University of Dayton Law Review

Volume 6 | Number 1 Article 2

1981

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UNIVERSITY OF DAYTON LAW REVIEW

VOLUME 6 WINTER 1981 NUMBER 1

OUR HIGH PREROGATIVE: THE ATTORNEY'S RESPONSIBILITIES TO THE LAW

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Last year I stood in the meadow of Runnymeade where King, prelates, and nobles gathered in confrontation on the issue of freedom from tyrannical shackles. For me, it was an occasion of reflection on the eventual impact of this historic event on the freedoms my fellow-Americans and I enjoy. Not long after, I revisited Independence Hall in Philadelphia where after ten years of intense and sometimes highly divisive effort, our Constitution was adopted. This time my reflections took me back to *Magna Carta*. My thoughts were haunted by the question—hypothetical to be sure, but germane—without the Great Charter of England,[1] would there have been a Constitution of the United States? Recently one of the four remaining copies of *Magna Carta* was brought to our country—and there have been observances at various places to refurbish our memories of its real meaning and its vast influence on our lives today.

Historians and legal scholars make reference to several sources of our liberty.[2] Not all name the same. But none fails to include *Magna Carta*. Indeed, most of them embrace the Great Charter as a primary source.[3]

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1. Charter, 1215. *See generally* F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 171-73 (2d ed. 1968); W. HOLDSWEETH, A HISTORY OF ENGLISH LAW 207-16 (1971).

2. P. CONKIN, SELF-EVIDENT TRUTHS 131, 132 (1974) [hereinafter cited as P. Conkin]. J. MUSSATTI, THE CONSTITUTION OF THE UNITED STATES: ITS ORIGIN, PRINCIPLES AND PROBLEMS 2 (1956) [hereinafter cited as J. MUSSATTI]; H. REUSCHLIEN,—ITS AMERICAN PROPHETS 22-23 (1968) [hereinafter cited as H. REUSCHLEIN]; B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971) [hereinafter cited as B. Schwartz]. H. SILVING, SOURCES OF LAW 237 (1968) [hereinafter cited as H. Silving].

3. In particular, the federal Bill of Rights was based directly upon the great Charters of English liberty, which began with the *Magna Carta*. Without the English development in this respect, it may be doubted that American colonists, revolutionaries and constitution makers would (or indeed could) have acted as they did. *See* B. SCHWARTZ, *supra* note 2. Mussatti stated that the "Magna Carta is *a formulation stone of American liberty*." J. MUSSATTI, *supra* note 2, at 9. Silving considers the 39th and 40th articles of the *Magna Carta* as the fountain head of Anglo American liberty. H. SILVING, *supra* note 2, at 237-38.

When John Adams, able and courageous lawyer and patriot, was attacking the Stamp Act, he cited *Magna Carta* as supporting the injustice of "taxation without representation."[4] This ignited in the Colonists a deep and wide-spread emotional fervor of resentment and resistance. To them it meant that King George was trampling on a sacred document, and they would have none of it. No greater rallying cry could have been sounded.

Of the many written passages referring to the influence of *Magna Carta* on American liberties,[5] I like best the words of Lord Denning, the Master of The Rolls, a universally admired English jurist. Speaking at Runnymeade a few years ago, he put it this way:

> Some bold and venturesome men sailed across the seas from this island. They founded the colonies of Virginia, Massachusetts, Pennsylvania and others. They took with them the rights of Englishmen. When they decided in 1776 to make their Declaration of Independence, they said of George III what the Barons said of King John: The history of the present King of Great Britain is a history of reported injuries and usurpations.
>
> When they came to draft the Constitution, they used in the Fifth Amendment words which came by direct succession from *Magna Carta*: No person . . . shall be deprived of life, liberty or property, without due process of law.
>
> So they established the rule of law in the greatest country of the world, the United States of America. It was established as those here in 1215 determined it should be—established forever.

Legal scholars confirm what Lord Denning has told us. They assure us that no clause of *Magna Carta* has been cited more often as a guarantee of the liberties of the citizen than Chapter 39.[6] This Chapter

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4. A Parliament of G.B. can have no more right to tax the colonies than a Parliament of Paris . . . . The Stamp Act was made where we are in no sense represented, therefore, it is no more binding upon us than an act which should oblige us to destroy one half our species. . . . The law, the King's writs, cannot be withheld from his subjects. Magna Carta says, we deny no man justice, we delay man no justice.

C. BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 289 (1950).

5. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819); E. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 26 (1941) [hereinafter cited as E. CORWIN]; E. BARRET & P. BRUTON, CONSTITUTIONAL LAW, CASES & MATERIALS 591 (4th ed. 1973) [hereinafter cited as E. BARRET & P. BRUTON]. *See also* note 3 *supra*.

6. Chapter 39 became Chapter 29 in the reissue of Henry III in 1225 *Magna Carta* 1297, 25 Edw. 1 c.29. R. MOTT, DUE PROCESS OF LAW 3 (1926) [hereinafter cited as R. Mott]. Chapter 39 has been *even more consequential* in the evolution of constitutional liberty. B. SCHWARTZ, *supra* note 2, at 6. *The most vital part of the Fifth Amendment provides that a person cannot be "deprived of life liberty, or property with due process of law."* J. MUSSATTI, *supra* note 2, at 84. *This goes to the Magna Carta* of 1215, in which it was provided that no one was to be denied his personal or property rights without the judgment of his peers. E. CORWIN, *supra* note 5, at 26.

provides that no free man shall be imprisoned, dispossessed, banished or destroyed, "except by the legal judgment of his peers or by the law of the land."[7] English law books of the twelfth century trace this phrase, "the law of the land," to documents of the Holy Roman Empire in the eleventh century.[8] It is quite reasonable to deduce, therefore, that the "law of the land" provision underscored a principle which eventually found its way to the Fifth and Fourteenth Amendments to the Constitution of the United States.[9]

To equate the "law of the land" provision with the concept of "due process of law" is not without precedent. Parliament declared in 1354, "that no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by *due process of the law.*"[10]

We need not labor to identify each constitutional guaranty that we enjoy today is arguably traceable to the Great Charter. The overall impact of this magnificent English document is what arrests our attention.

We know that our liberties depend upon the existence of established and known rules of law that prescribe and limit the authority, and restrain the influence, of those to whom we have entrusted the power of government.[11] We know from what we have examined historically today that *Magna Carta* announced the rule of law which is the foundation on which rests the entire edifice of Anglo-American constitutional liberties.

In May, throughout the nation as well as in every year since 1958, we observe Law Day.[12] Without a rule of law, there would be no Law Day. When Law Day was first recognized as a special day in our lives, it provided a forum for some lawyers to dwell retrospectively on the

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7. Charter 1215, c:39.

8. Amid the archaic phraseology of the federal decrees of Conrad II (Holy Roman Emperor, reign 1024-1039) one finds toward the end of the first canon of the edict of May 28, 1037, a phrase which seems strangely modern, it is there stated that no man shall be deprived of his fief, . . . but by the laws of the Empire and the judgment of his peers.

R. MOTT, *supra* note 6, at 7.

9. *See* notes 3 and 6 *supra.*

10. Act of 1354, 28 Edw. 3 c.3 (emphasis added).

11. The importance of a written declaration of the rights of the individual loomed large in the minds of early Americans. E. BARRETT & P. BRITON, *supra* note 5, at 591. "Today one measure of liberty is the extent to which the individual can insist that his government live under a Rule of Law." W. DOUGLAS, THE ANATOMY OF LIBERTY; THE RIGHTS OF MAN WITHOUT FORCE (1963).

12. S.J. Res. 32, 87th Cong., 1st sess.

contributions the members of the legal profession made to the founding and growth of our nation. Their addresses emphasized the accomplishments of the lawyer of yesteryear. These were usually interesting word pictures of the lawyer's glorious heritage, studded with statistics on the number of lawyers who participated in the drafting of the Constitution and in the signing of the Declaration of Independence.[13] The rhetoric was excellent and the reminiscences were inclined to raise our egos.

No longer is the narration of our heritage—proud as we are of it—the message Law Day conveys. Lawyers today are mindful of the challenges directed at the rule of law—challenges as grave as any our legal system has ever faced. We live in rapidly changing times, and as the changes are spawned, so are new demands. The demands are not on the legal profession and the courts alone—they are as much on the shoulders of the citizenry as a whole. Our prime responsibility as lawyers and as laymen is to aid fairly and faithfully in weaving the fabric of law so that it will meet the needs of a free society dedicated to equality, to justice and to untrammeled freedom.[14]

Whether our legal system will survive depends on how it will function in day-to-day operation, and how it will function will depend not merely on the attitude and dedication of judges and lawyers but as well on the active participation of all segments of society. If we honor the law by aiding it to serve as it was meant to serve, it will survive. If we dishonor it by overt action or by eroding indifference, it will surely be replaced. Central to the effective operation of the rule of law is the giving of undeviating obedience to adjudications by the courts, whether we like them or not.

Recently a friend of mine, former president of the State Bar of Texas, referred to the conduct of Andrew Jackson, also known as "Old Hickory." Jackson was thought to have been somewhat high-handed in his actions. He kept the militia under arms and New Orleans under martial law at a time when it was thought by public officials no longer to be necessary. It is said that once the immediate danger was past, the Governor and the Legislature showed a marked resentment of Jackson's high-handed ways.

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13. Of the 55 members of the constitutional convention, two-thirds had legal backgrounds. J. WICKENS, HIGHLIGHTS OF AMERICAN HISTORY 74 (1973). James Madison, the prime drafter, was a lawyer. C. ROSSITER, 1787 THE GRAND CONVENTION (1966). Of the signers of the Declaration of Independence, approximately 66% had legal backgrounds. M. BOATNER III, ENCYCLOPEDIA OF THE AMERICAN REVOLUTION (Bicentennial ed. 1976).

14. See ABA CANONS OF PROFESSIONAL ETHICS NO. 1 & 2.

Jackson had refused to answer interrogatories by the District Attorney. The Judge said:

> The only question was whether the law should bend to the General or the General to the Law . . . . A fine of one thousand dollars and cost was imposed. Jackson paid the fine saying: I have, during the invasion, exerted every one of my faculties for the defence and preservation of the constitution and the laws . . . . Considering obedience to the laws, even when we think them unjustly applied, as the first duty of a citizen, I did not hesitate to comply with the sentence you have heard, and I entreat you to remember the example.[15]

This is the only course a good American, interested in preserving the rule of law, can follow.

In June of 1968 President Lyndon Johnson signed an executive order establishing a National Commission on the Causes and Prevention of Violence.[16] One of the compelling reasons for the appointment of this Commission, on which I had the honor of serving, stemmed from the constantly increasing evidences of disrespect for law, including campus disorders and instances of so called "civil disobedience." With large numbers of classes, young and old, joining in defying legally constituted authority, valid laws and court decrees, conditions across the land became alarming.[17] The Commission was charged with the duty to investigate and make recommendations with respect to the "causes and prevention of lawless acts of violence in our society" and "the causes and prevention of disrespect for law and order, of disrespect for public officials, and of violent disruptions of public order by individuals and groups."[18]

After many months of listening to enlightened individuals, research and study, a majority of the Commission concluded:

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15. M. JAMES, ANDREW JACKSON THE BORDER CAPTAIN 286 (1933).

16. Exec. Order No. 11, 412, 3 C.F.R. 4702 (1968).

17. A sample of articles from one magazine during the time period from April 1968 to July 1968 indicate the extensiveness of these conditions. Some articles dealt with racial disorders, *Rampage and Restraint Time*, TIME Apr. 19, 1968, at 15; *Violence and History*, TIME Apr. 19, 1968, at 44. Other articles dealt with the campus arrest, *Why Those Students are Protesting*, TIME May 3, 1968, at 24; *Students Lifting a Siege—And Rethinking a Future*, TIME, May 10, 1968, at 77; *The Cynical Adealists of '68*, TIME, June 7, 1968, at 78. General articles concerning violence and society were also abundant, *The Age of Contention*, TIME, May 31, 1968 at 9; *The Generation Under Fire*, TIME, July 21, 1968, at 11. In the preceding months before the establishment of the commission, the assasinations of Martin Luther King and Robert F. Kennedy contributed to the unrest of the country.

18. *See* note 16 *supra*.

> For several years, our youth has been exposed to dramatic demonstrations of disdain for law by persons for whom exemplary conduct was to be expected. Segregationist governors had disobeyed court orders and had proclaimed their defiance of judicial institutions; civil rights leaders had openly disobeyed court injunctions and had urged their followers to do likewise; striking teachers' union members had contemptuously ignored judicial decrees. It was not surprising that college students, following adult example, destroyed scientific equipment and research data, interferred with rights of others by occupying laboratories and classrooms, and in several instances temporarily closed their colleges.[19]

This was the situation in 1969 and for a few years immediately prior. It was an aftermath of young people following examples set by their elders. A careful look at what is occuring in current times impels the conclusion that in this country we are about to set the cycle in motion again—the only difference being that the rule of law is being flouted by the older generation with greater abandonment than ever before.

A brief panorama of what has occurred in our borders within recent months unfolds like this: despite the existence of laws that forbid policemen, firemen, teachers and other public employees to strike and the issuance of court orders restraining them from continuing their conduct and ordering their return to work, both law and court decrees have been ignored and wantonly flouted.[20] In one of our larger cities, in violation of state law, policemen and firemen both went on strike and disregarded the court order to return to their duties. In another city, striking firemen watched an entire block of buildings burn down without one of them lending a helping hand to control the fire that threatened the business district and could well have ruined a major portion of that city. In still another city, striking teachers formed picket lines around schools to which children were reporting for classes and where quickly-assembled substitute teachers were undertaking to carry on. Large groups of teachers whose obligations were to instill into these young folk, most of them of a highly impressionable age, concepts of good citizenship, were jeering, shouting epithets and engaging in various disorders, and generally acting like ruffians and rogues. Some of them were arrested, sentenced for contempt of court and con-

19. The Nat'l Comm'n on the Causes and Prevention of Violence, Final Report: To Establish Justice, To Ensure Domestic Tranquility 88 (1969) [hereinafter cited as Final Report].

20. "With one exception all states agree on one point: they prohibit strikes by public employees . . . . These law-prohibiting strikes, however, have not prevented them." R. WALSH, SORRY . . . NO GOVERNMENT TODAY UNIONS VS. CITY HALL 155 (1969) [hereinafter cited as R. WALSH].

fined, where they were exemplifying citizenship behavior for their students to emulate.

Now contrast this conduct, if you will, with the comments of the president of the National Congress of Parents and Teachers, Mrs. Rollin Brown, on the occasion of this nation's first Law Day. Speaking for teachers as well as parents, she put it this way:

> It is incumbent upon us to demonstrate our belief that law and human progress are inseparable. Parents and teachers will be mindful that they are the guardians of tomorrow's lawyers and legislators. To keep American jurisprudence the organic, growing thing that it is, we shall do our utmost to instill in children a durable respect for law and set them an example of intelligent lawfulness worth emulating.

The question naturally arises what is to be expected of the young as they grow older. Is it to be expected that they will become citizens respectful of the law, or is it likely that they will recall the precepts and examples of their teachers in grade school and in high school? While in Chicago recently, I saw striking teachers guilty of similar conduct. Particularly appalling was the boastful manner in which the president of the teachers' union publicly referred contemptuously to the court decree prohibiting a continuation of the unlawful strike.

In most localities in this land, if not in all of them, a police officer takes an oath that he will abide by and support the law.[21] When he violates a state law prohibiting him from striking and when he disregards a court order directing him to cease his striking activities and return to his duties, he is not only flouting the law but contributing to its erosion. Picture this—an officer of the law who has taken an oath to uphold the law and who has been arresting people and charging them with a varity of law violations overnight becoming a law-breaker himself.

I am sympathetic to working conditions that some officers, firemen and teachers, for example, have to endure.[22] I am not at all unsym-

21. *See* U.S. CONST. art. VI, cl. 3. *Compare* Connell v. Higginbotham, 403 U.S. 207 (1971) *with* Cole v. Richardson, 405 U.S. 676 (1972). The Supreme Court vacillated on the constitutionality of loyalty oaths. *See, e.g.*, 28 U.S.C. § 563 (1976). (The oath of office to be taken by each United States Marshall and Deputy Marshall before assuming the duties of his office.)

22. "Unfortunately, police-community relations have deteriorated to the point that in some communities, outright hatred and violent action has been aimed at police officers . . ." W. BOPP, POLICE ADMINISTRATION 77 (1975). There is an increase of violence in the school systems as evidenced by the growing numbers of assaults, robberies, murders and crimes inflicted upon both teachers and students. "The National Fire Protection Association reports that three-fourths of all fires in school buildings are now caused by arson." M. BERGER, VIOLENCE IN THE SCHOOLS: CAUSES AND REMEDIES 7 (1974).

pathetic with the low and sometimes inadequate compensation they receive.[23] For years I have been advocating that these segments of our society, so important to the maintenance of a high level of social conduct, receive appropriate compensation and enjoy satisfactory working conditions. But they must remember that the city council is available to them; the state legislature is available to them; the polls are available to them; the open forum for an airing of their problems is available to them. All of these serve as proper places of resort for remedial action.[24] Finally, if they find compensation and other factors unbearable, they can resign in honor. Where the right to strike is not forbidden by law, legislative or judicial, and is conducted in orderly fashion, society accepts and respects the exercise of that right,[25] and I would not want for one moment to criticize the invocation of that right.

We must accept and never forget the truths so clearly stated in the Violence Commission majority report:

> Every time a court order is disobeyed, each time an injunction is violated, each occasion on which a court decision is flouted, the effectiveness of our judicial system is eroded. How much erosion can it tolerate? It takes no prophet to know that our judicial system cannot face wholesale violation of its orders and still retain its efficacy. Violators must ponder the fact that once they have weakened the judicial system, the very ends they sought to attain—and may have attained—cannot then be preserved.[26]

Why am I stressing these basic truths so vital to the rule of law to an assembly in which law graduates and law students form a substantial part? You may ask whether these members do not already know what I seek here to underscore.

Yes, graduates know and students exposed to law have learned the

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23. U.S. DEP'T. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (100th ed. 1979).

24. Furthermore, the public employee has an approach which is rarely available to workers in the private sector. If dissatisfied with bargaining results, he can exert political pressure on the legislative or budget authorities, who are elected officials. If a mayor or a board of selectmen are unduly adamant and unyielding in their bargaining attitudes, public employees can mount a campaign to defeat such officials at the polls.

25. R. WALSH, *supra* note 201, at 238.

The private employer must stay in business and sell his goods and his services in order to pay his employees. Unions normally do not make such high demands that they drive the employer out of business or into a drastic curtailment of his operations. If a strike occurs, it is a test of economic strength or staying power and is perfectly legal.

D. STANLEY, MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE 19 (1972).

26. Final Report, *supra* note 19, at 90.

substance of what I say. And, of course, judges know what is here reiterated because they are faced with this very problem at times. But knowledge alone is not sufficient; there must be a resurgence of dedication to the proposition that court decrees—the heart of the rule of law—must remain inviolate. There must not be a chipping away at our commitment to a government of laws by the weakening process of winking at violations of orders of judicial tribunals.[27]

It is the obligation of the lawyer to rise in protest against such violation, and I hope to see the day when lawyers en masse will face up to this obligation and discharge it with fervor and effectiveness. This has not been the case on occasions in the past. When judges of our Fifth Circuit Court of Appeals, with courage and determination, faced the desegregation issue a few years ago,[28] and governors and other public officials proudly displayed their contempt of court orders, there were lawyers—yes, lawyers—officers of the court—who were supporting this contemptuous conduct, some vociferously.[29] It is the lawyer's duty not only to counsel a client against such contempts—it is the lawyer's obligation to publicly denounce all conduct that weakens the efficacy of the rule of law.[30] Finally, it is the lawyer's high prerogative to lead his fellow citizens in honoring the law. From time to time, we remind ourselves of what de Tocqueville concluded when he made his study of the processes of democracy in America. He put it bluntly that the authority this nation "has entrusted to members of the legal profession and the influence which these individuals exercise in the government is the most powerful existing security against the excesses of democracy."[31] But the power of influence to which de Tocqueville alluded can be lost quicker than it was won, and nothing will bring about the demise of the prestige of the legal profession quicker than a default in our obligations to the rule of law.

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27. *See* Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964).

28. Meridith v. Fair, 313 F.2d 534 (5th Cir.), *cert. denied sub nom.* Mississippi v. Meridith, 372 U.S. 916 (1963).

29. The Governor of Mississippi, attorney, Ross R. Barnett, physically blocked negro James H. Meridith's path when he attempted to register at the Universtiy of Mississippi Campus at Oxford. Barnett acted in spite of a temporary restraining order issued by the Court of Appeals for the Fifth Circuit enjoining him from interferring in any way with the registration of Meridith, TIME, Oct. 5, 1962, at 15-16.

30. A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude. ABA CANONS OF PROFESSIONAL ETHICS, E.C. 1-5.

31. A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 272 (1946).

The practice of law is a noble profession. It must ever remain so. There is no better time than this day to embrace the words of Daniel Webster—"The law, it has honored us, may we honor it."[32]

32. Speech at the Charleston Bar Dinner (May 10, 1847).