative

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organ, functioning through this new membership, reflects the desire of the electorate, and repeals the offensive statute. It will be noticed at once that the repeal takes place, and can only take place, through the action of the legislative organ itself, no matter how much it may have been in fact "caused" or "motivated" by the wishes and the "power" of the "people".

Until the legislative organ, in other words, passes the repealing act, the offensive statute remains law just as much as ever, irrespective of the wishes of the people. The only lawful way in which the people can exert their power, and give effect to their dislike of the statute is through the orderly action of the legislative organ. Under such circumstances it seems clear that we must say that it is the action of the legislative organ, and not of the people, which makes or changes the law, which draws the line between what is law and what is not law.

The theory of popular sovereignty has the merit of emphasizing the importance of the interests and motives and ideals which sway the community and make their influence felt by the legislators. Insofar, however, as this theory fails to distinguish clearly the political from the legal category, it tends to obfuscate a true understanding of the nature and function of the legal sovereign which alone is the authoritative proclaimer of the law.

The failure to keep distinct in one's mind the difference between the legal and the political aspect of authority gives rise also to the untenable theory of "state sovereignty". This theory was developed in the nineteenth century in an effort to locate the specific organ of sovereignty, especially in the complex federal states such as the United States and Germany. This task proved so frustrating because of the impossibility of isolating one single organ in a federal state and identifying it with sovereignty, that some writers abandoned the attempt altogether and vested sovereignty, not in any particular governing organ or organs, but in an abstract entity called the "state". Thus arose the theory of "state sovereignty".

Abstractly to maintain that sovereignty "belongs to" the state, still leaves us with the problem of discovering through which organ or organs of government sovereignty is exercised. When we speak of sovereignty as belonging to the state, what we really mean is that the state or law-making organization is the authoritative source of the laws governing all other organizations and types of organization, and in this respect is superior to, or supreme over them. But this authority must of course be exercised by some specific law-making organ or system of organs. The problem of the "location" of sovereignty therefore still challenges us.

To affirm, as does the theory of state sovereignty, that sovereignty is attached to the state, is little more than a tautology. For if the state is the community politically organized — i.e. organized for the purpose of co-ordination between individuals and between other types of organization, and if it undertakes to perform this task by means of laws, then the state is that particular organization of the community whose function requires that

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it must ultimately be in a position to say what is or what shall be treated as law. And if sovereignty is then defined as the function of drawing the line between what is and what is not law, obviously sovereignty is by definition a function of the state organization as distinguished from other forms of organization, such as, for example, the economic or religious organizations.

Our problem still remains, as Friedrich Stahl pointed out over a century ago, how to isolate and identify the definite organ to which the other organs are subordinated: *Die Frage ist eben wer das Oberhaupt des Staates, wer das Centrum in den Functionen des Staates ist, und da kann man doch nicht antworten, der Staat.*[4] To the question as to the specific location of sovereignty within the state, it is not responsive to reply that it belongs to the state as a whole.

The theory of "state sovereignty" seems to have borrowed its notion of the state from international law. In international law the term state is used to mark out a separate entity, among a number of such entities, as a "legal person", which is treated by the law as a subject or object of rights and duties, and is therefore metaphorically described for legal purposes as acting and willing. This manner of speaking, proper enough in its place, has not unnaturally caused the state to be conceived as "really" a "person", and as therefore endowed in fact, no less than for conventional purposes of law, with the physical attributes of will and activity.

The abstract idea of the state as a person with a "will" is thus hypostatized in international law, and carried over into municipal law. Internally it is now conceived as standing personified in distinction from all natural individuals and groups within its own borders. These include, however, the officials and instrumentalities of government. Thus this reified "state" becomes an empty entity separate from and independent of its government, on the one hand, as well as of the body of its people, on the other.

Cut loose in this way from all reality, and regarded as vested with a "supreme" or unmotivated will, Dickinson points out that "a metaphysical" juggernaut has been brought into existence which can be demonstrated by formal logic to have no possible end but its own abstract existence; which can be regarded as serving no purpose but its own self-preservation and aggrandizement; and which can by definition be subject to no limitation or control.[5] This conception of a state vested with a "supreme" will, and subsisting above the government in some logical empyrean, in international relations leads by strict logic to the conclusion that it is and must rightly be of the esence of every sovereignty to exterminate every other. And within any particular state, it leads to the conclusion that the whole force and activity of the state must be motivated with the sole reference to external aggrandizement.

[4] F. J. Stahl, *Philosophie des Rechts*, vol. II, p. 536 (1856).
[5] *A Working Theory of Sovereignty*, cit., p. 539.

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Machiavelli, Fichte and Hegel contributed to the formulation of this fallacious and warlike doctrine; but it remained for Treitschke, a revered professor at the University of Berlin, to expound it to such effect that it probably contributed to the coming of the First World War which we now realize was the first gruesome Act of a series of Acts in a global Tragedy of Militarism whose end is not yet in sight. "The state is not an Academy of Arts", Treitschke pontificates. "If it neglects its strength in order to promote the idealistic aspirations of man, it repudiates its own nature and perishes. This is in truth for the state equivalent to the sin against the Holy Ghost . . ." "The highest duty of the State is to uphold its power . . . to maintain itself." "In the presence of world history there is nothing above the State; therefore it cannot sacrifice itself for anything higher." [6]

The doctrine of state sovereignty is as fallacious as it is mischievous. It results from assuming that what is a legal postulate for some purposes —e.g. the possession by the state of legal capacity or "will"— must be a physical fact for all purposes. It is a theory which runs counter to the concrete realities which make it plain that the state is not a selfexistent entity, but only an organization or system of organs enabling the community to perform certain functions. And sovereignty is only the function of making a division between two different kinds of rules, namely, between those rules which operate in such a way that we call them laws, and those which do not.

The legal function of sovereignty cannot be performed by an abstract, ghost-like "state" floating above and beyond the community. This legal function can only be performed by a concrete organ or system of organs of the government.

In looking about for the organs which operate or function actually as the sovereign arbiter of legality under a complicated form of government, the problem loses much of its difficulty if we recognize that sovereignty can be exercised by a system of organs properly geared together, no less than by a single organ. In a complex and complicated government, as for example that of United States, we find that the sovereignty consists not of one or two organs, but of a whole system of organs geared together into a complicated working pattern. It includes, first of all, the national and state legislative bodies, including the President and state governors, because of their veto and discriminating power. These are elements in the system of sovereignty because their enactments, unless brought into question in the manner hereafter described, are recognized as laws, that is, as vested with proper legal authority.

But means are provided for raising the question of whether or not these enactments are validly legal. This question is left to a system of courts, heading up ultimately into United States Supreme Court which tests

[6] H. von Treitschke, *Politics*, English translation, p. 24, *passim*. First published in German in 1898.

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the validity of legislative enactments by interpreting them, and then comparing them, as so interpreted, with the interpretation which the Court places upon a supreme law or Constitution.

For the creation or change of this supreme law there exists another system of organs vested with the power of constitutional amendment. Should the Supreme Court declare a law unconstitutional, it remains open to the amending power to reverse this result by so changing the Constitution as to bring this law into conformity therewith.

But even in case the amendment is passed, the last word remains with the Supreme Court through its power to establish authoritatively the validity and meaning of the amendment.

Reflecting upon this complicated procedure operating through a complex series of organs, the doubt may possibly arise whether we are not faced in reality with a "division" of sovereignty, thereby creating the possibility of a conflict between the parts, and so of two or more competing sets of contradictory legal precepts. Would not Bodin, for example, who knew only the simple sovereignty of an absolute monarch, be tempted to turn over in his grave were he in a position to experience this highly complex system?

Not so, Dickinson reassures us. We are not confronted with the problems of a divided sovereignty in the case of United States, because all the organs of the sovereign power function as parts of a single system with an ultimate organ, the Supreme Court, to define authoritatively the sphere of each and to restrain each within its own sphere. It is precisely the presence of such an organ as United States Supreme Court, with ultimate power to pass authoritatively upon questions of disputed competence, which binds the multiplicity of law-pronouncing organs into a single unified system. It also preserves sovereignty by making it possible to secure a final authoritative determination of what is and what is not law.

The doctrine of legal sovereignty has the merit of stressing order, stability, uniformity, predictability and certainty. It seems, however, to underestimate the importance of change, growth and progress. Since the legal order is based upon the obedience of the community, the age-old question of the relationship of law to justice arises. Individuals or groups within the community may, on moral grounds, find themselves in disagreement with a given positive law proclaimed by the sovereign. Is disobedience of the valid laws, or resistence to the sovereign, justifiable?

Faced by this agonizing predicament, two divergent paths lie before the concerned individual. On the one hand, he may direct his efforts toward bringing positive law as near as possible in keeping with his ideal, by attempting to so constitute the sovereign organ as to make it more delicately responsive to those impulses which he believes are seeking expression in the community. It is only in this way that he can effectively meet the challenge of improving the machinery of government. For the improvement of government means precisely the difficult task of so altering its machinery as to

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increase its responsiveness to the needs of the community without impairing its value as an instrument of regularity and order.

By adopting this method of approach, there will be no occasion to question the validity of sovereignty in the sense in which it has been discussed in the preceding pages. On the contrary, the ultimate responsibility will and must be centered on the sovereign as an indispensable instrumentality of beneficial change. It becomes a political question of bringing pressure to bear on the sovereign organ so as to make it more responsive to the ideals and values which reside in the community. "We must accept jural sovereignty", says Dickinson, "as an essential lever of progress; we set it up that we may have a focal point from which to go forward, and take up the deeper and distinct, if yet intimately related, questions of practical politics —the questions how best to mobilize for desirable political ends the actual power, social, economic, moral which always lies behind the jural sovereign and sets it in motion for good ends and bad". [7]

On the other hand, the disgruntled individual may choose to take another path. He may directly challenge sovereignty itself. He may be so distrustful lest the sovereign organ fall under the influence of forces which he regards as malign and mischievous that he will refuse to vest any agency with final authority to pronounce what is law and what is not, as between contending individuals or groups or interests. He may be so anxious that his favorite among the contenders shall win, that he will be unwilling to subject his chance of winning to the possibly adverse decision of an organ which can conceivably be convinced by the other side.

To take such a position, Dickinson maintains, is really to deny the advantages of a politically organized society. It means falling back on a faith in voluntary cooperation backed by the ever-present threat of an appeal to force, in case of disagreement. Such an attitude denigrates a state of affairs where the force or the community is constantly mobilized behind a central law-declaring agency. Whether one realizes it or not, to take such a position means questioning of the value of a *régime* of positive law as an instrument for the achievement by a community of its internal adjustments. It is really tantamount to a rejection of jural sovereignty in favor of pluralistic anarchy. To regularize and legalize disobedience to existing valid positive law means that any law may be legally broken at the will of the law-breaker. This view is not only the negation of law itself in any intelligible sense, but it must lead to a condition of chronic revolution.

From an historical point of view it must be recognized that revolution and war have at times played an important part in the progress of humanity. It is conceivable that under a condition of unbearable injustice and oppression, the only alternative may seem to be recourse to revolution. The

[7] "A Working Theory of Sovereignty", in *Political Science Quarterly*, p. 34, vol. 43 (1928).

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point that Dickinson stresses is that "... revolution should always be recognized for what it is —a lapse into anarchy".[8] It is only as a last resort and in the most extraordinary situations that rebellion and revolution may be considered as a valid alternative to obedience. But even in such rare cases must it be recognized that rebellion entails for the time being a dissolution of the conditions of civil order— conditions which it is the function of legal sovereignty to bolster and maintain in the interest of the entire community.

A variant of the foregoing Revolutionary theory which champions the right of private resistence, is the one which insists that the discretion of the sovereign must be subjected to, and limited by law. Its slogan, popular in United States, is "government by law and not by men". This demand obviously assumes the possibility of the existence of a body of law which is not merely independent of the sovereign's creation, but which can in some way be enforced against the sovereign to limit the scope of his authority. This idea is not quite the same, however, as the Revolutionary one discussed above, which is based on the assumption of the existence of some "higher" body of natural law, self-evident to the human reason, and hence capable of enforcement against the government by the independent resistence of private individuals.

The widely prevalent theory of "a government by law and not by men" contemplates ordinarily a set of more positive rules of a definitely juristic nature, embodied in precedents and fundamental documents, and enforceable through some sort of judicial procedure.

Upon analysis, however, this less extreme theory also raises familiar difficulties. If the enforcement of the law which is to control the sovereign is not to be left to the unregulated private action of individuals and groups, it must be put into the hands of some definite agency or organ analogous to the Supreme Court of United States. But when we have erected an organ of this kind with a power of control over the supposedly sovereign organ, it is obvious that we have in effect either simply transferred sovereignty from the older sovereign organ to the newer one, or else we have only geared the two together into a compound sovereign system like the American, where one organ within the system checks another. In either event, however, we have completely failed to establish over the sovereign an agent of control from without. It is the old problem of *quis custodiet ipsos custodes*; who will stand guard over the guardians; who will watch the watchmen.

The logic of infinite series thus makes it impossible to set up an agency to control the sovereign. Considering, however, as we have seen above, that physical compulsion is not a necessary sanction of law, provided obedience be paid to it for some other reason, what is to stop the sovereign from respecting the precepts of a "higher law" to control it, even though there can be

[8] *Ibid.*, p. 53.

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no way of enforcing these against it? The predicament here is that there is no one but the sovereign itself who by definition can pronounce this higher law which the sovereign is supposed to be ready and willing to obey. For this law to control the sovereign lies scattered within custom, precedent, and fundamental instruments, and the rule applicable to any given case will have to be pieced together out of a variety of sources, involving inference and policy, demanding choice and discretion. Obviously, in the absence of an independent agency outside the sovereign, only the sovereign itself, or some organ within the sovereign system is qualified to perform this task. Under these circumstances it cannot be said that the sovereign is really controlled by law external to itself, since it must rest with the sovereign itself to formulate and declare the law which is supposed to control it.

The sovereign, then, cannot be controlled by positive law in the same sense as the individuals who live under sovereignty. This does not mean, however, that there may not be rules of positive constitutional law, that is, rules enforceable by the courts against other organs which for the time being form elements of the system of sovereignty. There is no inconsistency, for example, between the doctrine of sovereignty and the suability of the state by private individuals. In other words, the sovereign system of organs may be so constituted that specific organs which form a part of the sovereign system may be subjected to law made by the whole system and enforced against them on the motion of individuals by some other part of the system.

Even so, however, there are necessarily limits to such accountability. Thus it seems obvious that there can be no suit for damages caused by an adverse judicial decision, or for loss accruing from the passage of a general law, since the very object of such laws is often to shift burdens from one part of the community to another.

Properly understood, the idea of a "government by laws and not by men" cannot mean a government where self-existing, disembodied rules inexorably control by their automatic operation the determinations of the human sovereign. For laws require to be formulated and interpreted and administered by human agencies; and the agencies charged with these tasks have the laws in their power to mould them in keeping with their own understanding and their own scale of values.

The idea of a "government of laws and not of men" can only mean a government where the sovereign is imbued with what may be described as habits of constitutional morality and of self-imposed respect for self imposed rules. "... Law is and must ever be at the mercy of human agencies", Dickinson concludes. "Good government cannot rest in the futile attempt to set up automatic barriers of abstract law to limit the action of the human sovereign ... It requires a careful attention to the organization of governmental agencies into a system responsive to those forces whose influence in the community it is desirable and practicable to promote ... Its effective functioning will always depend, not merely on machinery but on the existence

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within the organs of government, as well as within the community at large, of certain habits and states of mind which will make for restraint on the part of the one, and for obedience on the part of the other." [9]

There seems to be no way to envisage law except as a human enterprise. Law arises in society out of the need to solve inter-personal conflicts in a peaceable and orderly manner. It develops and grows in response to these needs as they become more and more complex. It accomplishes its magisterial function as a governmental agency through human beings called legislators and judges. Reason, experience and imagination are the tools at its disposal; but always they remain human tools in the service of humanity, exercised by human beings.

In the light of the foregoing discussion of legal sovereignty it seems clear that government is the agency through which law is constructed, and the judiciary is the specific governmental organ through which law becomes articulate and operative. Even under those systems of so-called Civil Law where the legislature is the primary source of law in the form of a Code and statutes, it remains true that the judges, in the final analysis, must interpret and elaborate the law.

Until the end of the nineteenth century, this view of the importance of the judiciary in moulding the law was, in general, not clearly apprehended. Under the prevailing influence of Montesquieu, the dogma of the separation of powers was accepted as a truism. Even in those countries where the legal system was rooted in the Common Law, it was accepted as self-evident that only the legislature made the law, and the judge merely found it in pre-existing statutes and precedents. [10] It followed from this dogma of the separation of powers that cases were decided by the law itself, in the sense of known public rules which the judge applies with machine-like precision. In a word, the judge who does his duty is an automaton.

At the same time it has been customary to assume that these rules are all somehow so related into a rational system that any rule which is needed can be deduced from others by a process of logic. Thus the decision of cases turns out not to require from beginning to end the intervention of human choice, but on the contrary to be dictated throughout by sheer legal necessity. Immune from judicial intervention, unsullied by the injection of external values, until about the end of the nineteenth century, law was envisaged as a closed, self-sufficient, logically coherent system of rules.

By the turn of the century, however, a revolt began against this notion that the judge is merely a mouthpiece passively recording the law as it is found in statute and precedent. Rapid changes were taking place throughout western civilization in the most fundamental human relations and institutions. The position of woman; the institution of marriage and divorce; the relation

[9] *Ibid.*, p. 63.
[10] Roscoe Pound, *Interpretations of Legal History*, p. 137.

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of parent to child; of employer to employee; of the owner of property; the rapid evolution of new types of economic activity and organization; the growth of corporations; the development of banking; and the emergence of new methods of production and transportation, —all these basic changes created an unprecedented mass of novel situations for courts and lawyers to deal with.

The attempt to deal with these situations strictly on the basis of rules deduced from pre-established and existing rules, created dissatisfaction among jurists in Europe and America. Saleilles and Gény in France; Jung, Zitellmann, Brütt in Germany; Holmes, Pound and Cardozo in the United States rebelled against the theory of the total logical completeness and self-contained character of the law. With critical acumen they called attention to the defectiveness of this theory, and were led to emphasize the creative function and technique of the judge.

Unlike the extreme theoreticians of the so-called "Free Judicial Decision" or *Freie Rechtsfindung* like Kantorowicz or E. Fuchs, Dickinson leans toward the more balanced view of Pound and Cardozo who find in the "unprovided case" the principal occasion for judicial discretion and creativity. "The problem of the unprovided case", says Dickinson, "is one of finding grounds for reaching a decision of a case where those grounds are not directly or clearly supplied by existing rules and precedents". [11] It is these unprovided cases which do not fall squarely and obviously within the terms of a statute or rule established by precedent, which are the interesting ones because they are the ones which reach appellate courts and become precedents for the future. Their quantity and importance vary with circumstances. The enactment of an important statute, for example, gives rise to countless situations of possible doubt in the law until the statute has been construed by the courts in decisions which can serve as precedents. Also, even where no new statute has been enacted, but where new inventions and other factors have given rise to new patterns of activity in a given field of business or social relations, creating new types of transactions, relationships and interest-conflicts, this spawning of novel situations raises doubt in great numbers as to the proper legal rules applicable.

It is out of the effort of the judge to decide the unprovided cases in novel situations, that new rules are created and old rules modified; and the law grows and progresses. In this creative process the judge is influenced by the legal tradition on the one hand, and by contemporary social and technological forces on the other. These social and technological forces function of course outside the law. They enter the legal system only insofar as the judge writes them into the law. Dickinson is keen on emphasizing the creative and decisive role played by the judge in the formulation of new rules. "The body of considerations which chance to operate on a judge or court at the moment of bringing a new rule of law into existence may properly be regarded as

[11] John Dickinson, "Problem of the Unprovided Case", in *University of Pennsylvania Law Review*, vol. 81 (1932), p. 116.

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the determining factor in the creation of law... The essential fact is always that current *mores*, factors of social convenience and the like, are things about which there is room for considerable scope of difference of opinion, that when it is a question of writing themselves into law, the opinion which prevails is the judge's opinion." [12]

In those novel, unprovided cases, in the so-called cases of first impression where the judge finds himself challenged to exercise the maximum amount of discretion in creatively formulating new rules which incorporate extra-legal considerations, and which later become precedents, it may be said that the judge is engaging in legislation, in judicial legislation.

What is called judicial legislation, however, is not to be equated literally with the work of the legislature in its enactment of statutes. Following Holmes and Cardozo, Dickinson says: "The courts seldom feel free to effect an important and direct change in an established legal rule in a way that a legislature would have no hesitation in doing. They usually confine themselves therefore to nibbling at the rule by creating distinctions and exceptions, and thus diminishing or deflecting the scope of its direction and operation. As Mr. Justice Holmes has put it, they limit their activities to molecular as contrasted with molar motions. When, however, the problem is not that of altering an existing rule, but rather of supplying a wholly new rule to meet a new type of case, they cannot well be so circumspect. Here they cannot evade the necessity of creative action on a bolder scale. But here also their method shows a marked difference from that of a legislature. Under the influence of the doctrine that they must apply law which already exists, they are generally concerned, when devising a new rule, to frame one which can be made by some process of reasoning, facile or tortuous, to appear as a necessary logical deduction from some already established rule. This is a necessity from which legislatures are of course free." [13] The difference between legislation by the courts, and legislation by the legislature, is one of degree. The judge is not as free as is the legislator to create new rules.

In his creative effort the judge is hedged about by the entire legal tradition. He may not roam at large and ignore the body of principles and rules which are, so to speak, the stock in trade of the judicial process. It is for this reason that Dickinson cannot accept the views of the more extreme writers of the school of *Freie Rechtsfindung*. By the same token he finds himself at loggerheads with the notions expressed by such writers as Jerome Frank and Karl L. Llewellyn who call themselves "realists". Aggressive polemicists and fervent crusaders, these contemporaries of Dickinson, with a penchant for the coining of novel words and unusual phrases, may have given the impression of ambivalence in their thought,and thus been misun-

[12] John Dickinson, "Law Behind Law", in *Columbia Law Review*, vol. 29 (1929), p. 307.

[13] *Law Behind Law*, cit., pp. 314-5. *Cf.* also Cardozo, *The Growth of the Law*, p. 135 and *passim*.

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derstood. To Dickinson, however, it seems clear that these writers look upon legal rules as mere fictions, rationalizations and illusions, lacking any real importance in the process of decision making on the part of the judge. He ascribes to Frank and Llewellyn the belief that "the law of every case is peculiar to itself, and different from the law of any other case. Law simply means official action. Any attempt to formulate and apply legal rules is said to amount to no more than a futile attempt at self-deception. There is a body of law only insofar as there can be a behavioristic psychology of judges". [14] In this view Dickinson discerns a kind of scepticism which is merely an inverted absolutism. Whereas under the old absolutism the legal rule was everything, under the new absolutism it is nothing. To deny reality to legal rules in the judicial process, seems to fly in the face of experience. "Under a developed legal system", Dickinson concludes, "the process of deciding cases differs to at least a certain extent from the exercise of arbitrary discretion by an oriental *cadi*".

Dickinson who is in the forefront of those scholars who call attention to the creative and dynamic thinking involved in the judicial process, finds it necessary however to denounce the extremism of those who wish to treat law simply and wholly as discretionary official action. Legal philosophy today would be a futile enterprise indeed if all it could accomplish would be to uphold the view that law is a sporadic and arbitrary bundle of official dooms. Government by decree is especially repugnant to the idea of a regime of law in a constitutional democracy. Nothing, one may surmise, could be more alien to the minds of the Realists than such an idea. And yet their doctrine, with the best intentions, leads to this implication, because of their rejection of the reality of rules binding upon the judiciary. The absence of rules would make a mockery of the entire concept of a legal order of justice according to law.

Another weakness which in Dickinson's opinion vitiates the Realistic doctrine is its intransigent belief that law is amenable to the method of the physical sciences. There is, he believes, a basic difference between the objectives of scientific thinking and the nature of the problems to which it addresses itself, as contrasted with the judicial thinking which is directed toward deciding litigated controversies in accordance with law. The whole procedure of scientific discovery and description, says he, "is radically different in intent and method from the kind of reasoning which is directed toward deciding controversies by the application of law ... The decision of controversies by recourse to authoritative rules is an instance of normative thinking. The goal of normative thinking is not discovery; the judge who is called on to decide whether or not to award damages to a plaintiff is not, like the scientist, engaged in the discovery of a new truth, or in adding to the sum total of human knowledge. The judge does not employ the case before him as

[14] *Problem of the Unprovided Case*, cit., p. 128. *Cf*. Llewellyn, "A Realistic Jurisprudence-The Next Step", in *Columbia Law Review*, vol. 30 (1930), pp. 431, 456.

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a means of testing the validity of the rules which he employs in reasoning toward his decision. The whole theory of decision according to law is that the rules are to govern the case, and not, like scientific laws, to be governed by it. Normative thinking rests on the assumption that it is socially beneficial that action shall be taken which is in accordance with a rule primarily because it is in conformity with the rule..." [15] Emulation of the quantitative methods of the physical sciences can result only in the distortion of jurisprudence as a normative and evaluative discipline.

The judge, we have seen, is not an automaton who mechanically finds within a self-contained, logically coherent system the rule applicable to any and every case before him; neither is he, at the other extreme, so superhumanly creative and inventive that he starts with a mind empty of all legal content, devoid of rules and principles, capable of deciding each new case before him as something unique, on the basis of what he considers would be a scientifically proper decision. It is true that the judge is creative and must use discretion when occasionally he is faced by a new case for which the existing rules are not quite applicable or are not at all in existence. In those important but relatively rare instances, when he must honestly acknowledge that he has the responsibility for the creation of a new rule, he does not ignore the existing body of rules and principles, and concepts and standards, but builds upon them, infusing new life and relevance into them by drawing upon extra-legal considerations from the social environment, influenced always by his conception of policy. The proper function of a judge includes creativity and judgments of value, but always within the bounds of a legal system which is elastic and flexible certainly, but which remains a nexus of legal rules nonetheless.

Because Dickinson recognizes that the traditional notion of the separation of powers is an obsolete myth, that the legal function is a governmental function which does not operate in a water-tight compartment, he has no difficulty in gracefully accepting the quasi-judicial administrative bodies which were beginning to be spawned increasingly by the legislature at the turn of the century. These quasi-judicial administrative agencies were set up to deal with the very complicated technical problems arising out of the growth of corporations, railroads, banks, public utility companies and similar developments. In the performance of their duty these administrative bodies have to exercise discretion, and make decisions based on judgments of law and fact. Inevitably their decisions affect the rights of many people. Victims of adverse administrative rulings properly appeal to the courts for the protection of their rights which they feel have been violated.

The problem of the judicial review of administrative rulings thus arises. How far should judicial review extend? It seems obvious to Dickinson that

[15] John Dickinson, "Legal Rules: Their Function in the Process of Decision", in *University of Pennsylvania Law Review*, vol. 79 (1931), p. 861; also, *Law Behind Law*, cit., p. 285, 289 ff.

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the regular courts should not be expected to repeat *de novo* the process of weighing evidence, balancing probabilities, and the credibility of witnesses, and thus to substitute their own judicial discretion for the discretion of the expert administrators. "Evaluation of evidence and conclusions of facts", he says, "are essentially matters for discretion as distinguished from law, and when so understood belong properly to the [administrative] officials". [16]

It really boils down to a question as to the proper division of labor. The purpose of judicial review, according to Dickinson, is to subject discretion to law. It is to ensure that government shall not act capriciously and arbitrarily, but subject to known rules of a stable and general character. The mere substitution of the discretion of judges for the discretion of official experts as to disputed questions of fact does not really further the end sought by judicial review. Such substitution, explains Dickinson, which is the substitution of one opinion for another, does not subordinate discretion to anything that can be called law, to anything which holds over from case to case and can serve as a guide for the future. It simply sets the discretion of a non-technical agency in place of one supposed to be technically qualified on what are technical issues. It results merely in the piling of one discretionary authority on top of another.

What then, in the division of labor between judge and administrator, is the proper sphere of judicial review? So far as facts are concerned, provided there is no violation of a legal rule or principle, the discretion of the administrator must be respected by the judge. It is only when the contested case revolves primarily around a question as to the law itself that the judge may intervene. The administrative record must be reviewed when it is claimed that a rule of law has been violated; that a finding was reached without any evidence to support it; or that the administrative procedure was arbitrary or tainted with fraud or malice. Here is the field for justifiable judicial interference in the work of administrative agencies.

The legal sovereign, through whichever organ it operates, guarantees to every individual under it a life protected by law, free from the caprice and arbitrariness of any official. This is the sense in which the expression "supremacy of law" or "rule of law" has the exalted meaning it enjoys within a constitutional democracy.

From the tyranny of absolutism on the one hand, and the chaos of anarchy on the other, the only escape into freedom seems to be the institution of a *régime* of law. Like good health, freedom seems to be a value which his appreciated mainly after it is lost. One often hears it said nowadays that in the confrontation between democratic communities which cherish freedom under law, and totalitarian imperialisms which threaten to engulf them, the democracies are at a disadvantage because they lack the motivation of a

[16] John Dickinson, "Administrative Law and Fear of Bureaucracy", in *ABAJ*, vol. 14 (1928), p. 599.

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fighting faith. In this view, the chacateristics of a fighting faith would seem to be unrestrained pasionate agitation, aggressive adventure, utopian ideals of progress, and the confiscation of private property. These are not, however, the only caracteristics of a fighting faith.

In the long list of the heroes of humanity there stand not merely passionate agitators and adventurers, but men of learning, culture and wisdom who on the battlefield as well as in the counsel chamber took their stand soberly and firmly for progress under law. They spilled their blood and gave their lives in defense of institutions and of law. Theirs was a fighting faith which may well serve to inspire the present-day upholders of constitutional democracy and the *régime* of law, — a fighting faith vigorous enough to meet head-on the challenge of absolutism or anarchism.

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