THE HIDDEN CHALLENGE OF MAGNA CARTA: A RESPONSE TO THE ADDRESS OF ANTHONY O'HEAR

THE ESTORIL POLITICAL FORM

JUNE 23, 2015

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My thanks to Anthony O'Hear for his thoughtful and learned address. There must be few thinkers in the world as qualified as he to address the topic of our conference. That topic, "Magna Carta today," must be the implicit if not explicit topic of most of this year's round of convocations. When a document turns 800, and still seems somehow worthy of mention, we justly commemorate it. At the same time we justly inquire what in it is worthy of mention, or how it is relevant to our own situation. This inquiry faces special obstacles in the case of Magna Carta.

As one of the three great sacred cows of British history – the others being the Glorious Revolution of 1689 and the much more recent Battle of Britain – Magna Carta creaks under the weight of its own respectability. That it is the oldest and therefore most venerable of these three events further discourages reflection. Unfortunately we are all modern (even those of us given to reflect on the dissatisfactions of that condition) and as such tend to assume that what has happened recently is not only more important but more perfect than what happened long ago. The result, at least in North America, is that while people my age learned to pay lip service to Magna Carta (or to *the* Magna Carta, as we Americans habitually called it) we gained little perspective on what it all meant. We sensed that Magna Carta lurked in the background of our own founding documents, but these had almost completely upstaged it. We were American, not British, and, moreover, modern, not medieval. We really didn't think that we had much to learn from a riotous lot of feudal barons and their ancient grievances. Our own tumultuous history, which issued not only in our Declaration of Independence and our own Constitution and Bill of Rights to say nothing of the momentous developments since, sufficed for us.

The situation in Canada is somewhat different, but not as much as you might suppose. There the Charter of Rights is our mantra, and the new emblem of Canada's independent nationhood, but little attention has been paid to locating it in the context of its predecessors.

This year, to be sure, Magna Carta is being much discussed throughout North America. In Canada, a consortium of private citizens has organized a traveling exhibition, including some ancient copies of the document. One of our leading newspapers has just published a whole week's worth of commentaries on it. South of the border no less a figure than John Roberts, the Chief Justice of the Supreme Court, has made Magna Carta a major project of his, and is participating in international commemorations of

the event. We're not expecting him to grace this one, but then he could not have spoken any better than Anthony O'Hear.

What then is the significance of Magna Carta today? Dr. O'Hear admits that m any of the provisions of that document were so contextual as to be meaningless to us, while other passages (the anti-Jewish ones) are downright embarrassing. In a crucial passage of the document, however – and understandably the one most quoted down through the ages, he sees "a resounding statement of the rule of law in England, perhaps the first such statement anywhere in post classical times." Besides which, Magna Carta limited the payment of taxes by the barons, while making the imposition of new ones subject to consent by a council of the barons themselves. This was the kernel of the eventual key constitutional doctrine that the sovereign could raise taxes only with the consent of parliament. The settlement obtained by the barons was neither liberal nor democratic (nor of course were their concerns), but in these two crucial respects of the rule of law and consent of the governed liberal democratic polities are its heirs. And the vast prestige of Magna Carta (which O'Hear convincingly demonstrates) therefore favored the eventual evolution of liberal democracy in England and throughout the Anglo-Saxon world.

Time doesn't permit me to follow Dr. O'Hear's learned account of Magna Carta's career through subsequent centuries, cleverly organized around a selection of such earlier of its centennials as 1415, 1615, and 1815. I will remark that his discussion of 1615 is of particular interest to North Americans like myself, for he contends that it was the enjoyment by the British colonists of the freedoms guaranteed by Magna Carta that explains why the British project of colonization of America was so much more successful than that of the French, Spanish, or Portuguese. This discussion reminded me of Francis Parkman's introduction of 1882 to his monumental historical cycle on the clash of England and France in America, and indeed of Tocqueville, whom Parkman had certainly read. There is also much good material in his paper on the American Revolution and its debt to Magna Carta.

I will note, however, that Dr. O'Hear being Dr.O'Hear, he proves to be after even bigger game than that so far noted. For while rule of law and the implicit security of property rights are certainly grand enough reasons to commemorate this anniversary of the document, he calls attention to a still grander one. To two of them, actually. One of them emerges under the rubric 1415, the bicentennial of Magna Carta, which was of course the year of the great British victory at Agincourt. From that triumph (or perhaps more precisely from Shakespeare's presentation of it in his *Henry V*) Dr. O'Hear concludes that what we might call the ethos of Magna Carta depends on (as well as reinforcing) a strong spirit of national community. This is a capital point, and I wish to underline it. A living, breathing Magna Carta requires something very different from the European Court of Justice or the International Criminal Court or whatever other bureaucratic entity to which we are likely to entrust the enforcement of so-called human rights today. Shakespeare assigns to his Henry a magnificent speech which while inclusive of all Britons regardless of class and tribe is still a speech of exhortation to them as Britons and in that sense remains exclusive. A living Magna Carta requires pride and therefore the cultivation of national identity; Strasbourg is not its legitimate heir.

Dr. O'Hear's second further point we could describe as philosophical or theological, as the case may be. It relies perhaps not so much on the original document as on the preamble to the version of 1225, whereby King Henry III willingly endorsed a document that had been extorted from his predecessor only through rebellion. From this preamble Dr. O'Hear concludes that Magna Carta clearly implied the existence of a permanent and impersonal standard of liberty and justice, whether grounded in the particular traditions of the British people or in reason or revelation (or, most happily, the concurrence of these last two and of all three). "So in Magna Carta we can identify recourse to a tradition which is older than the deliberations at Runnymede (where it was thrashed out), immemorial even on some accounts, and to a justice – divine justice – which is ontologically superior to any human law-making, and against which human law-making has ultimately to be judged."

There is an obvious problem here, for insofar as Magna Carta rests on distinctively British traditions, it will seem far more contingent (and much less elevated ontologically) than insofar as it rests on either reason or a revelation deemed authoritative for all mankind. Not only are national traditions peculiar to the nations concerned, but their perpetuity is an illusion. Like all historical contingencies, they come into being and pass away. To make, then, the strongest claims for whatever you take to be the core or ethos of Magna Carta, you'd have to raise your sights from British tradition to the metaphysical or theological basis of liberty and justice.

That is something that most contemporary thinkers refuse to do, hostile as they are to metaphysics and theology as such. They might allow that Magna Carta rests on British tradition, but as the only one of the three legs remaining, tradition is insufficient to support the table. A tradition is merely a set of values, no more binding than any other set of values. The great political movements of modernity, including liberalism in its current incarnation, begin by denying the great truth that Dr O'Hear presents as the essential teaching of Magna Carta. Mature modern thought (and not merely its epigone, postmodern thought) is historicist at its core, dismissing the notion that any doctrine can transcend the historical limits of its situation. (This is why modern liberalism, as articulated by such thinkers as Richard Rorty and John Rawls, cannot present even the rights it most cherishes as genuinely universal.)

From the point of view common to modern and postmodern thought, then, Magna Carta is in the essential respect not modern but (just as we'd expect) medieval. In implying a metaphysical or theological basis for justice and liberty, its authors fell prey to a typical premodern delusion.

Dr. O'Hear does not share this typically modern critique: on the contrary he stresses the inadequacy of the pared down modern notion of justice. This last is powerless before (and indeed is prone to promoting) the reign of ideology in modern politics. Ideology invariably claims to be progressive or scientific, rejects the notion of permanent limits on human behavior as obsolete, and brandishes the brightest of futures to discredit any scruples inherited from the past. Rather than defending liberty by vigorously combatting ideology, historicism can usually be found in bed with the latter.

Nothing will be more common in this 800th anniversary year of Magna Carta than to celebrate that venerable document as a cornerstone of British and ultimately of modern liberty. Dr. O'Hear does not dispute this view. Yet as he presents the relationship of modern liberty to Magna Carta as ambiguous.

In rejecting as benighted that document's presumption of a transcendent dimension of liberty, we have thrown out the baby through having mistaken it for the bathwater. Properly interpreted Magna Carta presents not just a comfort but a challenge to us its feckless offpring.

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