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## Managing Water Quality: Economics, Technology, Institutions, Allen V. Neese & Blair T. Bower

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## BOOK REVIEWS

SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH. By Dan T. Carter, Baton Rouge, Louisiana: Louisiana State University Press. 1969. Pp. viii, 431. \$10.00.

In delivering *Gideon v. Wainwright*,<sup>1</sup> the Supreme Court declared that it was breaking no new ground but simply returning to constitutional principles established some thirty years before in *Powell v. Alabama*.<sup>2</sup> Despite this bland assurance, the story behind the "restoration" of *Powell* was sufficiently intriguing as to command expression by Anthony Lewis in his *Gideon's Trumpet*. But what of *Powell* itself? One might suppose that the original precedent, arising as it did from the infamous Scottsboro trials, would have inspired similar treatment. Surprisingly, however, Professor Carter's welcome contribution represents the first and only scholarly book-length study of the case and its aftermath.

His was a challenging task. Whereas Lewis was able to focus upon a single basic concept, and to leisurely trace its development from a prisoner's mind to Mr. Justice Black's opinion, Professor Carter is obliged to grapple with six years of continuous litigation which spawned a dozen trials and not one but three major Supreme Court decisions (the sequels being *Norris v. Alabama*<sup>3</sup> and *Patterson v. Alabama*<sup>4</sup>). Between vivid courtroom sketches the book illustrates how it was then possible in Alabama, as it was also in contemporary Germany, for a civilized people to go berserk en masse over isolated racial incidents. This is quite a bit of ground to cover but it is accomplished by the author with minimal loss of direction.

Written with the meticulous balance of an historian and the understanding of a native Southerner, this readable account qualifies as a worthy companion of the Lewis book. It probably surpasses the latter in terms of sheer drama, if only because the Scottsboro episode has taken on folklore dimensions. This Nation was in the midst of economic chaos and social upheaval in 1931 when a sheriff's posse stopped a passing freight in rural Alabama and arrested nine illiterate

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<sup>1</sup>372 U.S. 335 (1963).

<sup>2</sup>287 U.S. 45 (1932).

<sup>3</sup>294 U.S. 587 (1935).

<sup>4</sup>294 U.S. 600 (1935).

Negro teen-agers. The initial charge was interracial fist-fighting, but two white female hobos got off the train and accused the boys of rape. Only by calling out the National Guard did the authorities avert a mass lynching. With armed troops holding back the mobs ringing the courthouse, the boys went on trial for their lives before consulting either of the attorneys who half-heartedly appeared to defend them. The all-white juries, exhorted by racial appeals from press and prosecution, vindicated white Southern womanhood (the "victims" were later exposed as snuff-dipping prostitutes whose clientele included Negroes) by bringing in the death penalty for all but the 13-year-old. While "progressive" Alabamians were congratulating themselves on the fact that the boys had been tried at all, the Communist-affiliated International Labor Defense intervened and denounced the trials as "legal lynching." The NAACP belatedly sought to enter the case and volunteered the services of Clarence Darrow and Arthur Garfield Hays, but the ILD noisily spurned cooperation and induced parents of the boys to sign affidavits repudiating NAACP support. The hapless defendants were all but forgotten in the swirl of propaganda and ideological bickering, leading skeptics to conclude "that these darkies do not mean a tinker's dam [sic] to the organizations which have supposedly been moving heaven and earth in their behalf." When the case was appealed, the ILD flooded the Supreme Court of Alabama with so many bombastic telegrams that Chief Justice Anderson, who personally regarded the trials as unfair and said so in lone dissent, issued a public statement complaining of "the evident intent to bulldoze this court." The Communists won few converts among Alabama proletarians, whose sentiments were elsewhere.

All of this makes for some rather lively reading. It is a source of regret that the only weak spot in the entire narrative comes just as the case finally reaches the top rung of the appellate ladder. Summary handling of the Supreme Court's review in *Powell v. Alabama* does seem perfunctory. Justice Sutherland's magnificent "guiding hand of counsel" opinion is reduced to a few dull quotations. There is no analysis of the holding apart from a digest of editorial comments by the Northern liberal press. Although the author briefly outlines the Court's steps in fastening the right to counsel to the due process clause of the Fourteenth Amendment, much else could have been explored: the historic evolution of the right to counsel; the arguments of counsel (Walter Pollak, whose argument prevailed, barely gets his name in the book); the judicial temperament and philosophies of the Justices;

the seeds of discord experienced by the Court over *Moore v. Dempsey*,<sup>5</sup> which split the conservative coalition along new lines in *Powell*; and the broad significance of the decision upon future constitutional theory (including, of course, the *Betts v. Brady*<sup>6</sup> controversy and its resolution in *Gideon*). A practicing lawyer covering the same ground doubtless would have been moved to spare more than three pages to this civil liberties landmark. Indeed, twice as much space was devoted to *Powell* in *Gideon's Trumpet*. A chapter evaluating the Supreme Court phase of the case would have provided better understanding of interaction between the judicial process and the environmental conditions which Professor Carter so thoughtfully describes.

By no means does the cameo approach to *Powell* destroy the overall effectiveness of this splendid case history. However consequential *Powell* may seem to lawyers, scholars, and civil libertarians, it did little to relieve the miserable ordeal of the Scottsboro boys. Professor Carter does well to concentrate upon the events and the participants, as a clear reminder that the real lines of battle were drawn before Alabama judges and juries and not in the rarified chambers of the Supreme Court. *Powell* did not end the futile litigation nor did it stem the flow of convictions, despite the superlative legal representation of the boys on retrial by Samuel S. Leibowitz (now a New York Judge). All told, at least 120 jurors voted for capital punishment before the case finally ended in shabby compromise.

Professor Carter has probed deeply into original source materials and interviewed as many survivors as could be located in order to diagnose the pathetic malfunctioning of the Alabama legal system. While his findings confirm the medical improbability of rape, one must also accept his conclusion that acquittal was an impossibility. No small town jury could have remained insensitive to the combined forces of racial bigotry, anti-Semitism, Red Scares, and blind chauvinism which swept Alabama, sometimes with lethal results. The larger tragedy of the Scottsboro cases, as I see it, lies in the failure of the bench and bar to restrain these violent passions. For instance, the state's attorney general, who could have ended the trials as a concession to decency, instead took personal charge of the prosecution and converted the trial table into his platform for election to higher office. It was one of his subordinates who urged a jury to prove by the death penalty "that Alabama justice cannot be bought and sold with Jew money from New York." Respectable lawyers mostly kept

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<sup>5</sup>261 U.S. 86 (1923).

<sup>6</sup>316 U.S. 455 (1942).

their mouths shut, although a few ventured that life imprisonment might be adequate punishment for the non-crime.

Of the three judges who presided at one or another of the trials, only James E. Horton made a serious attempt to import reason and fairness into the proceedings. Convinced from the evidence that the case was all "a horrible mistake," he defied powerful community sentiment and set aside a biased verdict. For his faith in the rule of law Judge Horton was rewarded by swift removal from the case and defeat at the next election. By reminding a new generation of Alabamians of this act of courage, Professor Carter has performed a valuable service.

H. THOMAS HOWELL\*

MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS. By Allen V. Kneese and Blair T. Bower. Baltimore, Maryland: The Johns Hopkins Press. 1968. Pp. vi, 328. \$8.95.

A few years ago clean water was of concern to perhaps a handful of largely amateur conservation groups. Complaints of stream deterioration were relegated to the fish and stream columns of America's newspapers. More recently, stories of our polluted air and water have become news that is fit to print. Regrettably, many of the recent self-proclaimed and self-righteous experts generate a great deal of heat but often shed little light on any effective resolution of the increasingly serious problems of environmental destruction.

Fortunately, however, Resources For the Future (RFF) is neither a Johnny-come-lately nor a self-righteous organization. In a series of publications it has called attention to the hard issues of conservation and future resource development and has offered rather sensible solutions to many of the major environmental problems facing this generation.<sup>1</sup> A recent book, *Managing Water Quality: Economics, Technology and Institutions* is no exception.

Allen V. Kneese and Blair T. Bower, authors of *Managing Water Quality*, are uniquely qualified to argue the economist's position on this question, for Dr. Kneese is Director of RFF's Quality of the

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<sup>1</sup>A very concise but thought-provoking publication of RFF which examines problems of land and air as well as water use from an economic point of view is O. HERFINDAHL & A. KNEESE, *QUALITY OF THE ENVIRONMENT: AN ECONOMIC APPROACH TO SOME PROBLEMS IN USING LAND, WATER, AND AIR* (1965).

Environment Program and Dr. Bower the Associate Director. This book represents a substantial revision of Kneese's *Economics of Regional Water Quality Management* published in 1964—a testament in itself to the concern and changing attitudes about water quality in five years.

The authors have done an amazing job of outlining, in essentially non-technical language, the questions viewed by them to be essential in solving the water pollution crisis. The book is divided into five parts. A compact introduction tells the reader what he will find and where in the remaining thirteen chapters it is to be found. In the following chapters the reader finds in clear detail what he expected and at the end of each of the five major divisions he finds a brief summary of what he has read. Technical language and mathematical equations presupposing a knowledge of economic theory are kept to a minimum and generally segregated in appendices. All of this makes for an expensive (\$8.95) but very readable book.

The major issues raised in the book are threefold and are closely interrelated. To determine the quality of water that society will use (issue number one) depends upon the cost of achieving a given level of water quality (issue number two). The ability to achieve some goal of water quality at the lowest possible cost bears a close relationship to the effectiveness of our political institutions to deal with complex resource problems (issue number three). It takes very little reflection to see that these issues are not merely interrelated but are in fact polycentric. At some point in the circle an additional factor is needed to elevate and speed up the reaction; for if America is to truly enhance the quality of its streams, something more than cross-action between the cost and quality issues is needed.<sup>2</sup>

The interaction of market forces normally relied upon to allocate social resources has not effectively functioned to clean up America's streams; for when polluters make decisions about the most efficient way to dispose of waste, they are not required to internalize the costs imposed by their effluent discharge on downstream users. This results in a misallocation of resources. A further defect in bringing the rules of the market place to the river bank is that not all values affected by polluted waters can be quantified or even assessed.

The problem, as the economist views it, is to forge a method of imposing these external costs on the polluter. A welfare economist

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<sup>2</sup>The stated purposes of the Water Quality Act of 1965 are "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control and abatement of water pollution." Act of Oct. 2, 1965, Pub. L. No. 89-234, § 1, 79 Stat. 903.

maintains that the decision of how much of society's resources will be expended in order to raise the level of water quality can be made by requiring the polluter to internalize all costs of water-borne disposal. Efficient allocation and an enhanced water quality level will then automatically occur through the forces of the free market.

This pure economic approach has been rejected by the Congress and a decision has been made to impose stream quality standards.<sup>3</sup> The standards approach is somewhat arbitrary and, of course, is not an ultimate answer; however, it does speak to the first issue of what level quality is to be attained. Stream standards represent at best a political judgment about values that the economist cannot measure. Thus, this is a factor which elevates the reaction between cost and quality referred to above. It is likely to result in greater enhancement of water quality than would the pure economic approach because many important downstream opportunities defy quantification.

Kneese and Bower, accepting the standards approach for the present, propose that a system of effluent charges be imposed on polluters in order to achieve the standards set for a water course.<sup>4</sup> An effluent charge is the amount to be paid by a waste discharger to compensate for (a) opportunities for downstream uses lost because of his pollution and (b) the cost of treatment made necessary by his pollution to make downstream water suitable for industrial or municipal users. A user's charges would be based on the quantity of wastes he discharges and the off-site cost resulting from his wastes. This, the authors argue, will act as an incentive to require waste dischargers to reduce pollution, since their payments will be correspondingly decreased. The concept of effluent charges is not without some problems, as the authors recognize. However, if an attempt were made to shift the external costs of pollution back to the polluters by such a system, this would certainly be a major step forward. Unfortunately, Congress and state legislatures continue to discuss tax breaks—write-offs and credits—to

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<sup>3</sup>The standards approach was adopted in the Water Quality Act of 1965 which amended the Federal Water Pollution Control Act, 33 U.S.C. §§ 466-466k (1964) (originally enacted as Act of June 30, 1948, ch. 758, § 1, 62 Stat. 1155). Proponents of strong federal water pollution legislation, notably Senator Edmund R. Muskie (D., Me.), were dissatisfied with the enforcement procedure provided by prior federal legislation.

<sup>4</sup>In chapter seven effluent standards are compared with a system of charges as a tool for water quality management and the concepts became somewhat slippery. However, they do make a rather telling point that stream and effluent standards are intertwined and that the heated debate over stream versus effluent standards is largely irrelevant. *But see* Dunkelberger, *Federal State Relationships in the Adoption of Water Quality Standards under the Federal Pollution Control Act*, 2 NAT. RESOURCES LAWYER 47 (1969).

polluters to encourage them to improve water quality. Kneese and Bower make a rather strong case that such efforts are not only potentially costly to the taxpayer but also unlikely to result in any substantial improvement in water quality. One supposes that a reason for the reluctance to center real attention on the concept of effluent charges is because of the hard thinking that will be required about the effectiveness of our political institutions.<sup>5</sup>

The use of effluent charges to clean up major water courses will require different kinds of governmental organizations than those to which we are accustomed. River basins have the unfortunate habit of disregarding man's territorial boundaries. Quite properly then, the authors call for new initiatives in policy at all existing levels of government, particularly at the federal level, to encourage the development of institutions to deal with such problems. Simply creating a regional or river basin authority as another layer of government and leaving it largely impotent is perhaps more deceitful than total inaction. The regional authorities envisioned by Kneese and Bower would be given the power to plan and implement programs. In the final chapter of the book, appropriately entitled "A Policy for the Future," the authors detail criteria for an effective regional management agency and describe its approximate function.

Following the policy goals outlined in this book would aid in the nation's efforts to halt the dangerous crises created by the reckless use of one of its natural resources. However, the use of economic analysis can go but so far. Even if the hard questions presented by Kneese and Bower are resolved—and many of them have not yet been seriously asked by our policymakers—we will have barely turned the corner in the search for a congenial relationship between man and his environment. Economic analysis depends upon evaluating alternatives. We do not yet know how to place a monetary figure on many things which we feel viscerally (e.g., aesthetics) should now have some value. One thing evident from the history of resource exploitation is that what is totally disregarded by one generation may be highly valued by the next. Forests were once an evil to be conquered. As a result of this policy of defoliation, our legacy has been the loss of billions of tons

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<sup>5</sup>The discussion in the United States Corps of Engineers, *1963 Potomac River Basin Report*, in chapter 11 is, as Kneese and Bower point out, a clear illustration that that agency perceives its mission to build dams and regulate flow. Thus its recommendation for improving the quality of the Potomac was, not surprisingly, a series of dams to regulate the flow of the river. As an existing institution the Corps of Engineers is not without some political power. See A. MAAS, *MUDDY WATERS* (1951).



of topsoil. In this century natural gas was flared off at the well head because its presence hindered oil production. Not only was natural gas—now a major source of energy—wasted, but also vast quantities of helium found in natural gas deposits were forever lost to the atmosphere.

It may be suggested that unless the entire debate about man's relation to his environment is raised from the economic level, the result is clear—there will be few clean streams and little air for the next generation to enjoy. It is with some trepidation that such a statement is made, for this reviewer is not a trained economist and is open to the rebuttal that he does not understand the nuances of "welfare economics." However, economic analysis is without question one of many useful tools for making decisions. The natural and social sciences have done a great deal to stimulate thinking about the water crisis and have offered better techniques for registering choices than other groups—notably the legal profession.

To require the Audubon Society to justify its desire to save the pileated woodpecker from extinction because its presence serves some imagined economic benefit in reducing insect population seems not only absurd but degrading—both to the economist and to the ornithologist. However, that sort of argument has been made on more than one occasion.<sup>6</sup>

Over the long pull some genuine ethical transformation is required. Man's perception of himself and his environment is fundamentally wrong. He presently regards himself as the master of the earth's resources. He will, in the future, have to learn to live with his environment in a state of harmony as a steward of the earth's resources, else the environment may master him. To examine seriously this thesis is painful and requires all the decision-making tools at hand—including economics. Aldo Leopold adroitly articulates the difficulty of such a confrontation:

No important change in ethics was ever accomplished without an internal change in our intellectual emphasis, loyalties, affections, and convictions. The proof that conservation has not yet touched these foundations of conduct lies in the fact that philosophy and religion have not yet heard of it. In our attempt to make conservation easy we have made it trivial.<sup>7</sup>

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<sup>6</sup>A. LEOPOLD, *A SAND COUNTY ALAMANAC* (1966). See also W. DOUGLAS, *A WILDERNESS BILL OF RIGHTS* (1965).

<sup>7</sup>A. LEOPOLD, *A SAND COUNTY ALAMANAC* 225 (1966).

Kneese and Bower have issued a timely call to action in a very rational and convincing argument. Though Congress has twice acted<sup>8</sup> since the forerunner of *Managing Water Quality* was published five years ago, the "deterioration in the quality of the environment" is increasing. That makes the clinical message of this book even more disturbing and worth heeding.

ANDREW W. McTHENIA\*

THE ROAD FROM RUNNYMEDE, Magna Carta and Constitutionalism in America. By A. E. Dick Howard. Charlottesville, Virginia: University Press of Virginia. 1968. Pp. xv, 533. \$10.00.

Magna Carta is "an ancestor on the family tree of American constitutionalism—an ancestor who might be surprised to see what his progeny have become," (p. 13) writes A. E. Dick Howard, Professor of Law and Associate Dean at the School of Law of the University of Virginia, in the Prologue of *The Road from Runnymede*. In this highly readable book, the author, who was educated both in England and America and is a teacher of constitutional law, effects a synthesis of more than 750 years of history in 533 pages, accomplishing this no mean feat by the judicious selection of ideas and details from diverse published materials.

Although Magna Carta may be the remote ancestor on the family tree, the most prominent member on the tree is Sir Edward Coke, but for whom, the author implies in his Epilogue, American constitutionalism would never have existed, or, as he indicates, "the present book probably would not have been worth writing." (p. 370).

Were it not for a matter of gender, one would perceive the picture of Sir Edward Coke on the family tree of American constitutionalism as the *other ancestor*, the connection of Magna Carta with Coke being made in 1610 in *Dr. Bonham's Case*.<sup>1</sup> The fruit of this union was born in 1761, being James Otis's argument in the *Writs of Assistance Case* (p. 133-38). This view of the family tree is not original, since John

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<sup>8</sup>The Water Quality Act of 1965, Pub. L. No. 89-234, § 1, 79 Stat. 903, and the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, § 101, 80 Stat. 1246, are both laws of major importance, emphasizing the federal role in enforcement actions and in aiding financially localities in their construction of waste treatment plants.

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<sup>1</sup>P. 18, 121, 136, 137-38, 146, 280, 347.

Adams himself said, sixty years after the event in recommending the *Writs of Assistance Case* as the subject for a play, "Then and there the child Independence was born."<sup>2</sup>

As the author points out, Sir Edward Coke undoubtedly had a profound influence upon American law. His commentaries, including that on *Magna Carta* in his second *Institutes*, and his reports were well known in America during a period when there was a paucity of law books. The first of the *Institutes*, *Coke upon Littleton*, was the mainstay in the education of generations of lawyers, a rather remarkable commentary on their education since the feudal learning in *Littleton* had become about as obsolete by the time Coke wrote his commentary,<sup>3</sup> as the law on *Baron et Feme* is today.

The extent of Coke's influence in the colonies during the seventeenth century is unclear. The earliest documented American reference to Coke, found by Professor Howard, is dated 1647 when the Massachusetts General Court ordered two copies of each of six English legal works: *Coke upon Littleton*, *Coke on Magna Carta*, *Coke's Reports*, *New Terms of the Law*, *Book of Entries*, and Dalton's *Country Justice* (p. 46). Beyond this, though, no connection is established between this action and the significant events of the period leading up to the publication of *Lawes and Liberties of Massachusetts* in 1648.<sup>4</sup> Exact dates, month and day as well as year, would be helpful here in clarifying the events of the period. Available evidence tends to show that Coke's books did not influence these 1648 laws, for the principal compiler, Joseph Hills, in a petition to the General Court said that he perused "all the Statute Laws of England in Pulton at Large, out of which I took all such as I conceived suitable to the condition of this Commonwealth; which with such others as, in my observation, experiences and serious studies I thought needful. . ."<sup>5</sup> One scholar has confirmed that Pulton's *De Pace Regis Et Regni* was the principal source of the 1648 *Lawes* and was even the model for the typographical layout.<sup>6</sup>

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<sup>2</sup>P. 136. 10 WORKS OF JOHN ADAMS 248.

<sup>3</sup>*Les Tenures de Monsieur Littleton* was originally published in London about 1481. Coke's commentary was published in 1628, that is nearly 150 years later. It is little wonder that Thomas Jefferson as a law student of 19 wrote a friend, "I do wish the Devil had old Coke, for I am sure I never was so tired of an old dull scoundrel in my life." P. 130 n.50.

<sup>4</sup>Pp. 35-48; Appendix C.

<sup>5</sup>Quoted in A. WINSHIP, *THE CAMBRIDGE PRESS 1638-1692*, at 106 (1945).

<sup>6</sup>L. Starkey, *A Descriptive and Analytical Bibliography of the Cambridge, Massachusetts Press from its Beginnings to the Publication of Eliot's Indian Bible in 1663*, at 84-90 (1949) (unpublished dissertation in Alderman Library, University of Virginia).

The story is a complex one, but the evidence seems to be overwhelming that the text of Magna Carta, and the ideas contained therein, first reached Massachusetts in the form of English statute books, rather than through the writings of Coke, a possibility that Professor Howard never seems to consider.

Coke's influence in Pennsylvania is better documented, since William Penn was influenced by Coke's commentaries on Magna Carta in developing a plan of government for his American colony. Furthermore, he was responsible for the first American publication of the text of Magna Carta, as a part of *The Excellent Privilege of Liberty and Property Being the Birth-Right of Free-Born Subject of England*. This document contained a commentary on Magna Carta lifted from Henry Care's *English Liberties*, who had himself taken it from Coke.<sup>7</sup> This beginning had considerable influence on later actions by the Pennsylvania General Assembly.

The only other clear instance of Coke reaching colonial America in the seventeenth century is found in an inventory of the library of Arthur Spicer, a Virginian, who died in 1699 leaving a library that included Coke's *Institutes*, a "Table to Cook's Reports," as well as another work on Magna Carta (p. 118).

Undoubtedly, other educated men in the colonies procured, read, and were influenced by works of Coke, but he neither was the exclusive conduit, nor even the earliest one by which Magna Carta ideas reached the American colonists, as Professor Howard would lead the reader to believe, by saying, "What Americans from the first settlements to the eve of Revolution knew of the Great Charter, they knew, with due allowance to Henry Care and others, because of Coke."<sup>8</sup>

American knowledge obtained on American soil of Magna Carta was almost certainly derived from statutory compilations printed in England and sent to this country. The first printing in England of Magna Carta, in Latin, was in 1508, when Pynson issued a small

<sup>7</sup>P. 88.90. Henry Care's work was reprinted in Boston in 1821 from the fifth English edition, the Coke commentary being again included. Evans, American Bibliography No. 2208. It was again reprinted in Providence in 1724. Evans, American Bibliography No. 13,185.

Magna Carta was also mentioned in connection with the discussion of trials by jury in John Hawles, *ENGLISHMAN'S RIGHT; A DIALOGUE BETWEEN A BARRISTER AT LAW AND A JURYMEN*, a 56-page pamphlet first published in England in 1680, and subsequently reprinted several times. There were two eighteenth century reprints in America, one in Boston in 1772, Evans, American Bibliography No. 12,414, and one in Philadelphia in 1798, Evans, American Bibliography No. 33,862.

<sup>8</sup>P. 369. Since Henry Care copied from Coke's *Second Institutes*, the credit remains exclusively with Coke, except for the unidentified "others."

edition of *Antiqua Statuta*, which had previously existed only in manuscript.<sup>9</sup> The first text in English, though only a partial text, was published by Rastell in 1527 in his *Great Abridgment*; twenty-four chapters of Magna Carta being distributed throughout the work under different titles.<sup>10</sup> In 1534 the full English text was published by George Ferrers in *The boke of Magna Carta with divers other statutes whose names appere in the next lefe followynge, translated into Englyshe by George Ferrers*.<sup>11</sup> After that date, Magna Carta was frequently printed in England; Faith Thompson lists nineteen separate printings during the sixteenth century and this listing does not purport to be exhaustive.<sup>12</sup> Any one of these many printings could have been brought to the colonies. It is possible that the text of Magna Carta reached Virginia soon after 1621, the year in which George Thorpe wrote the Virginia Company in London requesting "the newe booke of thabridgment of Statute" along with a couple of other law books and some pikes to fight the Spaniards should they descend on Jamestown.<sup>13</sup> Whether the books were ever sent is not known. Judging by the reception given by the Virginia Company in London to other requests from the colonists, it is doubtful whether they were. In any event, the inventory of the estate of John Kemp, taken on July 22, 1648, and recorded in Lower Norfolk County, shows that he owned "Rastall's abridgmt of ye Statutes."<sup>14</sup>

Thus it seems quite clear that the text of Magna Carta both in Virginia and Massachusetts came to the attention of the American colonists independently of Coke's writings, whatever his influence may have been, once his writings did become available.

By using the Virginia Charter of 1606 as the starting point for the transfer of Magna Carta ideas to America, Professor Howard overrates both the development of constitutionalism and Coke's role therein.

In the first chapter of *Road from Runnymede*, the author discusses "The 'Liberties of Englishmen'" as found in the colonial charters, taking the Virginia Charter of 1606 as being the first. Quoting the provision of the Virginia Charter assuring the inhabitants of the colony that they would enjoy the same liberties, franchises, and immunities

<sup>9</sup>F. THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300-1629*, at 148 (1948).

<sup>10</sup>*Id.* at 149.

<sup>11</sup>*Id.* at 147, n.24.

<sup>12</sup>*Id.* at 400-41.

<sup>13</sup>LIBRARY OF CONGRESS, *RECORDS OF THE VIRGINIA COMPANY* 446, 447 (KINGSBURY ed. 1933).

<sup>14</sup>*Libraries in Colonial Virginia*, 3 WM. & MARY Q. (1st Ser.) 43 (1894). The inventory actually says "Pastall," but this is probably an error for Rastell.

as though they lived in England, Professor Howard says, "The 'liberties, franchises, and immunities' of Englishmen [were] historic words would roll and echo down though the decades of colonial history" (p. 15-16). Furthermore, the author says, "The Virginia Charter of 1606 takes on even greater significance when one considers that the text of the charter may well have been scrutinized by the sometime English Attorney General Edward Coke and by the then Solicitor General, Sir John Dodderidge, and had the Great Seal affixed by Lord Chancellor Ellesmere, three of the greatest English lawyers of their time."<sup>15</sup> Others have gone even farther and said that Coke prepared the Virginia Charter.<sup>16</sup> But whether Coke scrutinized the Virginia Charter or prepared it, the idea was not new and did not originate with Coke. The same idea, in similar language, had become commonplace in similar charters issued before 1606. Letters patent of June 11, 1578, the year Coke was admitted to the bar, issued to Sir Humphrey Gilbert assured to every Englishman and his heirs who went with Gilbert that they would "enjoye all the priviledges of free denizens and parsons natyve of England and within out alleageance in suche like ample manner and fourme as if they were borne and personally resiaunte within our said Realme of England."<sup>17</sup> Similar

<sup>15</sup>P. 18. The significance of Professor Howard's careful phrasing "sometime" Attorney General Coke and "then" Solicitor General Dodderidge may escape the casual reader. At about this time Coke became Chief Justice of Common Pleas. Samuel Bemiss says the charter was drawn while Coke was Lord Chief Justice. S. BEMISS, *THE THREE CHARTERS OF THE VIRGINIA COMPANY OF LONDON* vi (1957). Catherine Drinker Bowen says Coke did not become Chief Justice until early summer 1606 but is unable to explain away a letter written by Coke dated February 2, 1606, saying he was to be made Chief Justice the following week. C. BOWEN, *THE LION AND THE THRONE* 279-80 (1956). It therefore is not really clear whether Coke was Attorney General when the Virginia Charter was drafted, and so the "sometime" means maybe he was and maybe he wasn't.

<sup>16</sup>The assertion seems to derive from a flat statement by Alexander Brown at page 6 of *THE FIRST REPUBLIC IN AMERICA* that the Virginia charter "was prepared by the attorney-general (Sir Edward Coke) and the solicitor-general (Sir John Dodderidge)." Brown gives no supporting authorities, whereas in his carefully documented work, *THE GENESIS OF THE UNITED STATES* (1890), he makes no such statement. Charles M. Andrews, citing no authority, apparently picks up the statement and reasserts it. C. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* 85 (New Haven 1934-37). Professor Philip Kurland of the University of Chicago Law School sanctified the assertion as a part of Magna Carta mythology, again without citation of authority, at the 1965 annual meeting of the American Council of Learned Societies at Harvard commemorating the 750th anniversary of Magna Carta. P. KURLAND, *MAGNA CARTA & CONSTITUTIONALISM IN THE UNITED STATES: THE NOBLE LIE IN The Great Charter* (1965).

<sup>17</sup>*VOYAGES AND COLONIZING ENTERPRISES OF SIR HUMPHREY GILBERT* 191 (Quinn ed. 1940). There is a bit of lost history, or sloppy editing or publishing involved in the fact that the last twenty-one words of this quote were omitted when the document was printed in HAKLUYT, *PRINCIPAL NAVIGATIONS* (1589). *Id.* at 191 n.1.

language is contained in the letters patent granted to Walter Raleigh on March 24, 1584,<sup>18</sup> while Coke was still practicing law, not yet having become a government official. Both these earlier charters also contained provisions requiring colonial laws for the governance of colonists to "be as neare as conveniently maye agreable to the forme of the lawes and pollicies of England."<sup>19</sup>

Sir Edward Coke deserves credit for many things, but any supposed activity in the drafting of the Virginia Charter of 1606 is without evidential support, and even if he were responsible, he cannot be given credit for any new ideas embodied in the Charter, since there were none. Professor Howard seems to be following in the footsteps of the Virginia State Bar, which has laid claim for Virginia as the first landing place in the New World of the common law and Magna Carta, these things being clutched firmly, one would suppose, in the single hand of that one-armed old pirate, Christopher Newport,<sup>20</sup> when he stepped ashore at Cape Henry.

The influence of Coke upon American law in the eighteenth century is impossible to define precisely. Coke's ideas provided ammunition for the colonists in their debate with England, as Professor Howard points out, (p. 133-202) though even here there are opportunities for overstatement. Did James Otis read Coke's report of *Dr. Bonham's Case* in preparation for his argument in the *Writs of Assistance Case* or did he merely pick up a quote and a citation from *Viner's Abridgment*?<sup>21</sup> Rather obviously, during this period an argument based on an unimpeachable English source might be thought to be more effective with England than one springing from some colonial source, and so Coke's words and ideas were frequently used during the pre-Revolutionary period.

Once independence had been decided upon, the Americans appear to have dropped Coke. He apparently goes unmentioned in the internal events leading up to the Declaration of Independence; in the Continental Congress during the Confederation period; in the Federal Convention of 1787; in the state ratifying conventions; and in the First Congress that proposed the amendments that have become known

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<sup>18</sup>1 ROANOKE VOYAGES 86 (Quinn ed. 1955).

<sup>19</sup>1 VOYAGES AND COLONIZING ENTERPRISES OF SIR HUMPHREY GILBERT 192 (Quinn ed. 1940); 1 ROANOKE VOYAGES 87 (Quinn ed. 1955).

<sup>20</sup>P. 23. The text of the plaque erected in 1959 is set forth in full, although its promotion and authorship is erroneously attributed to the Virginia State Bar Association instead of the Virginia State Bar, as is made clear by reference to the illustration of the plaque facing page 47.

<sup>21</sup>2 LEGAL PAPERS OF JOHN ADAMS 127-28 and notes 71-73 (Worth & Zobel, ed. 1965).

as the Bill of Rights. This is not too surprising: he was a representative of the English establishment, from which the Americans had declared their independence.

In his Prologue, Professor Howard says that he set out "to write a kind of biography of a document and the ideas it set loose—the document being Magna Carta, and the most significant idea being constitutionalism" (p. 6). This he has done most ably. That the evidence on which the biography is based is thin is not the author's fault. With the material available, he makes an extraordinarily able case for Magna Carta and for Coke. One caution: the casual reader may sometimes be led to conclude that the author is making categorical statements, while closer attention will show them to be the carefully guarded ones of the good lawyer, the conclusions drawn being those of the reader, not the writer, though perhaps suggested by his felicitous phrasing.

*The Road from Runnymede* is one of the series of Virginia Legal Studies sponsored by the School of Law of the University of Virginia. It is a most welcome addition to that series. It was published by the University Press of Virginia, which is to be commended for the high quality of the format and the printing, being typographically attractive, readable, and pleasing in every respect.

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