

Book Review of *The Road From Runnymede: Magna Carta and Constitutionalism in America*

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BOOK REVIEWS

THE ROAD FROM RUNNYMEDE. MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA. By A. E. DICK HOWARD. Charlottesville, Virginia: University Press of Virginia, 1968. Pp. 382.

The author states that the aim of the book is "to write a kind of biography of a document and the idea it set loose—the document being Magna Carta, and the most significant idea being constitutionalism."¹ How well he succeeds in achieving that aim may be a significant test to apply to his work. At least upon certain levels he is eminently successful. The book is a rather straight-forward and highly readable account of those points Professor Howard felt critical to the development of his theme. His research appears to me to be as accurate as his statement of the results of it. His selection of materials and areas of concentration cannot be faulted, except insofar as the treatment of the special manifestations needed to support his major theme necessarily required too great a condensation. One wishes that the author had not felt the need to limit so severely the size of the book. In any event, he has achieved his stated goal much better than most, and the book is worth reading for that reason.

On a different level, the value of the book might depend upon whether the goal of the author is worthwhile. The basic assumption that he makes is summed up by the statement that there is value in studying legal documents "on the assumption that, at least a good part of the time, those who wrote the documents both knew what they were saying and meant it."² Some of the shock value of this premise is lost by casual bows to economic determinism, behavioral studies and legal realism. Having recognized them and their contributions, however, he dismisses them without further complications about the operative relationship between them and the idea that he is developing. His point, therefore, seems to be to develop at least one facet of a cause-and-effect relationship, rather than to exclude all other factors which might have contributed to the end result of American constitutionalism. This approach, and the concentration that it permits upon one aspect, makes possible a readable and almost adequate coverage in a rather small volume. It leaves open, however, the question of

1. P. 6.

2. Pp. 5-6.

whether the references to Magna Carta were symbolic gestures of a good advocate—be he lawyer, essayist, judge or politician—or were significant in and of themselves. A different dimension to the assumption that people know and mean what they say might bolster the book's theme. The fact that the "good advocate" makes the reference indicates his personal judgment, whatever his personal motivation, that the people addressed will respond favorably to its use. The need, as an advocate, to rely upon written law as a justification in itself goes far to demonstrate the relationship Professor Howard is attempting to establish.

The premise, in spite of its inherent tendency to deprive law professors of their stock-in-trade, is justified in another regard. It does a service in reminding all but the most cynical that ideas are at least a part of the operative factors in decision-making. I may wonder about the strange coincidence that led Justice Story to write *Martin v. Hunter's Lessee*³ and Chief Justice Marshall to write *Fletcher v. Peck*;⁴ it does seem obvious, however, that both decisions refer to established concepts and create new ones of some continuing validity. In short, to the extent that decision-makers have freedom of choice, one may never be able to unscramble personal motivations, principles, ideas and concepts, but it is clear that all are involved, and that the decision itself, as a fact and a source of new concepts or insights, becomes an operative factor in the next decision. An articulate and clear history of one facet of the problem is, of course, a worthwhile contribution to understanding current problems and suggested solutions.

Having exorcised many of the ultimate problems in the above way,⁵ the author leaves the field to a contest between natural law and legalism. Having recognized the constant struggle between these two concepts currently demonstrated by the use of civil disobedience, he quite rightly demonstrates the partial accommodation inherent in the due process clause—the lineal descendant of Magna Carta's "law of the land." In procedural terms, he traces the conflict between Justice Frankfurter and Justice Black, over the test to be used, to the present concept of selective incorporation. This conflict and its resolution has been and probably will continue to be a major source of tension be-

3. 14 U.S. (1 Wheat) 304 (1816).

4. 10 U.S. (6 Cranch) 87 (1810).

5. It is never necessary, for example, to deal with such nagging problems as how the ideals and ideas, apparently stated in all-inclusive terms, never quite reach all of our people. Perhaps it was because the "rights of Englishmen" were limited to Englishmen or, at least, did not include Black men or members of other minority groups.

tween the United States Supreme Court and the other branches of government. Recognizing the difficulties of selection⁶ and the possibilities that exist for pouring new wine into old bottles,⁷ the solution still tends toward legalism and constitutionalism, as opposed to natural law.

In the limited sense that natural law still survives in our constitutional system under the guise of "due process," the problem of substantive due process is the more difficult. It seems obvious that Justice Douglas' search for the "penumbra" in *Griswold v. Connecticut*⁸ was an attempt to limit the dangers of the Supreme Court's reliance upon natural law concepts under the guise of constitutionalism and due process. On this level, of course, the problems of relationships between the Supreme Court and other branches of the government, institutional procedures and powers, and democratic theory seem to overshadow the theoretical contest between natural law and constitutionalism.

What the Supreme Court of the United States should do is clearly a different problem from the question we each face in terms of living with a law we believe to be unjust. We may, of course, believe that the law violates a higher man-made law—i.e. the United States Constitution—and decide to contest it. If a person decides to violate the law and the law is constitutional, whether or not he believed that it might not be, presumably he is subject to the sanction of the law. "Law abidingness" would seem to be a precious accumulation in society over centuries of development. Civil disobedience naturally detracts from that developing attitude. Yet, obedience to the law is not the sole value in a civilized society, so each person must constantly choose his own course.⁹ Law and lawyers can only attempt to avoid the injustice that leads to civil disobedience and to make the system responsive enough to make the necessary reforms. The consequences of civil disobedience are sufficiently severe to prevent it when, and only when, the injustices are more severe and other roads to change appear foreclosed.

The timeliness of a book might be judged by a variety of relationships to current problems it evokes in the reader's mind. I have already

6. One receives the impression sometimes that only the right to an indictment will not be incorporated.

7. There are many who will say that the right to counsel and the privilege against self-incrimination, as opposed to "coercion," are in strange surroundings in the jail.

8. 381 U.S. 479 (1965). The penumbra, of course, did not impress Justice Black in this regard.

9. See the excerpt from *Letter from Birmingham Jail* by Rev. Martin Luther King Jr. at page 378.

demonstrated that the book travels from King John and the Barons to the most recent constitution decisions and Reverend Martin Luther King Jr. Every reader, of course, brings himself to what he reads, and the impressions created are the result of his background as much as the author's. I had many other references.

Necessarily, as the title indicates, the book deals with the transition of time and place. It is not a study which considers in any detail the "legislative intent" of the parties at Runnymede. There is some interesting material on libraries and the education of American leaders, for example. As could be expected, however, considering the book's specific relation to the Magna Carta, the transition of the English common law to the United States was not explored.

The dominant group in our country was of course, composed of transplanted Englishmen or, at least, of northern Europeans. This is not true, in the main, of today's newly-emergent countries where the dominant groups are to be found amongst the indigenous people. Other factors, of course, differentiate our emergence into independent statehood from the countries now reentering the family of nations. Nonetheless, it would seem that a more detailed and elaborate study of our own birth pains would have relevance to today's scene.

The need for selection of English doctrine when applying it to the United States may well have conditioned our response to the doctrine of *stare decisis* and the role a court plays in affirmative law-making. Such an impact might lead to a whole set of criteria for judgment and selection more readily related to the community needs. This, in turn, gives a wholly different slant to legal education.

Modern newly-emergent countries face somewhat similar needs of selection. No matter how much they may have resented their colonial status, most could not, even if they desired, erase completely the effects of that status. Western law and the institutions of the law continue to shape developments. The institutions may become distorted to meet local needs while the western law is intermingled with, or exists side by side with, local laws. Above all, the government leaders and the Bar reflect widely the western education they have had. In countries emerging from the English colonial system, for example, Barristers abound and other lawyers are products of the local university—a direct descendant of the grossly inadequate colonial colleges. Neither education in law goes beyond the almost rote memorization of "principles" expounded *ex cathedra*.¹⁰ A leading Burmese jurist once

10. I encountered few lawyers who had studied law in the better known English institutions in which tutorials are more than idle dreams.

told me that he had been a Barrister for many years before he realized that the "principles" he learned so avidly were really useless unless they could be made applicable to Burmese conditions. It was an insight which many never achieve.

At the risk of chauvinism, it seems that American lawyers, as the products of a system evolved from a period of transition, might be of some assistance in these countries. Local conditions and, hence, substantive solutions might be beyond their expertise, but an attitude towards law and assistance in developing decision-making institutions which ask the right question are not.

Professor Howard's book, of course, does not deal with the transition in terms other than the Magna Carta. It does represent an interesting contribution in that regard. As an example of the transition it does trigger thought.

The only major criticism of the book is that so much is covered that one gets more general impressions than detailed development. It was necessary to select major themes, and that was well done. A reader, however, might wish that the author would have written two hundred more pages. Additional factual materials could have been added, and more space could have been given to the author's opinions and conclusions. It is a compliment, no doubt, that the reader would like a fuller statement of the author's views.

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ITEMS OF GROSS INCOME. By RICHARD R. DAILEY and LAWRENCE T. WARBLE. Philadelphia: Practising Law Institute, 1967. Pp. 125.

Gross Income—what is it? That's what every tax practitioner would like to know—and every judge or justice who has been confronted with this puzzling problem. Congress attempted to express the concept (without assuming to define it) with the following phrase: "Except as otherwise provided . . . gross income means all income from whatever source derived. . . ." ¹ A more elusive expression could hardly have been used! Reference to a few of the Supreme Court decisions will illustrate the fugitive nature of this slippery notion. The pragmatic pronouncement in *Eisner v. Macomber*,² often quoted but hardly ever

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1. INT. REV. CODE OF 1954, § 61(a).

2. 252 U.S. 189 (1920).