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THE MAGNA CARTA AND THE BEGINNING OF MODERN LEGAL THOUGHT

*Vincent R. Johnson**

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I. RELIC OF FEUDALISM

As the Magna Carta, England's Great Charter of Liberties,¹ marks its eighth centennial, it is appropriate to ask what's in it. The answer, it turns out, lives up to the legend. What's in the Magna Carta is the beginning of modern legal thought.

The Great Charter set the expectations that for 800 years have shaped the development of the law in England, America,² and around the globe.³ Like a blazing light piercing the medieval darkness, the Magna Carta illuminated the importance of legal principles, fair procedures, proportional punishment, official accountability, and respect for human

¹ See J.C. HOLT, *MAGNA CARTA* i (3d ed. 2015).

² See James Podgers, *America's Magna Carta*, A.B.A. J., June 2015, at 36, 40.

³ But see Michael Forsythe, *Magna Carta Visits China, But Venue Abruptly Shifts*, N.Y. TIMES, Oct. 15, 2015, at A6 (noting that an exhibit showing a rare copy of the Magna Carta "abruptly moved [from a planned exhibition at a university museum] to the British ambassador's residence, with few tickets available to the public and no explanation given").

dignity. It was unlike any legal document that had ever come before.

A. Rooted in War

The terms of the Magna Carta were negotiated on the battlefield during a cessation in an English civil war between King John and rebellious barons. The document was not intended to articulate enlightened standards for far-flung places or future ages,⁴ but it ended up doing so by focusing on the issues of the day. Those problems included crushing taxation; excessive fines; the freedom of the Church; the rights of widows, children, and heirs; the operation of the courts; the duties of guardians; the rise of French immigrants within English bureaucracy; and the return of hostages.

B. Understandable and Still Important

The more than five dozen clauses in the Magna Carta follow no discernible plan of organization. Many of the provisions are concerned with “feudal incidents”—the incidental rights of lords arising from feudalism’s hierarchical organization of status relationships. However, if one can get past the jumbled arrangement of the material and the unfamiliar terminology, many of the provisions can easily be understood.

More surprising is the fact that the Magna Carta’s text reflects many concerns that are still central today. Considering that eight centuries have passed, and that there are profound differences between the Feudal Age and the Digital Age, these commonalities are remarkable. They suggest that the ancient Magna Carta and modern jurisprudence were “cut from the same cloth.”

⁴ See DAN JONES, *MAGNA CARTA: THE MAKING AND LEGACY OF THE GREAT CHARTER 7* (2014) (few of the promises made by King John concerned themselves with high ideals).

C. The Many Magna Cartas

There were actually many Magna Cartas. The initial version was sealed by King John (reigned 1199–1216) on a small sheet of parchment dated June 15, 1215.

However, the 1215 charter was never implemented and soon became a dead letter. Within three months, King John repudiated the charter. It was also nullified by Innocent III, an able pope, on the ground that it had been extracted by coercion. Thus, the English civil war soon resumed. Fortunately for the charter, roughly a year later, John died of dysentery on October 19, 1216, leaving his nine-year-old son, Henry III, to succeed him. That royal transition changed the course of history for it gave the Magna Carta a second chance.

For political purposes, the Magna Carta of 1215 was resurrected and reissued in a revised form by the new king's advisers. They retained enough of the 1215 charter to appeal to the barons and the masses, but not so much as to seriously hamper the new king.

The original sixty-three clauses of the 1215 charter dwindled to forty in the 1216 Magna Carta. All this was done with lightning speed.

The 1216 charter was just the beginning. All told, Henry III (reigned 1216-72) and his successor, Edward I (reigned 1272-1307), reissued the Magna Carta at least six times. All of these versions differed substantially from the 1215 version. Thus, depending on which Magna Carta is at issue, the relevant date may be 1215, 1216, 1217, 1225, 1265, 1297, or 1300.⁵ Like a comet that appeared by popular demand, the Magna Carta continually re-crossed the dark sky of the thirteenth century.

Until the eighteenth century, "the 1215 and 1225 charters were hopelessly confused."⁶ The 1225 Magna Carta is the one that was eventually set out in the place of greatest honor at the beginning of England's first roll of statutes in 1297.

⁵ See Nicholas Vincent, *Magna Carta: Defeat into Victory*, in *MAGNA CARTA: THE FOUNDATION OF FREEDOM 1215-2015*, at 66, 84 (Nicholas Vincent & Neil Titman eds., 2d ed. 2015).

⁶ See NICHOLAS VINCENT, *MAGNA CARTA: A VERY SHORT INTRODUCTION* 92 (2012).

However, the 1215 Magna Carta is undoubtedly the most famous. That first edition is the one that arose from the dramatic confrontations between King John and the barons that have since been depicted in countless works of art.

In none of the editions of the Magna Carta were the substantive clauses numbered. However, historians inserted numerals into translations for purposes of reference. The numbers and quotations in this Article refer to the sixty-three clauses in the 1215 Magna Carta as translated on the website of the British Library.⁷

II. DECISIONS BASED ON LAWS AND EVIDENCE

The most famous provision is Clause 39 which declares, in language still sparkling with gemlike quality, an unquestionable commitment to legal principles. Clause 39 states:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.⁸

This product of the medieval world seems entirely modern and enlightened.

A. Due Process

Clause 39 arose directly out of King John's abuses. "In some cases John proceeded . . . by force of arms against recalcitrants as though assured of their guilt, without waiting for legal procedure."⁹ In other cases, he attacked his enemies

⁷ *English Translation of Magna Carta*, BRIT. LIBR., <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation> [<https://perma.cc/T9KW-GCRP>] (providing a full-text translation of the 1215 edition of Magna Carta) [hereinafter 1215 Magna Carta]. The text "is available under the Creative Commons License." *Id.*

⁸ *Id.* cl. 39.

⁹ WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 377* (2d ed. 1914).

by subjecting them to "a travesty of judicial process."¹⁰ In some cases, John's "political and personal enemies were exiled, or deprived of their estates, by the judgment of a tribunal composed [not of equals but] entirely of Crown nominees."¹¹ Driven by the King's avarice, the administration of justice was frequently just machinery for enriching the royal treasury.

Clause 39's essential point was clear: John was no longer to take the law into his own hands. Clause 39 has been credited as the first embodiment of the "English idea of due process" and its American progeny.¹²

B. Trial by Jury

The idea of trial by jury is inextricably linked to the Magna Carta. Thus, when American judges cite the Magna Carta in explaining to citizens called for jury duty the importance of their role, it is with this connection in mind.

Clause 39's reference to judgment by one's equals or peers is "what we might think of today as the right to trial by jury."¹³ However, "[w]hether or not the Magna Carta's reference to a judgment by one's peers was a reference to a 'jury' . . . [is] a fact that historians now dispute."¹⁴ As Oxford professor Arthur L. Goodhart has explained,

[T]he word 'judgment' here refers to the preliminary decision concerning the procedure to be adopted at trial, and not a final judgment to be reached in accord with that procedure [T]he first decision was that of the jury of peers while the final decision was reached by methods that seem strange to us [T]he jury of peers . . . determined whether the party should be put to his proof in one of the established ways: ordeal by hot iron or by water, compurgation, wager of law, trial by battle, or production of charter.¹⁵

¹⁰ *Id.*

¹¹ *Id.* at 378.

¹² Hannis Taylor, *Due Process of Law: Persistent and Harmful Influence of Murray v. Hoboken Land & Improvement Co.*, 24 YALE L.J. 353, 354 (1915).

¹³ VINCENT, *supra* note 6, at 4.

¹⁴ *Williams v. Florida*, 399 U.S. 78, 91 n.27 (1970).

¹⁵ ARTHUR L. GOODHART, "LAW OF THE LAND" 19 (1966).

Adherents of this view argue that trial by jury developed only after trial by ordeal gradually fell out of fashion following the Roman Catholic Church's Fourth Lateran Council. That conclave, held in Rome in 1215, forbade the clergy from taking part in judicial ordeals. Regardless of which view is correct, it is certain that Clause 39 contributed to establishing the principle of trial by jury based on relevant evidence.

Interestingly, the Magna Carta contains a second, longer, less well-known provision that deals with a type of jury which had a role to play in resolving certain controversies between King John of England and King Alexander II of Scotland. Clause 59 stated: "With regard to the return of the sisters and hostages of Alexander, . . . his liberties and his rights, . . . [t]his matter shall be resolved by the judgment of his equals in our court."¹⁶ Clause 59 clearly implied that the "equals" would render a final judgment.

C. Evidentiary Support

Clause 38 of the 1215 Magna Carta stated: "In [the] future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it."¹⁷ To modern eyes, this provision seems unsurprising. However, it may have been revolutionary. The provision offered "real protection to the common man" against abuses by arrogant manorial officials.¹⁸

III. ETHICS IN GOVERNMENT

The 1215 Magna Carta contains a trove of anti-corruption provisions. Though framed in terms addressing the realities of thirteenth-century life, those provisions were driven by the same concerns that inspire modern efforts to fight corruption.¹⁹

¹⁶ 1215 Magna Carta, *supra* note 7, cl. 59.

¹⁷ *Id.* cl. 38.

¹⁸ DORIS M. STENTON, *AFTER RUNNYMEDE: MAGNA CARTA IN THE MIDDLE AGES* 12 (1965).

¹⁹ See Vincent R. Johnson, *The Magna Carta and Texas Ethics Reform*, MY SAN ANTONIO (Apr. 5, 2015, 12:00 AM), <http://www.mysanantonio.com/opinion/commentary/article/The-Magna-Carta-and-Texas-ethics-reform-6177987.php> [<https://perma.cc/Z7MV-L44L>].

A. Justice Is Not for Sale

Clause 40 is the shortest and most elegant provision in the Magna Carta. In language that still glows with ethical clarity, it provides, "To no one will we sell, to no one deny or delay right or justice."²⁰

Bribery of the king and his judges, and delays in rendering judgment, had been serious problems in the decades leading up to the barons' rebellion. Clause 40 "has been interpreted as a universal guarantee of impartial justice to high and low."²¹ Today, the principle that justice is not for sale is a cornerstone of the American principles of judicial ethics which broadly prohibit judges from receiving gifts or other things of value from persons whose cases may come before them.

B. Improper Economic Benefit Is Prohibited

Three additional clauses in the 1215 charter were intended, in part, to address other corrupt practices. Clause 28 provided, "No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this."²² Clause 30 stated, "No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent."²³ Further, Clause 31 said, "Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner."²⁴

These provisions were intended to address abuses related to the royal right of purveyance, the prerogative of the king to requisition supplies from the citizenry as the royal court travelled about England, but with an obligation to pay. The problem was that the persons from whom supplies were requisitioned were often not paid, or were paid too little, or were paid too late. Some were compensated in exchequer

²⁰ 1215 Magna Carta, *supra* note 7, cl. 40.

²¹ MCKECHNIE, *supra* note 9, at 398.

²² 1215 Magna Carta, *supra* note 7, cl. 28.

²³ *Id.* cl. 30.

²⁴ *Id.* cl. 31.

tallies, a hated form of currency which could be used only to pay taxes.

The abuses related to the right of purveyance included not only takings to provide for the king's household, but requisitioning by officials for their own personal benefit. Clauses 28, 30, and 31 were intended to address that kind of abuse, too. In doing so, these clauses presaged the development of a broader, fundamental principle of modern government ethics jurisprudence. That principle holds that a government official or employee may not use official power for personal economic benefit.

C. Officials Must Be Accountable

Under anti-corruption principles, public officials and employees must be accountable for corrupt practices. In modern societies, the procedures often involve criminal indictment or impeachment. The Great Charter sought to achieve the same goal by extracting from King John a promise in Clause 55 that a committee of twenty-five barons could hold him accountable, by majority vote, for failure to return all fines unjustly exacted.²⁵ Another provision, Clause 12, greatly limited the king's power to impose unconsented taxation.²⁶ That provision, which was permanently dropped in 1216, foreshadowed the struggle between the Crown and its American colonies more than five centuries later.

IV. INSTITUTIONAL RESPECTABILITY

A just legal system operates in a manner that merits the respect and confidence of the citizenry. The Magna Carta contained several clauses that contributed to this goal.

A. Professional Qualifications and Temperament

It is often taken for granted that judges will be learned in the law. However, even today, this is not always the case. Because judicial qualifications were also problems in medieval

²⁵ *Id.* cl. 55.

²⁶ *Id.* cl. 12.

England, the barons forced King John to promise in Clause 45 that, "We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well."²⁷

B. Judicial Jurisdiction

A corollary principle is the idea that judicial tasks should be performed only by judges. Otherwise, litigants could be harmed by the actions of unqualified judicial interlopers. The barons included as Clause 24 this language, "No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices."²⁸

From a modern perspective, it would be easy to applaud this provision as advancing separation of powers and judicial independence, and avoiding the conflicts of interest that would arise if a sheriff responsible for an arrest was tasked with deciding the guilt of the accused. However, those concepts were not well developed in thirteenth-century England. The most that can be said is that Clause 24 was a useful step toward clarifying judicial jurisdiction.

Clause 34 stated, "The writ called *precipe* shall not in [the] future be issued to anyone in respect of any holding of land, if a free man could thereby be deprived of the right of trial in his own lord's court."²⁹ This provision was drafted against the background of the ongoing struggle that reflected the expanding jurisdiction of the royal courts and the diminishing power of the local feudal courts. Unlike the writ of right, which allowed the royal courts to interfere with the operation of feudal courts only in cases where they had failed to do justice, the writ *precipe* did not require an "allegation of failure of justice but simply ignored the lord's jurisdiction" by ordering the sheriff to command the tenant to deliver disputed land to another or to appear in the royal court to explain his disobedience.³⁰

²⁷ *Id.* cl. 45.

²⁸ *Id.* cl. 24.

²⁹ *Id.* cl. 34.

³⁰ MCKECHNIE, *supra* note 9, at 347.

Jurisdictional disputes between courts are inevitable, but they must be sorted out based on principle. In a world where kings and judges were often bribed, a procedure like the writ *precipe*, by which a “feudal lord . . . was . . . robbed by the King of his jurisdiction,”³¹ invited abuse, and it was important that such a risk be curbed.

C. Accessibility and Transparency

Several provisions in the Magna Carta sought to advance the goals of judicial accessibility and transparency.³² Until the late twelfth century, it was the custom of the royal courts to travel with the king from place to place as he handled the realm’s business. This often forced litigants and observers to traverse great distances and incur substantial expenses in order to participate in court proceedings. To address these issues, Clause 17 provided, “Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.”³³ Though no particular place was named, Westminster was probably intended. However, royal pleas, in which the Crown had a special interest, were treated differently, and continued to travel with the king.

1. Popular Petty Assizes

Henry II, John’s father, had been a legal innovator. Among his reforms were the three petty assizes (trial sessions). These efficient dispute resolution mechanisms proved popular. They quickly resolved questions about who was entitled to possession of real property.

The grievance of the barons was that the petty assizes were too infrequent and inconvenient. To remedy these deficiencies, Clause 18 stated, “Inquests of *novel disseisin*, *mort d’ancestor*, and *darrein presentment* shall be taken only in

³¹ *Id.* at 348.

³² Vincent R. Johnson, *The Great Charter: A Look at the History and Texas Legacy of the Magna Carta, Which Celebrates Its 800th Anniversary This Year*, 78 TEX. B.J. 266, 268 (2015) (noting Clause 40 of the Magna Carta inspired the “open courts” provisions found in many American state constitutions).

³³ 1215 Magna Carta, *supra* note 7, cl. 17.

their proper county court. We . . . will send two justices to each county four times a year . . . ”³⁴

Clause 19 further mandated that, “If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind . . . as will suffice for the administration of justice, having regard to the volume of business to be done.”³⁵

2. Undermining Trial by Combat

Clause 36 provided, “In [the] future nothing shall be paid or accepted for the issue of a writ of inquisition of life or limbs. It shall be given gratis, and not refused.”³⁶ This reform was important because it undermined the system of trial by combat—which sometimes amounted to nothing more than “legalized private revenge.”³⁷

The writ of inquisition allowed certain criminal defendants to avoid, or at least delay, trial by combat while a diversionary procedure played out. If the accused’s neighbors decided that he was innocent, trial by combat was avoided.

The problem during King John’s reign is that the writ of inquisition was used not to save the innocent from the capricious process of trial by combat, but as an important source of revenue. Thus, the writ was sold only to those with deep purses.

Clause 36 which made the writ freely available, moved the legal system toward processes under which decisions would be based on relevant evidence rather than physical might. It also limited the corrupt practices of selling justice only to the wealthy.

D. Prompt Remedies

Six provisions in the Magna Carta demonstrated concern with the timeliness of remedies. The most surprising of these provisions, Clause 48, imposed tight deadlines for the

³⁴ *Id.* cl. 18.

³⁵ *Id.* cl. 19.

³⁶ *Id.* cl. 36.

³⁷ MCKECHNIE, *supra* note 9, at 360.

investigation and abolition of certain “evil” customary practices relating to forests, warrens, and riverbanks.³⁸ Clause 32 stated, “We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the ‘fees’ concerned.”³⁹ Clause 52 established a general principle requiring remedies for violations of rights, but with a significant exception that was applicable if King John was on a Crusade.⁴⁰ Clause 53 applied the “Crusade exception” to the resolution of legal disputes involving forests and certain other matters.⁴¹ There were many such controversies because English kings had appropriated forests for their exclusive use as sources of wealth and recreation, which interfered with ability of commoners to forage for food and fuel. Finally, Clauses 56 and 57 specifically guaranteed that Welshmen were entitled to prompt remedies.⁴²

V. RESPECT FOR HUMAN DIGNITY

The 1215 Magna Carta demonstrated respect for human dignity by addressing proportionality of punishment and the needs of some of the most vulnerable persons.

A. Proportionality

Clause 20 eloquently stated:

For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a villein [a feudal tenant] the implements of his husbandry, if they fall upon the mercy of a royal court.⁴³

³⁸ 1215 Magna Carta, *supra* note 7, cl. 48.

³⁹ *Id.* cl. 32.

⁴⁰ *Id.* cl. 52.

⁴¹ *Id.* cl. 53.

⁴² *Id.* cls. 56, 57.

⁴³ *Id.* cl. 20.

This provision reflected a “humane desire not to reduce a poor wretch to absolute beggary.”⁴⁴ The same proportionality principle was echoed in Clauses 21 and 22 which dealt specifically with earls, barons, and ordained religious.⁴⁵

B. Legal Protection of the Vulnerable

In the feudal world, “much of the sovereign’s revenue came from feudal incidents resulting from the king’s control of persons under disabilities.”⁴⁶

1. Widows and Surviving Children

A widow “could be married at the wish of her feudal overlord to any man willing to pay the going rate.”⁴⁷ However, in rare cases a widow was sufficiently wealthy to be able to outbid suitors and buy a charter from her lord guaranteeing that she would not be forced to remarry. “John did a lively business in payments for the widow’s privilege of remaining single, of remarrying whom she wished, or of keeping control of the lives and fortunes of her minor children.”⁴⁸ The payments, which sometimes included chattels (e.g., hunting animals) as well as money, testified “eloquently to the greed of the King, the anxiety of the victims, and the extortionate nature of the system.”⁴⁹

The charter addressed these deeply resented practices in language so strong that it is something of a landmark in the recognition of women’s rights. Clause 8 states with certainty:

No widow shall be compelled to marry, so long as she wishes to remain without a husband. But she must give security that she will not marry without royal consent, if

⁴⁴ MCKECHNIE, *supra* note 9, at 292.

⁴⁵ 1215 Magna Carta, *supra* note 7, cls. 21, 22.

⁴⁶ State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 118 (W. Va. 1974).

⁴⁷ See GEOFFREY HINDLEY, A BRIEF HISTORY OF THE MAGNA CARTA: THE STORY OF THE ORIGINS OF LIBERTY 167 (2008).

⁴⁸ FRANCES GIES & JOSEPH GIES, WOMEN IN THE MIDDLE AGES 28 (1978).

⁴⁹ MCKECHNIE, *supra* note 9, at 220.

she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of.⁵⁰

This victory for women was qualified. This was only a prohibition against a forced *second* or later marriage, and a woman could not choose to remarry without her lord's consent. Moreover, most widows had no option other than to remarry because there were few career opportunities. The alternatives were to face financial destitution or enter a nunnery.

Clause 8 may have been rooted more in concerns about the reputation and status of noble families, than in solicitude for widows. Such familial concerns are reflected in Clause 6 which provides, "Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be made known to the heir's next-of-kin."⁵¹

At the time of the Magna Carta, "[i]t was customary for a land-owner to bestow marriage portions [of his land] on his daughters."⁵² In addition, it was usual for a new husband to establish a dowry for his wife as they were leaving the altar. If the husband failed to do so, the law stepped in and fixed the dower at one-third of all his lands. The problem for a widow was that "she could only enter into possession [of the land] by permission of the King, who had prior claims and could seize everything."⁵³ To address this problem, Clause 7 provided:

At her husband's death, a widow may have her marriage portion and inheritance at once and without trouble. She shall pay nothing for her dower, marriage portion, or any inheritance that she and her husband held jointly on the day of his death. She may remain in her husband's house for forty days after his death, and within this period her dower shall be assigned to her.⁵⁴

Issues remained relating to personal property, including food and other necessities. Those matters were addressed in Clause 26, which provided limited protection to widows and

⁵⁰ 1215 Magna Carta, *supra* note 7, cl. 8.

⁵¹ *Id.* cl. 6.

⁵² MCKECHNIE, *supra* note 9, at 216.

⁵³ *Id.* at 215.

⁵⁴ 1215 Magna Carta, *supra* note 7, cl. 7.

surviving minor children by making clear that their reasonable shares of a deceased man's estate would not be treated as assets of the estate, except in cases of an unpaid debt to the Crown.⁵⁵

2. Heirs

Clauses 2 and 3 of the 1215 Magna Carta limited the inheritance taxes that could be charged to the male heir of an earl, baron, or other person holding lands directly of the Crown in exchange for military service. Clause 2 capped the amount that would be charged to an heir who had reached majority.⁵⁶ Clause 3 then exempted minor male heirs from any such obligation.⁵⁷

3. Duties of Guardians

Guardians of the property of minors "had always strong inducements to exhaust the soil, stock, and timber, uprooting and cutting down whatever would fetch a price, and replacing nothing."⁵⁸ To protect minor heirs from these abuses, Clause 4 stated, "The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to men or property . . . [and is] answerable to us . . ."⁵⁹

Clause 5 of the 1215 Magna Carta further specified that a guardian

shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. [And w]hen the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the

⁵⁵ *Id.* cl. 26.

⁵⁶ *Id.* cl. 2.

⁵⁷ *Id.* cl. 3.

⁵⁸ MCKECHNIE, *supra* note 9, at 207.

⁵⁹ 1215 Magna Carta, *supra* note 7, cl. 4.

season demands and the revenues from the land can reasonably bear.⁶⁰

4. Debtors

Clause 9 addressed the treatment of debtors. It provided in part, “Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt.”⁶¹ In an agrarian society, this helped to prevent a creditor from taking away a debtor’s livelihood.

VI. EQUAL TREATMENT

The subject on which the Magna Carta is most at odds with modern sensibilities is the issue of equal rights.

A. *Free Men*

Clause 1 clearly signaled that the Magna Carta was a charter of liberties only for free men. It provided, “TO ALL FREE MEN OF OUR KINGDOM we have . . . granted . . . all the liberties written out below”⁶²

In addition, the most important provision in the Magna Carta—Clause 39, which guaranteed legal protection from criminal sanctions—expressly limited its protection to “free m[e]n.”⁶³

However, there was at least a hope that non-free men might receive similar treatment. Clause 60 stated, “All these customs and liberties that we have granted Let all men of our kingdom . . . observe them similarly in their relations with their own men.”⁶⁴

More importantly, Clause 40, the elegant provision on access to justice, did not purport to exclude anyone. It said

⁶⁰ *Id.* cl. 5.

⁶¹ *Id.* cl. 9.

⁶² *Id.* cl. 1.

⁶³ *Id.* cl. 39.

⁶⁴ *Id.* cl. 60.

simply, "To no one will we sell, to no one deny or delay right or justice."⁶⁵

B. Jews in England

Jews in England lent money at high rates. However, they did business only at the mercy of the king, who raked off much of the profits in the form of arbitrary taxes.

The barons, many of whom were debtors, discovered a way to strike at both the money-lenders and John. That cause was the plight of heirs whose fortunes were likely to be depleted by the high interest rates on loans that had been made to the deceased. Clause 10 provided in part, "If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age"⁶⁶

A second clause—framed in terms of the interests of widows and surviving children—struck at the assets often used as security for loans. Clause 11 provided:

If a man dies owing money to Jews, his wife may have her dower and pay nothing towards the debt from it. If he leaves children that are under age, their needs may also be provided for on a scale appropriate to the size of his holding of lands. The debt is to be paid out of the residue⁶⁷

Thus, under Clause 11, a widow's dower lands were beyond the reach of her deceased husband's creditors. In many cases, the effect of this provision was to reduce the security for a loan by one-third. What remained was further reduced by amounts needed to provide necessities for minor children. Historian Paul Johnson has said the "Magna Carta undermined the economic basis of English medieval Jewry."⁶⁸

⁶⁵ *Id.* cl. 40.

⁶⁶ *Id.* cl. 10.

⁶⁷ *Id.* cl. 11.

⁶⁸ See PAUL JOHNSON, *THE OFFSHORE ISLANDERS: ENGLAND'S PEOPLE FROM ROMAN OCCUPATION TO THE PRESENT* 155 (1972).

C. Testimony by Women

The Magna Carta confirmed the existing rule, which held that the testimony of women was in many instances legally insignificant. Clause 54 stated, "No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband."⁶⁹

This clause, which dealt only with cases involving murder, meant that no woman could sue for harm caused by the death of her father, son, or friend, but only the death of her husband. The charter recognized no similar disability in the case of men.

D. Earls and Barons

Earls and barons were extensively insulated from criminal liability by Clause 21, which effectively created a class privilege for the aristocracy. Clause 21 states, "Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence."⁷⁰ The number of earls and barons was small, so it is easy to envision how this provision was conducive to a "conspiracy of silence."

E. Immigrants

One concern of the English barons was the fact that French supporters of King John during his military quests in France had returned with him to England and were promoted to positions of power and authority. To remedy this, King John was forced to promise that they would be dismissed. Thus, Clause 50 launched an *ad hominem* attack against immigrants whose names are now oddly memorialized in the Great Charter, whom the king promised to "remove completely from their offices."⁷¹

F. On Balance

The 1215 Magna Carta was in no sense a model of equal treatment under law. However, it is important to remember

⁶⁹ 1215 Magna Carta, *supra* note 7, cl. 54.

⁷⁰ *Id.* cl. 21.

⁷¹ *Id.* cl. 50.

that the Magna Carta did in fact protect a much wider array of persons and entities than just free men and aristocrats. It recognized the freedom of the church;⁷² the rights of “[a]ll merchants”⁷³ and “any man” to travel;⁷⁴ the liberties, customs, and obligations of cities⁷⁵ and similar entities;⁷⁶ and the interests and needs of hostages⁷⁷ and mercenaries⁷⁸ (in addition to the interests of widows, surviving children, heirs, wards, and persons accused of crime).⁷⁹ Though it did not provide for full equality, the Magna Carta moved legal institutions across the globe closer to the ideal of equal justice under law.

VII. OTHER PROVISIONS

Not every provision in the Magna Carta addressed issues of lasting importance. Many clauses dealt with temporary issues such as feudal obligations⁸⁰ and taxes;⁸¹ intestate

⁷² *Id.* cl. 1 (“[T]he English church shall be free, and shall have its rights undiminished and its liberties unimpaired . . .”).

⁷³ *Id.* cl. 41 (“All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. . .”).

⁷⁴ *Id.* cl. 42 (“[I]t shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. . .”).

⁷⁵ *Id.* cl. 13 (“The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.”).

⁷⁶ *Id.* cl. 25 (“Every county, hundred, wapentake, and tithing shall remain at its ancient rent, without increase, except the royal demesne manors.”).

⁷⁷ *Id.* cl. 49 (“We will at once return all hostages and charters delivered up to us by Englishmen as security for peace or for loyal service.”).

⁷⁸ *Id.* cl. 51 (“As soon as peace is restored, we will remove from the kingdom all the foreign knights, bowmen, their attendants, and the mercenaries that have come to it, to its harm, with horses and arms.”).

⁷⁹ *See supra* Part V.B.

⁸⁰ *Id.* cl. 16 (“No man shall be forced to perform more service for a knight’s ‘fee,’ or other free holding of land, than is due from it.”); *id.* cl. 29 (“No constable may compel a knight to pay money for castle-guard if the knight is willing to undertake the guard in person, or . . . supply some other fit man to do it. . .”); *id.* cl. 43 (“If a man holds lands of any ‘escheat’ such as the ‘honour’ of Wallingford, Nottingham, Boulogne, Lancaster, or of other ‘escheats’ in our hand that are

distribution;⁸² forests⁸³ and rivers;⁸⁴ standardized units of measure;⁸⁵ founders of abbeys;⁸⁶ and pardons.⁸⁷

CONCLUSION

Today, authors are quick to point out that only three of the original sixty-three provisions in the 1215 Magna Carta are still good law in England.⁸⁸ Two of those provisions guarantee the freedom of the English Church and the rights of the City of London. The other deals with the administration of justice, guaranteeing that justice will not be sold or denied, and that persons will be punished only in accordance with the lawful judgment of their equals or the law of the land.

It is not surprising that the other fifty-nine clauses have been repealed. They dealt in specific terms with the problems of a different age. No one would have expected them to last 800 years. The important thing is that the Magna Carta set high

baronies, at his death his heir shall give us only the 'relief' and service that he would have made to the baron, had the barony been in the baron's hand. . . .").

⁸¹ *Id.* cl. 15 ("In future we will allow no one to levy an 'aid' from his free men, except to ransom his person, to make his eldest son a knight, and (once) to marry his eldest daughter. For these purposes only a reasonable 'aid' may be levied.").

⁸² *Id.* cl. 27 ("If a free man dies intestate, his movable goods are to be distributed by his next-of-kin and friends, under the supervision of the Church. The rights of his debtors are to be preserved.").

⁸³ *Id.* cl. 44 ("People who live outside the forest need not in future appear before the royal justices of the forest in answer to general summonses, unless they are actually involved in proceedings . . ."); *id.* cl. 47 ("All forests that have been created in our reign shall at once be disafforested.").

⁸⁴ *Id.* cl. 33 ("All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.").

⁸⁵ *Id.* cl. 35 ("There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russet, and haberject Weights are to be standardised similarly.").

⁸⁶ *Id.* cl. 46 ("All barons who have founded abbeys . . . may have guardianship of them when there is no abbot, as is their due.").

⁸⁷ *Id.* 62 ("We have remitted and pardoned fully to all men any ill-will, hurt, or grudges that have arisen between us and our subjects . . . since the beginning of the dispute. . . .").

⁸⁸ *MAGNA CARTA: LAW, LIBERTY, LEGACY* 221 (Claire Brey & Julian Harrison eds., 2015).

expectations for the development of Anglo-American law⁸⁹ that continue to inspire the reform and administration of justice.

The clarity and succinctness of the 1215 Magna Carta stands in sharp opposition to other legal relics of the same feudal world, such as the intricate organization of the King's courts,⁹⁰ the complex writ system for gaining access to tribunals,⁹¹ the multitudinous forms of action,⁹² the bewildering rules of property law,⁹³ and the Year Books containing cryptic reports of medieval litigation.⁹⁴ In a very real sense, the Magna Carta was the beginning of modern legal thought.⁹⁵

⁸⁹ See Justice Sandra Day O'Connor, *Magna Carta and the Rule of Law*, in RANDY J. HOLLAND, *MAGNA CARTA: MUSE & MENTOR* 7 (2014) (“[I]n the last fifty years the [United States Supreme] Court has cited Magna Carta in more than eighty written opinions.”).

⁹⁰ MCKECHNIE, *supra* note 9, at 270–76 (discussing the Curia Regis, the travelling justices, the Justices of Assize, and the petty assizes).

⁹¹ See Edward Jenks, *The Prerogative Writs in English Law*, 32 *YALE L.J.* 523, 531 (1923) (“According to the well known passage in Bracton’s great work, writs are either (a) original or (b) judicial; ‘originals’ are either (a) patent or (b) close; or they are (a) ‘of course’ or (b) ‘magisterial’; or they are (a) ‘real’ or (b) ‘personal’ or (c) ‘mixed.’” (footnote omitted)).

⁹² See F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 5 (A.H. Chaytor & W.J. Whittaker eds., reprinted ed. 1976) (noting there are “as many forms of action as there are causes of action”).

⁹³ See Philip A. Joseph, *The Environment, Property Rights, and Public Choice Theory*, 20 *N.Z.U. L. REV.* 408, 408 (2003) (“The mixing of English feudal and Roman property law principles produced, for English common law, a complex epistemology that seeks to conciliate two elements: the private and public dimensions of property.”).

⁹⁴ See WILLIAM CRADDOCK BOLLAND, *A MANUAL OF YEAR BOOK STUDIES* 3 (1925) (explaining the books are written in “old Gothic character[s], with its drastic abbreviations” and require readers to have “intimate knowledge of the old law and the old procedure”).

⁹⁵ A different version of this Article appeared in a magazine published by the San Antonio Bar Association. See Vincent R. Johnson, *The Magna Carta and the Expectations It Set for Anglo-American Law*, *SAN ANTONIO LAW.*, Mar.-Apr. 2015, at 5, <http://c.ymcdn.com/sites/sanantoniobar.site-ym.com/resource/collection/A8517B98-12D1-4287-8640-E4709DC69A36/MarApr15SAL.pdf> [<https://perma.cc/X8JJ-Y4UD>].