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## The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015.

Vincent R. Johnson

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## ARTICLE

# THE ANCIENT MAGNA CARTA AND THE MODERN RULE OF LAW: 1215 TO 2015

VINCENT R. JOHNSON\*

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#### ABSTRACT

This article argues the text of the Magna Carta, now 800 years old, and reflects many of the values that are at the center of the modern concept of the Rule of Law. A careful review of its provisions reveals the Magna Carta demonstrates a strong commitment to the resolution of disputes based on rules and procedures that are consistent, accessible, transparent, and fair; and to the development of a legal system characterized by official accountability and respect for human dignity.

## I. FROM FEUDALISM TO THE DIGITAL AGE

The modern Rule of Law is a complex philosophic concept that defines the ideals against which the integrity of “any legal system can be measured.”<sup>1</sup> Although writers differ in their definitions of the Rule of Law,<sup>2</sup> it is generally agreed that legal decisions must be based on rules that are binding on persons regardless of rank. No one—not even a king,<sup>3</sup> a president,<sup>4</sup> or a former governor<sup>5</sup>—is above the law if a legal system is faithful to the Rule of Law. In addition, the Rule of Law demands a legal system be operated in a way that is consistent, accessible, transparent, fair, even-handed,<sup>6</sup> merits public confidence, and respects human dignity.<sup>7</sup>

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1. Vincent R. Johnson & Stephen C. Loomis, *The Rule of Law in China and the Prosecution of Li Zhuang*, 1 CHINESE J. COMP. LAW 66, 76 (2013); *see id.* (“[T]he [R]ule of [L]aw sets goals that are difficult to achieve, and their attainment is never accidental.”).

2. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 114, 119, 122 (2004) (identifying three indispensable components: “[g]overnment limited by law”; “formal legality”; and “[R]ule of [L]aw, not man”); Mortimer N.S. Sellers, *What Is the Rule of Law and Why Is It So Important?*, in 38 IUS GENTIUM: COMPARATIVE PERSPECTIVE ON LAW AND JUSTICE 3, 4 (James R. Silkenat et al. eds., 2014) (“The [R]ule of [L]aw signifies ‘the empire of laws and not of men’: the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper purpose, which is the public good (*res publica*) of the community as a whole.”); Benjamin A. Templin, *Chinese Reverse Mergers, Accounting Regimes, and the Rule of Law in China*, 34 T. JEFFERSON L. REV. 119, 129 (2011) (“The World Bank takes a middle ground approach defining the [R]ule of [L]aw in its World Governance Indicators . . . project as ‘capturing perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.’”).

3. *See* Larry May, *Magna Carta, The Interstices of Procedure, and Guantánamo*, 42 CASE W. RES. J. INT’L L. 91, 101 (2009) (“Even kings, such as King Edward II [1307–1327], would declare that they could not act ‘contrary to Magna Carta and the common law of the realm’ . . .”).

4. *See* James F. McHugh, III, Book Review, 86 MASS. L. REV. 174, 174 (2002) (reviewing RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (2001)) (“President Nixon turned over what he knew were powerfully damning tapes, President Clinton gave his deposition and President Truman returned the [steel] mills. Those events occurred because . . . the principal actors knew that our collective commitment to the [R]ule of [L]aw made any other course unthinkable.”).

5. *See* Vincent R. Johnson, *Rick Perry and the Lessons of the Magna Carta*, SAN ANTONIO EXPRESS-NEWS (Mar. 1, 2015), <http://digital.olivesoftware.com/Olive/ODE/SanAntonioExpressNews/LandingPage/LandingPage.aspx?href=U0FFFTi8yMDE1LzAzLzAx&pageno=NzE.&entity=QXIwNzEwMA..&view=ZW50aXR5> (discussing the prosecution of a former governor of Texas for alleged abuse of office).

6. *See* ANDRÁS SAJÓ, CONSTITUTIONAL SENTIMENTS 51 (2011) (describing the Rule of Law as “at least partly” a “fairness-related neutral constitutional value”).

7. “The American concept of the Rule of Law is complex.” Vincent R. Johnson, *The Rule of Law and Enforcement of Chinese Tort Law*, 34 T. JEFFERSON L. REV. 43, 80 (2011). Discussing U.S. Supreme Court precedent, the article states:

[T]he Rule of Law demands that a legal system: operate transparently and consistently based on neutral principles which manifest due concern for the correctness of decisions; provide fair notice of what the law requires and treat all persons equally; hold governmental actors and

### A. *Text Versus Interpretation*

As the Magna Carta<sup>8</sup> (England's Great Charter of Liberties)<sup>9</sup> marks its eighth centennial, it is appropriate to ask whether the key themes of modern Rule of Law jurisprudence are expressed in the text of that landmark document. Certainly, it would be possible to argue, regardless of the specific language, the Magna Carta catalyzed legal developments in England,<sup>10</sup> the United States,<sup>11</sup> and other countries,<sup>12</sup> which ultimately led to the robust contemporary support the Rule of Law now enjoys.<sup>13</sup>

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private individuals accountable for their misconduct; and merit public respect through practices which manifest an essential respect for human dignity.

*Id.*

8. *English Translation of Magna Carta*, BRIT. LIBR., <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (last visited Nov. 15, 2015) (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.*

9. The Latin term "Magna Carta" translates as "great charter." J.C. HOLT, *MAGNA CARTA* app. 6, at 441 (2d ed. 1992). An alternate spelling is "Magna Charta." See, for example, Chas. D. Turner, *Magna Charta*, 4 TEX. L. REV. 46 (1925).

10. For example, the Magna Carta contains no language prohibiting cruel and unusual punishments. However, it has been said "[t]he [English] Declaration of Rights' prohibition on cruel and unusual punishments was drawn originally from the Magna Carta, which 'required that the amercement [or financial penalty] imposed on a criminal not . . . exceed the severity of his crime.'" John Niland & Riddhi Dasgupta, *Texas Law's "Life or Death" Rule in Capital Sentencing: Scrutinizing Eighth Amendment Violations and the Case of Juan Guerrero, Jr.*, 41 ST. MARY'S L.J. 231, 273 (2009) (quoting James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551, 552 (2004)).

11. See DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA, at XII (Touchstone ed. 2004) (2003) (indicating the authors of the American Declaration of Independence "professed to have read Magna Carta before they put pen to paper"). See Appendix A (containing a resolution passed by the Texas House of Representatives to celebrate the 800th anniversary of the Magna Carta and its positive impact on the law of Texas).

12. See The Rt. Hon. Lord Bingham of Cornhill, Lord Chief Justice of England, *Foreword to the Revised Edition of A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY*, at v (Univ. Press of Va. rev. ed. 1998) (1964) ("The Charter was to transform constitutional thinking not only in the land of its birth but also in the United States, Canada, India, and vast areas of the world which learned from their example."); Dominic DiFruscio, *Patriation, Politics and Power: The State of Balance Between the Supreme Court and Parliament After Thirty Years of the Charter*, 8 J. PARLIAMENTARY & POL. L. 29, 33 n.23 (2014) ("[T]he signing of the *Magna Carta* appears to be the foundational moment for establishing the separation of powers that is now practiced in most Commonwealth countries."). But see Michael Forsythe, *Magna Carta Exhibition in China Is Abruptly Moved from University*, N.Y. TIMES (Oct. 14, 2015), [http://www.nytimes.com/2015/10/15/world/asia/china-britain-magna-carta-renmin-university.html?\\_r=0](http://www.nytimes.com/2015/10/15/world/asia/china-britain-magna-carta-renmin-university.html?_r=0) (reporting that a planned exhibition of an original thirteenth century Magna Carta was "abruptly moved [from a Beijing university museum] to the British ambassador's residence, with few tickets available and no explanation given," and that "[t]he Chinese characters for 'Magna Carta' are censored in web searches on Sina Weibo, the country's Twitter-like social media site").

13. See LARRY MAY, *GLOBAL JUSTICE AND DUE PROCESS* 28–29 (2010) ("What transpired over the centuries after Magna Carta was 'the long slow progression toward the "[R]ule of [L]aw.'");

However, it is a different and more difficult question to ask whether the Magna Carta's provisions themselves expressly demonstrate concern for, or commitment to, decision-making based on legal rules and processes that are consistent, accessible, transparent, fair, even-handed, and inspired by fidelity to institutional respectability and official accountability.

The answer to this question depends on a careful examination of the language of the Magna Carta. It is not enough to assume, as many have, that there must be support for every important legal concept in the text of the Great Charter.<sup>14</sup> Writing a century ago, Professor William Sharp McKechnie (1863–1930), the eminent Glasgow scholar, lamented that Sir Edward Coke (1552–1634), the greatest jurist of the Elizabethan and Jacobean eras,<sup>15</sup> “mislead generations of commentators” by “following his vicious method of assuming the existence, in Magna Carta, of a warrant for every legal principle of his own day.”<sup>16</sup>

Some important rights and liberties can be found nowhere in the Magna Carta text.<sup>17</sup> However, as time passed, those propositions have been read back into the Charter, or linked to the Charter through interpretation or historical accident. For example, the Magna Carta says nothing about the writ of habeas corpus<sup>18</sup> and indeed very little about criminal procedure.<sup>19</sup>

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*see also* SAJÓ, *supra* note 6, at 47 (“[T]he [R]ule of [L]aw . . . [is] endorsed, or at least not rejected emotionally by an overwhelming majority [of the members of society] . . .”).

14. *See, e.g.*, David Clark, *The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law*, 24 MELB. U. L. REV. 866, 868 (2000) (“[C]hiefly ‘sentimental value’ has inspired both litigants and judges to attribute to it all manner of legal phenomena that are not warranted by the historical evidence.”).

15. *See* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, at xiii (Steve Sheppard ed., 2003) (“Coke’s influence was great at a pivotal moment in English and American history.”); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 167 (4th ed. 2002) (highlighting Sir Edward Coke’s “reputation as the greatest lawyer of the time”); Edgar A. Hahn, *Edward Coke*, in 14 ROWFANTIA, AN OCCASIONAL PUBLICATION OF THE ROWFANT CLUB 9, 9 (1949) (“Although Coke was essentially a lawyer and not a historian, the importance of his contribution to a critical understanding of English history must not be underestimated.”).

16. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 385 (2d ed. 1914); *id.* at 381 (discussing how Coke found that the Magna Carta required a grand jury and prohibited proceedings under martial law).

17. *See id.* at 394 (discussing the erroneous theory that holds the Magna Carta prohibits “the Crown from making arrests without a warrant showing the cause of detention”); *see generally* GEOFFREY HINDLEY, A BRIEF HISTORY OF THE MAGNA CARTA: THE STORY OF THE ORIGINS OF LIBERTY (2008) (noting a lack of express legal rights for women in medieval Europe).

18. *See* DANIEL JOHN MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 5 (1966) (“The charter . . . says nothing about the writ of habeas corpus.”); *id.* (“Habeas corpus can be followed back through time as far, and indeed a bit farther, but along an entirely different stream.”).

19. *Cf.* *Albright v. Oliver*, 510 U.S. 266, 302 (1994) (Stevens, J., dissenting) (“As we explained in . . . [*Hurtado v. California*, 110 U.S. 516 (1884)] ‘bulwarks’ of protection such as the Magna Carta and the Due Process Clause ‘guarantee not particular forms of procedure, but the very substance of

However, it has long been maintained that the rights to legally challenge unlawful detention and unfair criminal procedures are implicit in the charter's guarantee that a person accused of crime is protected from adverse consequences, "except by the lawful judgment of his peers or by the law of the land."<sup>20</sup> This is an enlightened reading of that famous provision, well justified by public policy and subsequent legal history. However, it cannot be said the text of the Magna Carta expressly recognized a right to habeas corpus<sup>21</sup> or requires specific procedures (such as cross-examination, a particular standard of proof, or a given number of jurors) in criminal cases. In contrast, on many other subjects, the Magna Carta was specific. For example, it defined with precision—in pounds and schillings—the maximum amount of certain payments that were owed to the Crown.<sup>22</sup>

### B. *Rooted in War and Status Relationships*

As a legal icon, the Magna Carta is more frequently invoked than read.<sup>23</sup> This is not surprising, for even the best translations of the Magna Carta's medieval Latin text present obstacles to comprehension.<sup>24</sup> Many of the provisions in the Magna Carta are concerned with "feudal incidents"<sup>25</sup>—the incidental rights of lords arising from feudalism's

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individual rights to life, liberty, and property.").

20. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1089 n.47 (1995) (citing 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 104 (3d ed. 1944, reprinted 1966)). "Over several centuries, habeas corpus developed to require that such detention be justified by law, rather than mere personal whim." *Id.* at 1089. "Four hundred years later, the Commons held that the writ of habeas corpus was directly derived from the Magna Carta." *Id.* at 1089 n.47 (citing WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 45 (1980)).

21. See MEADOR, *supra* note 18, at 5 (observing the Magna Carta does not mention a right to habeas corpus).

22. See 1215 Magna Carta, *supra* note 8, at cl. 2 (providing for an inheritance tax of 100 pounds in the case of an earl and not more than 100 schillings in the case of a knight).

23. See NICHOLAS VINCENT, MAGNA CARTA: A VERY SHORT INTRODUCTION 2 (2012) ("[M]ore often appealed to than actually read.')

24. Cf. 1215 Magna Carta, *supra* note 8 ("The precise meaning of a few clauses is still uncertain.')

25. See *Daniel v. Whartenby*, 84 U.S. 639, 642 (1873) (explaining the feudal system favored "the taking of estates by descent rather than by purchase, because in the former case the rights of wardship, marriage, relief, and other feudal incidents attached, while in the latter the taker was relieved from those burdens"). Feudal incidents were a great factor in shaping the development of the law. See *In re Estate of Lichtenstein*, 247 A.2d 320, 337 (N.J. 1968) (noting the doctrine of worthier title reflected the "greater advantage in feudal incidents thereby accruing to the lord of the manor"); see also *Edwin Smith, LLC v. Synergy Operating, LLC*, 2012-NMSC-034, ¶ 13, 285 P.3d 656 ("[J]oint tenancies emerged in part 'to avoid the feudal incidents triggered by the death of a tenant,' that is, to benefit tenants rather than feudal lords by reducing the tenants' obligations to their

hierarchical organization of status relationships.<sup>26</sup> Thus, the document is freighted with references to unfamiliar concepts, such as “scutage,”<sup>27</sup> “aid,”<sup>28</sup> “relief,”<sup>29</sup> “escheat,”<sup>30</sup> “disafforested” land,<sup>31</sup> “fee-farm,”<sup>32</sup>

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lords.”).

26. See VINCENT, *supra* note 23, at 14 (underscoring the “the ‘incidental’ consequences of lordship”); see also Turner, *supra* note 9, at 46–47 (describing the feudal system).

27. Clause 14 states:

To obtain the general consent of the realm for the assessment of an ‘aid’—except in the three cases specified above—or a ‘scutage,’ we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.

1215 Magna Carta, *supra* note 8, at cl. 14. See *Scutage*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining scutage as “[a] monetary payment levied by the [K]ing on barons as a substitute for some or all of the knights to be supplied to the [K]ing by each baron”).

28. Clause 12 states:

No ‘scutage’ or ‘aid’ may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable ‘aid’ may be levied. ‘Aids’ from the city of London are to be treated similarly.

1215 Magna Carta, *supra* note 8, at cl. 12. See *Aid*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining aid as “[a] subsidy or tax granted to the [K]ing for an extraordinary purpose” or “[a] benevolence or tribute (i.e., a sum of money) granted by the tenant to his lord in times of difficulty and distress,” and noting that “[o]ver time, these grants evolved from being discretionary to mandatory”).

29. Clause 2 states:

If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a ‘relief,’ the heir shall have his inheritance on payment of the ancient scale of ‘relief[.]’ That is to say, the heir or heirs of an earl shall pay £100 for the entire earl’s barony, the heir or heirs of a knight 100s. at most for the entire knight’s ‘fee,’ and any man that owes less shall pay less, in accordance with the ancient usage of ‘fees.’

1215 Magna Carta, *supra* note 8, at cl. 2. Clause 43 states:

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 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. We will hold the ‘escheat’ in the same manner as the baron held it.

*Id.* at cl. 43. See *Relief*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining relief as “[a] payment made by an heir of a feudal tenant to the feudal lord for the privilege of succeeding to the ancestor’s tenancy”).

30. See 1215 Magna Carta, *supra* note 8, at cl. 43 (discussing how escheat passes to the heirs); see also *Escheat*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining escheat as “[t]he reversion of land ownership back to the lord when the immediate tenant dies without heirs”).

31. See 1215 Magna Carta, *supra* note 8, at cl. 47 (“All forests that have been created in our reign shall at once be disafforested. River-banks that have been enclosed in our reign shall be treated



“socage,”<sup>33</sup> and “burgage.”<sup>34</sup> Unfortunately, many of these references occur at the beginning of the Charter and are likely to discourage the less than fully determined reader from going further.

Even when the Magna Carta is read today, it is inevitably viewed with modern eyes and with the benefits of hindsight. Thus, some writers argue “the framers of [the] Magna Carta had grasped the essentially modern principle that taxation and representation ought always to go together” and the framers should be given “credit for anticipating the best features of modern parliamentary government.”<sup>35</sup> However, other scholars disagree<sup>36</sup> and remind readers one must be careful not to attribute to the genius of the charter’s drafters later institutions that the original drafters would have found unrecognizable.

The terms of the Magna Carta were negotiated on or near the battlefield during a cessation in an English civil war<sup>37</sup> between King John and rebellious barons. The barons had been driven to the breaking point by John’s abusive practices<sup>38</sup> and similar actions by his predecessors.<sup>39</sup>

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similarly.”); *id.* at cl. 53 (discussing the rendering of justice in connection with disafforested lands and lands maintained as forests). “To *disafforest* meant to remove from royal jurisdiction; it did not mean to clear-cut timber or destroy the trees.” PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL* 31 (2008).

32. Clause 37 states:

If a man holds land of the Crown by ‘fee-farm,’ ‘socage,’ or ‘burgage,’ and also holds land of someone else for knight’s service, we will not have guardianship of his heir, nor of the land that belongs to the other person’s ‘fee,’ by virtue of the ‘fee-farm,’ ‘socage,’ or ‘burgage,’ unless the ‘fee-farm’ owes knight’s service. We will not have the guardianship of a man’s heir, or of land that he holds of someone else, by reason of any small property that he may hold of the Crown for a service of knives, arrows, or the like.

1215 Magna Carta, *supra* note 8, at cl. 37. See *Fee Farm*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining fee farm as “[a] species of tenure in which land is held in perpetuity at a yearly rent (fee-farm rent), without fealty, homage, or other services than those in the feoffment”).

33. See 1215 Magna Carta, *supra* note 8, at cl. 37 (discussing socage); see also *Socage*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining socage as “[a] type of lay tenure in which a tenant held lands in exchange for providing the lord husbandry-related (rather than military) service”).

34. See 1215 Magna Carta, *supra* note 8, at cl. 37 (discussing burgage); see also *Burgage*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining burgage as “[a] type of socage tenure in which tenants paid annual rents to the lord of the borough”).

35. MCKECHNIE, *supra* note 16, at 249; see also 1215 Magna Carta, *supra* note 8, at cl. 12, 14 (discussing taxation).

36. See, e.g., MCKECHNIE, *supra* note 16, at 249 (“The text, however, will scarcely bear so liberal an interpretation.”).

37. The war began on May 5, 1215 when the barons renounced their fealty. DANZIGER & GILLINGHAM, *supra* note 11, at 249. The terms of the Magna Carta were finalized on June 15, 1215. *Id.* at 250. The barons “renewed their homage to the king” four days later “and peace was proclaimed.” *Id.* “[W]ar broke out again within three months . . .” *Id.* at 251.

38. See VINCENT, *supra* note 23, at 70 (“[King John’s] reign had been scarred by hostage-taking, allegations of rape, and the murder of prisoners.”).

In contrast, for example, to the United Nation's Universal Declaration of Human Rights,<sup>40</sup> the Magna Carta was not issued as a document intended to articulate enlightened standards for far-flung places or future ages. Rather, when King John sealed it in 1215, the Charter was focused on pressing problems in feudal England.<sup>41</sup> Those troubles included crushing taxation;<sup>42</sup> excessive fines;<sup>43</sup> the freedom of the Church;<sup>44</sup> the rights of widows, minor children, and heirs;<sup>45</sup> the operation of the courts;<sup>46</sup> the duties of guardians;<sup>47</sup> the rise of French immigrants within English bureaucracy;<sup>48</sup> and the hostages taken during the civil war.<sup>49</sup> As McKechnie explains, "[t]he object of the barons was to protect themselves

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39. See *id.* at 24–25 (“[T]he government of Henry II and his sons was founded upon extortion . . . .”); Hannis Taylor, *Due Process of Law*, 24 YALE L.J. 353, 358 (1915) (“What with feudal incidents and scutages and indiscriminate fines, so heavy in amount that they could only be paid by installments, a large proportion of Englishmen must have been permanently indebted to the Crown.”).

40. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). “The [Universal] Declaration [of Human Rights] . . . adopted in 1948 . . . has gradually evolved into the Magna Carta of the international human rights movement.” Thomas C. Buerghental, *The Human Rights Revolution*, 23 ST. MARY’S L.J. 3, 7 (1991). See also ARTHUR L. GOODHART, “LAW OF THE LAND” 4 (A.E. Dick Howard ed., 1966) (“[T]he Charter was not a simple declaration of certain general principles such as were the French Declaration of the Rights of Man . . . .”).

41. See GOODHART, *supra* note 40, at 4 (asserting the charter was focusing on the troubles happening between King John and his barons in 1215).

42. See Turner, *supra* note 9, at 52 (discussing how King John greatly increased taxation to support wars of conquest in France).

43. See 1215 Magna Carta, *supra* note 8, at cl. 14 (detailing the process of assessment or scutage). After the Norman Conquest, the problem of excessive discretionary fines (amercelements) in criminal cases became “prevalent” in England. Niland & Dasgupta, *supra* note 10, at 273; see also MCKECHNIE, *supra* note 16, at 455 (quoting William Stubbs’s assertion that John’s “system of fines . . . was elaborated into that minute and grotesque instrument of torture which all the historians of the reign have dwelt on in great detail”).

44. 1215 Magna Carta, *supra* note 8, at cl. 1, 63 (declaring the English church will be free). A continuing area of controversy concerned the selection of bishops. It was important to the English kings to have a major say in who they were to be. ROBERT E. RODES, JR., *ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND: THE ANGLO-SAXONS TO THE REFORMATION* 129 (1977); see also Turner, *supra* note 9, at 48 (discussing the controversy over Stephen Langton’s appointment by Pope Innocent III as archbishop of Canterbury).

45. See discussion *infra* Section V.B.

46. See discussion *infra* Part II.

47. See 1215 Magna Carta, *supra* note 8, at cl. 4 (prohibiting guardians of the land from engaging in certain practices); *id.* at cl. 5 (specifying duties of guardians); *id.* at cl. 37 (restricting the King’s role in guardianship).

48. See RALPH V. TURNER, *MAGNA CARTA: THROUGH THE AGES* 21 (2003) (“[A]lien mercenaries who had fled Normandy with John in 1204 became royal favourites . . . .”).

49. See 1215 Magna Carta, *supra* note 8, at 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.”); *id.* at cl. 58 (“We will at once return the son of Llywelyn, all Welsh hostages, and the charters delivered to us as security for peace.”).

and their friends against the King, not to set forth a scientific system of jurisprudence.”<sup>50</sup>

### C. *Readable and Understandable*

The more than five dozen clauses in the Magna Carta follow no discernible plan of organization, and some of the most important provisions are buried deep within the document. However, if one can get past the jumbled arrangement of the material and the arcane references to feudalism, many of the provisions are eminently readable and can be easily understood. This alone makes the Great Charter an intellectual landmark. Its clarity and succinctness stand in sharp opposition to other legal relics of the same feudal world, such as the intricate organization of the King's courts,<sup>51</sup> the complex writ system for gaining access to tribunals,<sup>52</sup> the multitudinous forms of action,<sup>53</sup> the bewildering rules of property law,<sup>54</sup> and the Year Books containing cryptic reports of medieval litigation.<sup>55</sup>

Even more surprising is the fact that, despite the Magna Carta's focus on the legal, political, and social issues of the early thirteenth century, its text reflects many of the concerns that are central to today's understanding of the Rule of Law. 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 Rule of Law jurisprudence were, in a phrase, cut from the same cloth or animated by the same intellectual DNA. Upon reading

50. MCKECHNIE, *supra* note 16, at 382 (summarizing the scope of protection against the King).

51. *See id.* at 270–76 (discussing the *Curia Regis*, the travelling justices, the Justices of Assize, and the petty assizes).

52. *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)).

53. *See* F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 5 (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press reprint ed. 1976) (1909) (noting there are “as many forms of action as there are causes of action”).

54. *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.”).

55. *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”); Percy H. Winfield, *Abridgments of the Year Books*, 37 HARV. L. REV. 214, 214 (1923) (“[T]he very language . . . [is] unfamiliar to many lawyers.”); J.H. Beale, *Book Review*, 29 HARV. L. REV. 887, 893 (1916) (“[T]he learning is obsolete, the facts undramatic.”).

the Magna Carta, one finds that the ancient document lives up to the legend. The Magna Carta is where modern legal thought began.

#### D. *The Many Magna Cartas*

Many persons have heard of the Magna Carta, but few are aware that there were many Magna Cartas. King John (reigned 1199–1216) sealed the initial version on parchment dated June 15, 1215.<sup>56</sup> That document, which dealt with many subjects of great public interest, was widely published through readings across England.<sup>57</sup> Consequently, according to historian Doris M. Stenton:

Much of the awe and romance which through the ages has come to surround the Great Charter was already in the ears and eyes of those who first heard its terms proclaimed and saw in the hands of the King's officer the actual document sealed with the King's great seal.<sup>58</sup>

The Magna Carta was not a secret treaty or an abstruse legal document. Indeed, its terms were quickly and openly announced to the public. In the “hectic weeks after the sealing of the Charter,” during a hiatus in the civil war, “knowledge of its terms was driven home to the people by proclamation throughout the land.”<sup>59</sup>

However, the 1215 Charter was never implemented in any important respect, and soon became a dead letter.<sup>60</sup> Within three months, King John had repudiated the charter.<sup>61</sup> Innocent III,<sup>62</sup> “one of the ablest

56. See VINCENT, *supra* note 23, at 72 (“The date of the charter, 15 June, is now generally accepted as that on which the first copy of the charter was sealed, although the process of issue took several weeks thereafter . . .”).

57. See DORIS M. STENTON, *AFTER RUNNYMEDE: MAGNA CARTA IN THE MIDDLE AGES* 9 (1965) (“[R]oyal orders were addressed, not only to all the sheriffs, but to all the King's foresters, warreners, keepers of river banks, and bailiffs, commanding that the Charter ‘should be publicly read . . .’”; *id.* at 9–10 (“It is impossible to believe that this long document was read aloud in the shire courts in Latin. People would have rioted. They were too keenly interested . . . [in] hearing and understanding . . . in their own mother tongue.”); see also VINCENT, *supra* note 23, at 72 (“[C]opies, perhaps as many as forty, were . . . sent out to be proclaimed in the individual English county courts.”).

58. STENTON, *supra* note 57, at 10.

59. *Id.* at 16.

60. See DANZIGER & GILLINGHAM, *supra* note 11, at 267 (describing the Magna Carta as an “abysmal failure,” which was “surely dead” by the end of 1215).

61. See G.R.C. DAVIS, *MAGNA CARTA* 13–14 (Brit. Libr. 12th ed. 1999) (indicating the 1215 Magna Carta went into effect in mid-June, and notice of its nullification by the Pope was received by the end of September through a letter dated August 24 and 25).

62. See Robert Swanson, *Papal Monarchy: 1085–1431*, in *THE PAPACY* 80, 85 (Michael Walsh ed., 1997) (noting that with “one of the most significant pontificates in papal history,” Innocent III, “[u]ntil his death in July 1216, . . . appear[ed] as the dominant individual in Europe”).

popes,"<sup>63</sup> nullified it on the grounds it had been extracted by coercion.<sup>64</sup> Thus, the English civil war soon resumed.<sup>65</sup> Fortunately, roughly a year into the renewed fighting, King John died of dysentery on October 19, 1216,<sup>66</sup> leaving his nine-year-old son, Henry III, to succeed him.<sup>67</sup> That royal transition changed the course of world history for it gave the Magna Carta a second chance.

For political purposes,<sup>68</sup> the Magna Carta of 1215, which had been scorned by King John and reviled by the Pope, was resurrected and reissued in a revised form by the new King's advisors.<sup>69</sup> Their goal was to make peace with the barons and drive the barons' French allies back across the Channel.<sup>70</sup> To accomplish this objective, the King's advisors decided to retain enough of the 1215 Charter to appeal to the barons and the masses, but not so much as to seriously hamper the new king.<sup>71</sup>

The original sixty-three clauses of the 1215 Charter dwindled to forty in the 1216 Magna Carta, with a text equivalent of almost 4,600 English words in 1215 reduced to about 3,100 words in 1216.<sup>72</sup> To the great credit of the young King's advisors, who acted forthrightly, almost all of the deletions<sup>73</sup> were fully identified in a clause of the 1216 Charter, which

63. DANZIGER & GILLINGHAM, *supra* note 11, at XIV.

64. See VINCENT, *supra* note 23, at 81 (listing one of the reasons for annulment as "because extracted by force"); see also STENTON, *supra* note 57, at 9 ("By a letter dated August 24, 1215, at Anagni [east of Rome], the Pope solemnly annulled it. . . . [T]his news reached England near the end of September . . .").

65. See VINCENT, *supra* note 23, at 81 ("By 17 September, the [K]ing was once again ordering the seizure of rebel lands . . . . Peace dissolved into civil war.").

66. STENTON, *supra* note 57, at 20.

67. VINCENT, *supra* note 23, at 81.

68. See DANZIGER & GILLINGHAM, *supra* note 11, at 261 (asserting the reissuing of the Magna Carta of 1215 was a highly effective "propaganda move").

69. See RICHARD THOMSON, AN HISTORICAL ESSAY ON THE MAGNA CARTA OF KING JOHN cl. 62, at 116 (London, John Major & Robert Jennings 1829).

[B]ecause we have not as yet any seal, we have caused the present Charter to be sealed with the seals of our venerable father the Lord Gualo, Cardinal Priest by the title of Saint Martin, Legate of the Apostolic See; and of William Marshal Earl of Pembroke, the guardian of us and of our kingdom, at Bristol the twelfth day of November, in the first year of our reign.

*Id.*

70. "It was not until 11 September 1217 that France and England made peace . . ." LINEBAUGH, *supra* note 31, at 36.

71. See STENTON, *supra* note 57, at 17 ("The omitted provisions were in the main those which might have hampered the men responsible for recovering his kingdom for the young King.").

72. See VINCENT, *supra* note 23, at 4 (establishing "nearly one-third" of the 1215 Magna Carta's words were "either dropped or substantially rewritten within the first ten years of its existence").

73. *But see* STENTON, *supra* note 57 at 17 (admitting "[n]o mention was made of the [deletion of the] arrangements, so offensive to the King, by which the barons had tried to secure the royal observance of the Charter in the previous year ([Clause] 61)," which called for enforcement by

indicated that those provisions dealt with matters that were “weighty and doubtful” and required further study.<sup>74</sup> All this was done with lightning speed. “King John died on October 19; his son was crowned on the other side of England on October 28; [and] the [new] Charter [was] dated on November 12, in the same year 1216.”<sup>75</sup>

The 1216 reissuance was just the beginning of a new life for the resurrected Charter. All told, Henry III (reigned 1216–72) and his successor, Edward I (reigned 1272–1307), reissued the Magna Carta at least six times.<sup>76</sup> All of the reissued versions differed substantially from the 1215 Charter.<sup>77</sup> Thus, depending on which Magna Carta is at issue, the relevant date may be 1215, 1216, 1217, 1225, 1265, 1297, or 1300.<sup>78</sup> Like a comet that appeared by popular demand, the Magna Carta continually pierced the dark sky of the thirteenth century.

Until the eighteenth century, “the 1215 and 1225 charters were hopelessly confused.”<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> The 1215 Charter contained all of the provisions for which the Magna Carta has become famous. Importantly, in the later versions of the Magna Carta, “the legal and administrative clauses of 1215 were preserved.”<sup>82</sup>

In none of the editions of the Magna Carta were the substantive clauses

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twenty-five barons).

74. THOMSON, *supra* note 69, at 115–16. Many of the matters in question never reappeared in legal form, although some did.

75. STENTON, *supra* note 57, at 20.

76. See VINCENT, *supra* note 23, at 87 (listing dates of the reissues).

77. See DAVIS, *supra* note 61, at 9 (acknowledging the excisions and alterations between each reissue of the Magna Carta).

78. See NICHOLAS VINCENT, *A BRIEF HISTORY OF BRITAIN 1066–1485*, at 298 (2011) (“The 1297 reissue was in effect [the] Magna Carta’s swan song . . . granted one final outing in 1300 (reissued under Edward I’s great seal this time, rather than the seal of absence which had been employed in 1297) . . .”); VINCENT, *supra* note 23, at 4 (“[T]he [C]harter as a whole was already treated as an archaic relic as long ago as 1300, when it was for the last time granted a full reissue by a [K]ing of England . . .”).

79. VINCENT, *supra* note 23, at 92.

80. See DAVIS, *supra* note 61, at 9 (designating the 1225 reissue as the “third and final revision of 1225”); VINCENT, *supra* note 23, at 87 (writing that the text for the 1297 confirmation of the 1225 Charter “seems to have been taken from . . . an unofficial lawyer’s collection”).

81. See DANZIGER & GILLINGHAM, *supra* note 11, at 250–51 (asserting the Magna Carta was a compromise between King John and the barons).

82. VINCENT, *supra* note 23, at 82.

numbered. However, historians have inserted numerals into translations for purposes of convenient reference. The numbers mentioned in this article refer to the sixty-three Clauses in the 1215 Magna Carta as translated on the website of the British Library.<sup>83</sup>

The following sections explain the text of the 1215 Magna Carta in light of the expectations of the modern Rule of Law and the issues faced by the English legal system eight centuries ago. Part II deals with whether legal decisions would be based on law and evidence; Part III with issues related to ethics in government; Part IV with institutional respectability; Part V with respect for human dignity; Part VI with equality of treatment; Part VII with provisions in the Magna Carta unrelated to the Rule of Law; and Part VIII offers concluding thoughts.

## II. DECISIONS BASED ON LAWS AND EVIDENCE

The Rule of Law requires that a society be committed to the resolution of disputes and the imposition of punishment in accordance with established rules and procedures, and based on the relevant evidence.<sup>84</sup> Arbitrary decisions and excessive penalties are abhorred,<sup>85</sup> as is the unreasoned disregard of established legal principles.<sup>86</sup>

### A. *Legal Supremacy*

The most famous provision in the 1215 Magna Carta is Clause 39.<sup>87</sup> That Clause declares, in language often quoted and still sparkling with gem-like quality, a firm and unquestionable commitment to the importance of legal principles and the role that they play in constraining the use of force. 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,

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83. 1215 Magna Carta, *supra* note 8.

84. See *Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring with the judgment) (“[T]he [R]ule of [L]aw is imperiled by sentences imposed for no discernible reason other than the subjective reactions of the sentencing judge.”).

85. See *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) (“[P]reventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the [R]ule of [L]aw.”); *Sellers*, *supra* note 2, at 8 (“The [R]ule of [L]aw is so valuable precisely because it limits the arbitrary power of those in authority.”).

86. This is why many of the U.S. Supreme Court decisions discussing the Rule of Law involve the issue of *stare decisis*. See *Johnson*, *supra* note 7, at 55–58 (quoting U.S. Supreme Court decisions discussing the Rule of Law); see also *Stare Decisis*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *stare decisis* as “to stand by things decided”).

87. See *DAVIS*, *supra* note 61, at 9 (identifying Clauses 39 and 40 as the most famous clauses of the Magna Carta).

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.<sup>88</sup>

To the twenty-first century reader, this product of the medieval world seems entirely modern and enlightened. Clause 39 is animated by the same ideas that drive modern Rule of Law jurisprudence and its commitment to legal principles.

Clause 39 arose directly out of King John's abuses. "In some cases John proceeded, or threatened to proceed, by force of arms against recalcitrants as though assured of their guilt, without waiting for legal procedure."<sup>89</sup> In other cases, John attacked his enemies by subjecting them to a "travesty of judicial process."<sup>90</sup> John's "political and personal enemies were exiled, or deprived of their estates, by the judgment of a tribunal composed [not of their equals but] entirely of Crown nominees."<sup>91</sup> Driven by John's avarice, "the machinery of justice was [often merely] an engine for transferring land and money to his treasury."<sup>92</sup>

While scholars and jurists have debated for eight centuries the narrowness<sup>93</sup> or breadth<sup>94</sup> of Clause 39, which some say applies "only to abuses of criminal process,"<sup>95</sup> its essential point is clear. "John was no longer to take the law into his own hands: the deliberate judgment of a competent court of law must precede any punitive measures to be taken by the King against freemen of his realm."<sup>96</sup> Execution could not be placed before judgment. More specifically, under Clause 39, there must be a judgment; the judgment must precede punishment, and the judgment must be imposed by equals in a manner otherwise consistent with the law of the land.<sup>97</sup>

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88. 1215 Magna Carta, *supra* note 8, at cl. 39.

89. MCKECHNIE, *supra* note 16, at 377.

90. *Id.*

91. *Id.* at 378; *see also id.* at 384 (discussing how outlawry was used to place a price on mens' heads and terrify them until they fled the country).

92. *Id.* at 383.

93. *See id.* at 380 ("[T]he older, more technical signification was gradually forgotten . . .").

94. Expansively construed, "It has been usual to read . . . [Clause 39] as a guarantee of trial by jury to all Englishmen; as absolutely prohibiting arbitrary commitment; and as solemnly undertaking to dispense to all and sundry an equal justice, full, free, and speedy." *Id.* at 376.

95. *Id.* at 382 n.2.

96. *Id.* at 381.

97. McKechnie argues that in the context of Clause 39 "or" means "and," therefore judgment had to be imposed by peers *and* in accordance with the law of the land. *See id.* at 377, 381–82 (noting the agreement among experts on medieval Latin that 'vel' is sometimes equivalent to 'et'). However, juries today play a reduced role in criminal proceedings. *See* Antoinette Plogstedt, *E-Jurors: A View from the Bench*, 61 CLEV. ST. L. REV. 597, 599–600 (2013) ("In some countries, jury systems have been



B. *Due Process*

Clause 39 has been credited as the first embodiment of the “English idea of due process”<sup>98</sup> and its American progeny.<sup>99</sup> Thus, it was said on the 700th anniversary of the Magna Carta, “[a]fter being reproduced in all the original [American] state constitutions[,] Clause 39 passed into the [f]ederal Constitution in this form: ‘No person shall be . . . deprived of life, liberty, or property, without due process of law.’”<sup>100</sup> Elaborating on this theme in *Duncan v. Louisiana*,<sup>101</sup> Justice Hugo Black explained:

The origin of the Due Process Clause is [Clause] 39 of [the] Magna Carta . . . . As early as 1354 the words ‘due process of law’ were used in an English statute interpreting [the] Magna Carta, and by the end of the 14th century ‘due process of law’ and ‘law of the land’ were interchangeable. Thus the origin of this clause was an attempt by those who wrote [the] Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. [Clause] 39 of [the] Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans . . . the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws.<sup>102</sup>

The 1215 Charter says little about litigation processes other than that legal consequences for a party must be based on “the lawful judgment of his peers or by the law of the land.”<sup>103</sup> Nevertheless, because the idea of due process is inherent in the Great Charter, the “Magna Carta and the writ of habeas corpus have become inextricably linked,”<sup>104</sup> although the writ is not mentioned in the Charter. The reasoning behind this linkage is

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abolished completely. . . . In the many countries that maintain a criminal jury system, juries are used primarily for the most serious criminal offenses.”). Thus, it is easy for a modern observer to conclude that sanctions imposed in accordance with Clause 39 as it was written (using “or” rather than “and”) offers substantial protection from arbitrary punishment, assuming that the “law of the land” is not seriously deficient—procedurally or substantively.

98. Taylor, *supra* note 39, at 354.

99. *See id.* (discussing how, in America, Clause 39 materialized in the U.S. Constitution through the Fifth Amendment).

100. *Id.*

101. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

102. *Id.* at 169 (Black, J., concurring).

103. 1215 Magna Carta, *supra* note 8, at cl. 39.

104. MEADOR, *supra* note 18, at 3.

quite simple: the Magna Carta requires due process, and the “Great Writ” is “*the* remedy for restraints on liberty contrary to due process of law.”<sup>105</sup>

On the 700th anniversary of the Magna Carta, it was argued in the pages of the *Yale Law Journal* by Hannis Taylor, a lawyer and diplomat,<sup>106</sup> that the Anglo-American principle of due process “has no prototype in the constitutional history of any other people.”<sup>107</sup> If that was true then, it is certainly not true now, a hundred years later. Due process is an ideal now firmly implanted in modern Rule of Law jurisprudence,<sup>108</sup> which articulates aspirations that are endorsed, and often lived up to,<sup>109</sup> in many parts of the world. Due process is now an established concept in international legal dialogue. For example, in a recent critique of a criminal prosecution in China, published in the *Chinese Journal of Comparative Law*, my co-author and I explained to an audience in China and beyond that

[i]n determining whether a legal system comports with the [R]ule of [L]aw, perhaps nothing is more important than due process. In the most basic terms, due process entails both notice and hearing. Persons must have notice of what the law requires and, in defending against accusations, notice of the claims against them. Persons must also have a fair opportunity to state a legal claim or assert a defence, and this opportunity must occur before a decision is made by the adjudicatory authority. If a decision is reached before the arguments are heard and the evidence is considered, the purported observance of procedures is not compliant with the [R]ule of [L]aw but is simply a mockery of justice.<sup>110</sup>

### C. Trial by Jury

In the view of many, the idea of trial by jury is synonymous with the

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105. *Id.* at 4.

106. Hannis Taylor (1851–1922) “pursued the multifaceted career of practicing attorney, constitutional historian, journalist, diplomat, and ever-aspiring politician.” TENNANT S. MCWILLIAMS, HANNIS TAYLOR: THE NEW SOUTHERNER AS AN AMERICAN, at ix (1978).

107. Taylor, *supra* note 39, at 353.

108. See *In re Winship*, 397 U.S. 358, 384 (1970) (Black, J., dissenting) (describing due process as a “fundamental principle of the [R]ule of [L]aw”); Kendall L. Manlove, Note, *Process Long Overdue: Transitional Justice, Prisoners, and Procedural Due Process Reform*, 46 N.Y.U. J. INT’L L. & POL. 1249, 1251 (2014) (“[D]ue process is an essential aspect of upholding the [R]ule of [L]aw.”).

109. “The [World Justice Project] Rule of Law Index is a quantitative assessment tool designed to provide a comprehensive picture of the extent to which countries adhere to the [R]ule of [L]aw in practice.” THE WORLD JUSTICE PROJECT, THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 2014, at 217, [http://worldjusticeproject.org/sites/default/files/files/wjp\\_rule\\_of\\_law\\_index\\_2014\\_report.pdf](http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf).

110. Johnson & Loomis, *supra* note 1, at 77.

Magna Carta.<sup>111</sup> Thus, when American judges cite the Magna Carta in explaining to citizens called for jury duty the importance of their role in the administration of justice, it is with this connection in mind.<sup>112</sup> 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."<sup>113</sup>

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."<sup>114</sup> There are at least three possibilities: the first is that trial by jury was a mode of adjudication established sometime before the Magna Carta, the second is that the Magna Carta created trial by jury, and the third is that trial by jury was legal innovation established after the Magna Carta was sealed.

As to the first possibility, some have argued that Clause 39 intended to restore a jury system that was already in place in England prior to 1215, but disregarded by King John. For example, Nicholas Vincent, a Magna Carta scholar,<sup>115</sup> writes that after the Norman Conquest in 1066:

the customary laws of the Anglo-Saxons were to a large extent preserved, including most famously the idea of the jury of twelve men, responsible in English law from at least the 1160s until 1879 not just as a "trial jury" for determining guilt or innocence but as a "jury of presentment" for "presenting" suspected criminals for trial (in some ways equivalent to the modern American "Grand Jury," for the investigation, not merely the trial of wrongdoing).<sup>116</sup>

As to the second possibility, some jurists and scholars suggest the Magna Carta created trial by jury. In a typical passage from a judicial opinion, Justice Byron White wrote in *Duncan v. Louisiana*, "by the time our

111. See *United States v. Booker*, 543 U.S. 220, 238–39 (2005) ("The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases. . . . The Founders presumably carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta."); see also *Glasser v. United States*, 315 U.S. 60, 84 (1942) ("Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression . . .").

112. See Jim Parsons, *Jury Service and Jury Trial Improvements*, app. 1, at i (July 19, 2007) (unpublished manuscript), [http://www.texasbarcle.com/Materials/Events/6371/590\\_01.pdf](http://www.texasbarcle.com/Materials/Events/6371/590_01.pdf) (quoting Judge Parson's opening instruction to a Texas jury).

113. VINCENT, *supra* note 23, at 4.

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

115. See *Personnel*, THE MAGNA CARTA PROJECT, <http://magnacarta.cmp.uea.ac.uk/about/personnel> (last visited Nov. 15, 2015) (identifying Nicholas Vincent as the author of works on "the English and European context of Magna Carta" as well as the writer of the catalogue for a Sotheby's auction of a 1297 issue of the Magna Carta).

116. VINCENT, *supra* note 23, at 8.

Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to [the] Magna Carta.”<sup>117</sup> However, the idea that trial by jury originated in the Magna Carta seems improbable as a matter of logistics. As noted earlier, the Magna Carta was crafted on the battlefield during a break in an ongoing civil war.<sup>118</sup> It is unlikely an entirely new mode for resolving disputes would have been agreed to in that environment and yet so poorly expressed in the terms of the Great Charter.<sup>119</sup>

The third possibility is that trial by jury originated sometime after the Magna Carta was sealed. Embracing this view, some scholars are emphatic that Clause 39 does not require a criminal petty jury.<sup>120</sup> Because the institution “had not been invented in 1215” they argue that “to introduce trial by jury into John’s Great Charter is an unpardonable anachronism.”<sup>121</sup> These scholars contend that “[t]he idea of a trial, in which the judge and the jury listen to the evidence produced by both parties, was entirely unknown at that time.”<sup>122</sup> As Arthur L. Goodhart, a professor of jurisprudence at the University of Oxford,<sup>123</sup> explained in a small book published to celebrate the 750th anniversary of the Magna Carta:

[T]he procedure they followed was an astonishing one, for it has been summed up by saying that “judgment preceded proof.” This apparently absurd statement can, however, be explained when we realize that the word “judgment” here refers to the preliminary decision concerning the procedure to be adopted at the 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, i.e., of equals, determined whether the party should be

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117. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

118. See DANZIGER & GILLINGHAM, *supra* note 11, at 249–51 (identifying the beginning date of the war as May 5, 1215; the date of the finalization of the terms of the Magna Carta as June 15, 1215; the date that peace was proclaimed as June 19; and indicating war broke out three months later).

119. See *id.* at 251 (“[A]s drawn up in June 1215, [the] Magna Carta was bound to fail. Naturally no king could look kindly upon a document to which his consent had been extorted by force.”).

120. See *id.* at 270 (“[T]he myth that the right to trial by jury goes back to [the] Magna Carta is one that remains widely believed in today.”).

121. MCKECHNIE, *supra* note 16, at 393.

122. GOODHART, *supra* note 40, at 19.

123. See *Arthur Goodhart Visiting Professor in Legal Science*, U. OF CAMBRIDGE, [http://www.squire.law.cam.ac.uk/eminent\\_scholars/arthur\\_goodhart\\_professors.php](http://www.squire.law.cam.ac.uk/eminent_scholars/arthur_goodhart_professors.php) (last visited Nov. 15, 2015) (announcing a Visiting Professor of Legal Science position to be awarded in commemoration of Arthur L. Goodhart, who was Emeritus Professor of Jurisprudence at Oxford University).

put to his proof in one of the established ways: ordeal by hot iron or by water,<sup>124</sup> compurgation,<sup>125</sup> wager of law,<sup>126</sup> trial by battle,<sup>127</sup> or production of charter.<sup>128</sup>

Adherents of this third view argue 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, "at almost the same time that the barons were meeting at Runnymede,"<sup>129</sup> forbade the clergy from taking part in judicial ordeals, "thus robbing the trial [by ordeal] of all religious sanction."<sup>130</sup> It was only years later, holders of the third view say, that the words in Clause 39 were given a different meaning.<sup>131</sup>

Regardless of which of the three views is correct, Clause 39 contributed to establishing the principle of trial by jury based on relevant evidence. Clause 39 "supplied the congenial soil wherein the principle of trial of peers was able to expand and grow to maturity."<sup>132</sup> Clause 39 prevented

124. Ordeal was "[a] primitive form of trial in which an accused person was subjected to a . . . dangerous or painful physical test, the result being considered a divine revelation of the person's guilt or innocence." *Ordeal*, BLACK'S LAW DICTIONARY (10th ed. 2014). Trial by ordeal was virtually abolished by the Lateran Council in 1215, the same year the Magna Carta was signed. See MCKECHNIE, *supra* note 16, at 375 ("In 1217 a change occurred, which was undoubtedly a consequence of the virtual abolition of the ordeal by the Lateran Council in 1215.").

125. "Compurgation," also known as "*wager of law*" or "*trial by oath*," was "[a] medieval trial by which a defendant could have supporters (called *compurgators*), frequently [eleven] in number, testify that they believed the defendant was telling the truth." *Compurgation*, BLACK'S LAW DICTIONARY (10th ed. 2014). "If a defendant on oath and in a set form of words will deny the charge against him, and if he can get a certain number of other persons (compurgators) to back his denial by their oaths, he will win his case. If he cannot get the required number, or they do not swear in proper form, 'the oath bursts,' and he will lose." *Id.* (quoting 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 305–08 (7th ed. 1956)).

126. See *Wager of Law*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A method of proof in which a person defends against a claim by swearing that the claim is groundless, and by enlisting others (*compurgators*) to swear to the defendant's credibility.>").

127. "Trial by combat"—also known as "trial by wager of battle," "trial by duel," "judicial combat," or "*duellum*"—is "[a] trial that is decided by personal battle between the disputants, . . . the idea being that God would give victory to the person in the right." *Trial by Combat*, BLACK'S LAW DICTIONARY (10th ed. 2014). "This method was introduced into England by the Normans after 1066, but it was a widely detested innovation and was little used. . . . [And was eventually] replaced in practice by the grand assize and indictment." *Id.*

128. GOODHART, *supra* note 40, at 19 (internal footnotes added).

129. *Id.* at 20.

130. *Id.*

131. See *id.* at 19 (explaining that the modern version of a trial "was entirely unknown at that time").

132. See MCKECHNIE, *supra* note 16, at 389 (alteration in original) (citing L.W. VERNON HARCOURT, HIS GRACE THE STEWARD AND TRIAL OF PEERS: A NOVEL INQUIRY INTO A SPECIAL BRANCH OF CONSTITUTIONAL GOVERNMENT 236 (1907) (suggesting Clause 39's ambiguity

the King from condemning a suspect before holding some form of a trial.<sup>133</sup>

Interestingly, the Magna Carta contains two other, lesser known, provisions dealing with judgment by equals.<sup>134</sup> The first dealt with a type of jury that had a role to play in certain controversies arising from military actions.<sup>135</sup> In his war against the English barons, King John's "fearful punitive raid of waste and pillage" had pushed as far north as the Scottish lowlands.<sup>136</sup> Around the same time, King Alexander II of Scotland retreated into Northumberland<sup>137</sup> in northern England, where the barons had recently done homage to him during the "turmoil of 1215."<sup>138</sup> To address the resulting legal issues and implement the barons' desire to appease Alexander,<sup>139</sup> Clause 59 of the 1215 Magna Carta states:

With regard to the return of the sisters and hostages of Alexander, [K]ing of Scotland, his liberties and his rights, we will treat him in the same way as our other barons of England, unless it appears from the charters that we hold from his father William, formerly [K]ing of Scotland, that he should be treated otherwise. This matter shall be resolved by the judgment of his equals in our court.<sup>140</sup>

In addition, Clause 56 provides in part:

If we have deprived or dispossessed any Welshmen of lands, liberties, or anything else in England or in Wales, without the lawful judgment of their equals, these are at once to be returned to them. A dispute on this point shall be determined in the Marches by the judgment of equals.<sup>141</sup>

Arguably, Clauses 56 and 59, in contrast to Clause 39, more clearly imply that the "equals" will render a final judgment and resolve these various matters.

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contributed to its success and development)).

133. See GOODHART, *supra* note 40, at 20 (noting that the King was prevented "from condemning a free man before a trial").

134. 1215 Magna Carta, *supra* note 8, at cl. 56, 59.

135. *Id.* at cl. 59.

136. See HINDLEY, *supra* note 17, at 246 (reporting on King John's northward advancement into Berwick-upon-Tweed before entering the lowlands).

137. See *id.* (describing how King Alexander II "retreated pell-mell from his own harrying raids into Northumberland").

138. See *id.* at 175 (recognizing the Scots' reprieve from strife when the barons paid homage to King Alexander II).

139. See MCKECHNIE, *supra* note 16, at 459 (suggesting reconciliation with Alexander was an underlying motive behind Clause 59).

140. 1215 Magna Carta, *supra* note 8, at cl. 59.

141. *Id.* at cl. 56.

#### D. *Evidentiary Support*

Under the Rule of Law, legal decisions must be based on the relevant evidence.<sup>142</sup> In addition

[T]he [R]ule of [L]aw demands that legal decision-making processes must be structured in a way that minimizes the chances that errors will occur and that provides a fair opportunity for correcting errors that nevertheless are made. Consequently, fact-finding processes must ensure the reliability of evidentiary determinations and provide opportunities for identifying and rectifying legal mistakes. In part, this process means that the application of the law to the facts must be sufficiently transparent that errors can be identified. In the usual case, . . . affected individuals are entitled to learn the evidence against them as well as the reasons for a court's decision, and they must have a fair opportunity to challenge the errors on appeal.<sup>143</sup>

According to the Rule of Law, allegations unsupported by evidence are not sufficient to trigger legal consequences. Reflecting this concern, Clause 38 of the 1215 Magna Carta states:

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.<sup>144</sup>

To modern eyes, this provision seems unsurprising and consistent with the Rule of Law. However, it may have been revolutionary. The provision offered “real protection to the common man” against abuses by arrogant manorial officials.<sup>145</sup>

142. See S. Ronald Ellis, *A Smoking-Gun Reform Strategy for Rights Tribunals*, 16 CAN. J. ADMIN. L. & PRAC. 279, 284 (2003) (“[T]he [R]ule-of-[L]aw promise is that disputes about rights will be resolved on the basis of law and evidence, in fair hearings, before independent and impartial tribunals.”); see also Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1673 (2013) (“The problem with allowing historical evidence about the true basis for decisions is not merely that it wastes time but that it undermines the [R]ule of [L]aw by rendering the law deeply indeterminate.”).

143. Johnson & Loomis, *supra* note 1, at 77–78.

144. 1215 Magna Carta, *supra* note 8, at cl. 38.

145. STENTON, *supra* note 57, at 12. A century ago, McKechnie offered a different translation and divergent interpretation. See MCKECHNIE, *supra* note 16, at 370 (translating Clause 38 as, “Bailiffs . . . were [not] to abuse their authority: henceforth they shall put no man to his ‘lex’ on their own initiative.”). McKechnie believed that what we think of as a trial based on evidence was not well established when the Magna Carta was enacted in 1215. See *id.* at 393 (asserting the criminal jury had not been instituted by 1215). Instead, Clause 38, translated into different terms, had to be reconciled with other forms of trial that were still the norm. See *id.* at 370 (identifying the forms of judicial test as including compurgation, ordeal, and combat). McKechnie suggests that if more recent scholars have made a mistake in translating and interpreting Clause 39, “[t]he mistake probably owes its origin to a tendency of later generations to explain what was unfamiliar in the Great Charter by what was familiar in their own experience.” See *id.* at 392 (describing how later generations “found nothing in their own day to correspond with the *judicium parium* of 1215”).

### III. ETHICS IN GOVERNMENT

The Rule of Law condemns<sup>146</sup> corrupt official practices<sup>147</sup> and requires commitment to what today is often called “ethics in government.”<sup>148</sup> Anticipating the more complete development of such principles in later eras,<sup>149</sup> the 1215 Magna Carta contained a trove of anti-corruption provisions. Though framed in terms of addressing the realities of life in early thirteenth century England, those provisions were driven by the same types of concerns that inspire modern champions of the Rule of Law to fight official corruption eight centuries later.

#### A. *Justice Will Not Be Sold, Delayed, or Denied*

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 [will we] deny or delay right or justice.<sup>150</sup>

Bribery of the King and his judges,<sup>151</sup> and delays in rendering

146. See Johnson, *supra* note 7, at 68 (“The Rule of Law demands proper conduct on the part of governmental actors.”); see also Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 627 n.109 (1998) (“In each of the Nation’s two major scandals during the past half century, Teapot Dome and Watergate, the appointment of a special prosecutor was essential to preserve the integrity of the criminal justice system and public confidence in the [R]ule of [L]aw.” (citing FINAL REPORT OF THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. NO. 93-987, at 80–81 (1974))).

147. It is difficult to comprehensively define official corruption. See Vincent R. Johnson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 5 (2008) (distinguishing between corruption and unethical conduct). However, the conduct must relate to the performance of official duties. *Cf. id.* at 4–6 (defining educational corruption). Presumably, official corruption includes conduct by governmental actors that involves (1) serious criminal conduct; (2) tortious conduct in the nature of fraud or intentional breach of fiduciary duty; and (3) conduct that betrays the values that form the moral basis for governance, including the welfare of the community and equal treatment of persons. See *id.* at 6 (enumerating the elements of corruption).

148. See generally Vincent R. Johnson, *America’s Preoccupation with Ethics in Government*, 30 ST. MARY’S L.J. 717, 729–30 (1999) (“[T]he enactment of codes of ethics governing the conduct of public officials and public employees has become common . . . [and those] who violate these rules face a wide range of sanctions, including criminal prosecution, civil suits for damages, discipline, or removal from office.”).

149. See Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715, 767 app. at 767–79 (2006) (containing a model code); see generally Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL’Y 1, 18–50 (2006) (discussing prohibitions and disclosure requirements).

150. 1215 Magna Carta, *supra* note 8, at cl. 40.

151. The only fair reading of Clause 40 is that “we” refers to not only the King, but also the judges of the royal courts. See BAKER, *supra* note 15, at 15 (“[T]he means of extending the [K]ing’s direct control of justice throughout the length and breadth of the realm was the practice of delegating



judgment, had been serious problems in the decades leading up to the barons' rebellion.<sup>152</sup> The barons used this clause to take a stand against such practices, which undercut the legitimacy of England's legal system.<sup>153</sup>

During the subsequent centuries, Clause 40 has been interpreted as a guarantee of equal justice under the law.<sup>154</sup> Today, the principle that justice is not for sale is a cornerstone of the American rules of law governing judicial conduct.<sup>155</sup> Those rules broadly prohibit judges from receiving gifts or other things of value from persons whose cases may come before them.<sup>156</sup>

To say that justice is not for sale does not mean access to the courts is free—except in the case of the indigent.<sup>157</sup> Even centuries ago, it was an accepted maxim that “the poor should have their writs for nothing.”<sup>158</sup> Otherwise, reasonable filing charges may be assessed.<sup>159</sup> What Clause 40 means is that access to an impartial justice system must be available to all comers on equal terms.<sup>160</sup> In King John's time, abusive practices had arisen whereby some writs were granted to applicants “only as marks of favour or after a bargain had been struck.”<sup>161</sup> In certain instances, creditors promised to remit to “the King a quarter or a third of the debts”<sup>162</sup> they hoped to recover, which obviously created a conflict of interest that threatened to deprive alleged debtors of a fair day in royal

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royal authority to trusted members of the [K]ing's own court.”). At the time of the Magna Carta, there was nothing like the judicial independence that today in America separates the executive branch from the judiciary. *Cf.* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2010) (“A judge shall uphold and promote the independence . . . of the judiciary.”).

152. *See* VINCENT, *supra* note 23, at 30 (discussing how delays induced efforts to buy the King's favor); *see also id.* at 34 (“[B]ribes . . . swelled the [K]ing's coffers.”).

153. *See* HINDLEY, *supra* note 17, at 96 (describing “the chief grievance of the baronage” as the increase in dues to the king).

154. *See* MCKECHNIE, *supra* note 16, at 398 (providing “impartial justice to high and low”).

155. *See* Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 *FORDHAM URB. L.J.* 1007, 1020 (2002) (discussing the rules against gifts and excessive extra-judicial compensation).

156. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3, r. 3.13(a) (AM. BAR ASS'N 2010) (prohibiting the acceptance of gifts as proscribed by law or “would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality”).

157. *See* RANDY J. HOLLAND, *MAGNA CARTA: MUSE & MENTOR* 7 (2014) (recognizing the roots of indigent access to the courts as principles of the Magna Carta).

158. MCKECHNIE, *supra* note 16, at 397.

159. *See id.* at 395–96 (stating the thirteenth and twentieth centuries were similar in that courts could assess reasonable costs).

160. *See id.* at 396 (balancing the need for indigent access with the court's right to charge nominal fees).

161. *Id.* at 395.

162. *Id.* at 397 (quoting 1 *FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 174 (Cambridge, Univ. Press 1895)).

court. These are the kinds of abusive practices that Clause 40 was intended to prohibit and are condemned today by Rule of Law jurisprudence.<sup>163</sup>

#### B. *Improper Economic Benefit Is Prohibited*

Three additional clauses in the 1215 Charter addressed other corrupt official practices. Clause 28 provides:

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.<sup>164</sup>

Clause 30 states:

No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.<sup>165</sup>

Clause 31 provides:

Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.<sup>166</sup>

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 as “compelled by their administrative duties and induced by the pleasures of the chase.”<sup>167</sup> Purveyance was merely “a right of pre-emption; the provisions . . . were to be paid for at the market rate . . . .”<sup>168</sup> However, a variety of abuses had developed in the years leading up to 1215. The persons from whom supplies were requisitioned were often not paid, paid too little, or paid too late.<sup>169</sup> Other persons were paid “in exchequer tallies,” a despised form of currency that could be used only to pay taxes.<sup>170</sup>

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163. Cf. James R. Pratt, III, *Are We Being Fair to Our Judges and the Perception of Justice in Alabama by Having Partisan Elections for Judicial Offices?*, 72 ALA. LAW. 443, 444 (2011) (“[T]he perception [that] justice is for sale will undermine the [R]ule of [L]aw.” (quoting Sandra Day O’Connor, *Foreword* to JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE* (Charles Hall ed., 2010))).

164. 1215 Magna Carta, *supra* note 8, at cl. 28.

165. *Id.* at cl. 30.

166. *Id.* at cl. 31.

167. MCKECHNIE, *supra* note 16, at 329.

168. *Id.* at 330.

169. *Id.*

170. *Id.*

To the extent Clause 28 required prompt payments by the Crown for goods legitimately requisitioned, it is similar to the “takings” clauses found in later constitutional instruments which require payment when private property is taken by the government.<sup>171</sup> Clauses 30 and 31 further restricted certain types of takings (horses, carts, and wood)—either by officials or, in one case, by the Crown itself—that were particularly harmful to the owners of goods.<sup>172</sup>

However, the abuses related to the right of purveyance included not only takings to provide for the legitimate needs of the King’s household, but also requisitioning by officials for their “own personal . . . needs.”<sup>173</sup> These three Clauses—28, 30, and 31—were intended to address that kind of abuse, too.<sup>174</sup> In doing so, these Clauses presaged the development of a broader, fundamental principle of modern government ethics jurisprudence.<sup>175</sup> That principle holds that a government official or employee may not use official power for personal economic benefit.<sup>176</sup> The threats to the Rule of Law posed by that type of self-interested conduct are ones that must be addressed in every country and generation. Indeed, in England, issues related to the right of purveyance continued for at least four centuries, ensnaring ordinary persons, members of Parliament, and kings.<sup>177</sup>

### C. *Officials Must Be Accountable*

The good government principles inherent in the Rule of Law mean that public officials and employees must be accountable for corrupt practices.<sup>178</sup> In modern societies, the procedures for ensuring official

171. For example, in the French Declaration of the Rights of Man and of Citizens, “[t]akings of property by the state are conditioned on ‘just indemnity.’” Vincent R. Johnson, *The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 BOSTON COLL. INT’L & COMP. L. REV. 1, 7 (1990). That provision was similar, but not identical, to language in a few early American state constitutions. *Id.* at 1, 45 n.27.

172. 1215 Magna Carta, *supra* note 8, at cl. 30–31.

173. MCKECHNIE, *supra* note 16, at 331.

174. *Id.*

175. See 1215 Magna Carta, *supra* note 8, at cl. 28, 30–31 (limiting various officials’ ability to confiscate certain possessions from any free man without compensation or agreement).

176. See, e.g., SAN ANTONIO, TEX. CODE OF ETHICS § 2-43 (2014), <http://www.sanantonio.gov/Portals/0/Files/Ethics/2013EthicsCode.pdf> (“To avoid the appearance and risk of impropriety, a City official or employee shall not take any official action that he or she knows is likely to affect the economic interests of: (1) The official or employee . . .”).

177. MCKECHNIE, *supra* note 16, at 330.

178. See *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (“Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the [R]ule of [L]aw.”); Michael S. Ariens, *American Legal*

accountability often involve criminal indictment<sup>179</sup> or impeachment.<sup>180</sup> The Great Charter sought to achieve the same goal of accountability through procedures that reflected the balance of powers in thirteenth century England.<sup>181</sup> Thus, the barons extracted from King John a promise in Clause 55:

All fines that have been given to us unjustly and against the law of the land, and all fines that we have exacted unjustly, shall be entirely remitted or the matter decided by a majority judgment of the twenty-five barons referred to below in the clause for securing the peace (§ 61) together with Stephen, archbishop of Canterbury, if he can be present, and such others as he wishes to bring with him. If the archbishop cannot be present, proceedings shall continue without him, provided that if any of the twenty-five barons has been involved in a similar suit himself, his judgment shall be set aside, and someone else chosen and sworn in his place, as a substitute for the single occasion, by the rest of the twenty-five.<sup>182</sup>

Another provision in the 1215 Magna Carta purported to spell out certain limits of royal authority.<sup>183</sup> Clause 12 provides:

No ‘scutage’<sup>184</sup> or ‘aid’<sup>185</sup> [kinds of taxes] may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable ‘aid’ may be levied. ‘Aids’ from the city of London are to be treated similarly.<sup>186</sup>

Clause 12, had it been implemented, would have greatly limited the

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*Ethics in an Age of Anxiety*, 40 ST. MARY’S L.J. 343, 344–45 (2008) (“The [R]ule of [L]aw constrains lawgivers.”). *But see* Ramsey Clark, *Foreword* to MIMI CLARK GRONLUND, SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE, at xiii (2010) (“Without honorable servants, the [R]ule of [L]aw is lost.”).

179. *See* Gerald S. Reamey, *The Rule of Law, Not Politics, Will Determine Indictment Outcome*, SAN ANTONIO EXPRESS-NEWS (Sept. 19, 2014, 1:13 PM), <http://www.mysanantonio.com/opinion/commentary/article/The-rule-of-law-not-politics-will-determine-5765151.php> (discussing the indictment of the governor of Texas for alleged abuse of power).

180. *See* Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 790 n.279 (1999) (stating that in the 1800s, “Justice Story noted the dual value of impeachment as both a check and a reaffirmation of the [R]ule of [L]aw.”).

181. *See* MCKECHNIE, *supra* note 16, at 455 (describing the procedure for resolving legal disputes regarding fines and penalties).

182. 1215 Magna Carta, *supra* note 8, at cl. 55.

183. *See id.* at cl. 12 (limiting the Crown’s ability to levy taxes).

184. *See supra* note 27 and accompanying text.

185. *See supra* note 28 and accompanying text.

186. *See* 1215 Magna Carta, *supra* note 8, at cl. 12 (internal footnotes added).

Crown's ability to raise money.<sup>187</sup> However, this provision from the 1215 Charter was permanently dropped when the Magna Carta was reissued in 1216.<sup>188</sup> Although it is difficult to characterize Clause 12 as a limitation on royal authority in the form of an anti-corruption measure, it foreshadowed the struggle between the Crown and its American colonies more than five centuries later over the issue of unconsented taxation.<sup>189</sup>

#### IV. INSTITUTIONAL RESPECTABILITY

The Rule of Law demands a legal system operate in a manner that merits the respect and confidence of the citizenry.<sup>190</sup> The 1215 Magna Carta contained several clauses that undoubtedly contributed to this goal by addressing issues related to official qualifications, judicial jurisdiction, the location of court sessions, and remedies.<sup>191</sup>

##### A. *Judicial Qualifications*

The institutional respectability of any legal system depends in large measure on whether judges are qualified to perform judicial functions.<sup>192</sup> In many places, it is taken for granted judges will be learned in the law. However, even today, this is not always the case. One of the great obstacles to the development of a modern legal system in China has been the fact that, until recently, the Chinese judicial ranks were filled by retired military officers with no legal training and little judicial temperament.<sup>193</sup>

187. MCKECHNIE, *supra* note 16, at 232.

188. *See id.* at 233 (noting that Clause 12 was omitted “from all reissues”). Clause 14 of the 1215 Magna Carta addressed the implementation of Clause 12. *See* 1215 Magna Carta, *supra* note 8, at cl. 14 (quoted at *supra* note 27) (describing the process of obtaining “the general consent of the realm”). The substance and language of Clause 14 did not appear in later reissued versions of the Magna Carta. *See* MCKECHNIE, *supra* note 16, at 255 (noting the omission from subsequent confirmations).

189. *But see* MCKECHNIE, *supra* note 16, at 232, 240 (“It came indeed to be interpreted in a broad general sense by enthusiasts who . . . found in it the modern doctrine that the Crown can impose no financial burden on the people without consent of Parliament . . . . [However,] [t]his famous clause was far from formulating any doctrine of self-taxation . . .”).

190. *See* Johnson, *supra* note 7, at 75 (“This is true because the success of a peaceful substitute for unlawful forms of dispute resolution depends upon the perceived legitimacy of the alternative.”).

191. STENTON, *supra* note 57, at 14.

192. *See* Lawrence N. Gray, *Ballot Rigging: How It's Done in New York*, 85 N.Y. ST. B.J., May 2013, at 32, 34 (2013) (quoting N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 212–13 (2008) (Kennedy, J., concurring in the judgment) (“The [R]ule of [L]aw, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments and the absolute probity of its judges.”)); *see also* Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249, 278 (2011) (“Merit selection . . . ensure[s] a qualified and neutral judicial branch consistent with our principled commitment to the [R]ule of [L]aw.”).

193. *See* William Heye, *Forum Selection for International Dispute Resolution in China—Chinese Courts*

Because judicial qualifications were also problems in Medieval England, Clause 45 was included in the Great Charter:

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.<sup>194</sup>

This provision held out the promise of “honest and learned judges.”<sup>195</sup> To be sure, Clause 45 was short on specifics as to how the qualifications of candidates for judicial positions would be assessed.<sup>196</sup> Moreover, there are differences of opinion about what the drafters intended.<sup>197</sup> Some scholars have argued the barons meant “to secure the appointment of men well versed in legal science.”<sup>198</sup> Others have strongly disagreed, saying that all the barons wanted was “plain Englishmen with a rough-and-ready knowledge of insular usage, who would avoid arbitrary acts condemned by the law.”<sup>199</sup> Regardless of the merits of these contentions, it is easy to see that important questions had been raised relevant to the Rule of Law, even though the barons’ immediate concerns were rooted not in lofty abstract principles but in resentment over the favoritism that had been shown by King John to particular individuals.<sup>200</sup> Clause 45 was an important step on the road to the type of careful attention to the judicial qualifications, selection,<sup>201</sup> and training that is so important to the modern Rule of Law.<sup>202</sup>

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*vs. CIETAC*, 27 HASTINGS INT’L & COMP. L. REV. 535, 550 (2004) (footnotes omitted) (“Many articles have pointed out that the military background and the low competency of Chinese judges have prevented judges from being able to decide cases on their merits. . . . New judges are required to pass a national exam, and former military judges are being phased out.”).

194. 1215 Magna Carta, *supra* note 8, at cl. 45.

195. STENTON, *supra* note 57, at 14.

196. 1215 Magna Carta, *supra* note 8, at cl. 45.

197. See MCKECHNIE, *supra* note 16, at 431–32 (examining differing views of the drafters’ intentions).

198. See *id.* (discussing the views of Bishop William Stubbs).

199. See *id.* at 432 (offering his own views).

200. See *id.* at 431 (naming Peter de Roches and Engelard de Cogogne).

201. See Vincent R. Johnson, *Judge Bernard S. Meyer: First Merit Appointee to the New York Court of Appeals*, 75 ALB. L. REV. 963, 967–71 (2012) (discussing improved selection of judges for the highest court in New York State).

202. See Norman L. Greene, *Advancing the Rule of Law Through Judicial Selection Reform: Is the New York Court of Appeals Judicial Selection Process the Least of Our Concerns in New York?*, 72 ALB. L. REV. 633, 635 (2009) (“One of the key purposes of a judicial selection system is to select a judiciary in a manner most conducive to establishing the [R]ule of [L]aw.”); see also Gail Vaughn Ashworth, *The Voice of the Profession*, 45 TENN. B.J., July 2009, at 3, 3 (“[C]ontinuation of a merit selection and retention election judicial selection system in Tennessee was one of the top three action items identified as critically important by the multidisciplinary participants in the October 2008 TBA [Tennessee Bar Association] Rule of Law Conference.”); *Judicial Selection in Minnesota: A Special Report*, 64 BENCH & B. MINN., Apr. 2007, <http://mnbenchbar.com/2007/04/judicial-selection> (“[J]udicial campaigns have

### B. *Jurisdiction*

A corollary to the idea that judges must be knowledgeable and temperamentally disposed to judging is the idea that judicial tasks should be performed only by judges.<sup>203</sup> Otherwise, litigants are likely to be harmed by the actions of unqualified judicial interlopers.<sup>204</sup>

To address this concern the barons included, as Clause 24 of the 1215 Charter, this language:

No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices.<sup>205</sup>

From a modern perspective, it is easy to applaud this provision. It can be argued the Clause was sound because it was likely to advance the separation of powers and consequently, judicial independence.<sup>206</sup> Americans typically regard judicial independence as an indispensable component of the Rule of Law,<sup>207</sup> even though that argument finds little support in countries such as China.<sup>208</sup> In addition, Clause 24 can be praised on the ground that it avoids the conflicts of interest that would inevitably arise if a sheriff responsible for an arrest was charged with deciding the guilt of the accused.

However, it is important to remember separation of powers and judicial independence were ideas, which, if known at all, were not well developed, in thirteenth century England. Until the reign of Henry II (1154–1189), “all departments of government were centered in the King’s household.”<sup>209</sup> To argue Clause 24 was intended to advance separation of powers and judicial independence would be to place more weight on the

the potential to threaten the very foundation of our constitutional democracy and the [R]ule of [L]aw.”)

203. See Greene, *supra* note 202, at 636–37 (noting the “judicial selection system does not operate alone”).

204. Similar issues arise with respect to unauthorized practice of law by nonlawyers. See Zachary C. Zurek, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY’S J. LEGAL MAL. & ETHICS 242, 279 (2013) (“[N]onlawyer activities that flirt with the practice of law . . . [may have] potential for harm” to the public.).

205. 1215 Magna Carta, *supra* note 8, at cl. 24.

206. See Johnson, *supra* note 7, at 71 (noting “American conceptions of the Rule of Law focus on the importance of judicial independence”).

207. See *id.* (“No ideal has been more deeply associated with the American justice system.”).

208. See *id.* at 90 (“Courts [in China] are viewed not as a separate branch of government with a duty to check and balance the actions of other branches, but rather as administrative agencies designed to carry out governmental policy.”).

209. MCKECHNIE, *supra* note 16, at 262. “The entire machinery of royal justice followed Henry II., as he passed, sometimes on the impulse of the moment, from one of his favourite hunting seats to another.” *Id.*

prohibition than its slender text will bear.<sup>210</sup>

It is also important to remember that, at the time of the Magna Carta, the duties of sheriffs, constables, and coroners were not defined the same way they are today.<sup>211</sup> Sheriffs traditionally performed certain judicial functions,<sup>212</sup> while constables, coroners, and bailiffs performed a range of tasks so wide and varying it is difficult to generalize their roles.<sup>213</sup>

McKechnie argues that Clause 24 was not intended to strip all royal officials, other than royal justices, of judicial jurisdiction.<sup>214</sup> Rather, he says, it simply meant that grave crimes could be tried only before royal justices.<sup>215</sup> If that is true, the most that can be said is that Clause 24 was a step towards clarifying judicial jurisdiction, which was consistent with the modern understanding of the Rule of Law.

However, the 1215 Magna Carta contained another provision related to judicial jurisdiction. Clause 34 stated:

The writ called *praecipe*<sup>216</sup> 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.<sup>217</sup>

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.<sup>218</sup> According to McKechnie, this was not a minor procedural reform.<sup>219</sup> Rather, “the

210. See *id.* at 265 (tracing the long evolution of legal institutions from a common action).

211. See *id.* at 313, 316 (examining the sheriff and coroner positions in England).

212. See *id.* at 309 (“[B]oth before and after the granting of the Charter, the sheriff exercised criminal jurisdiction, . . . heard indictments[,] and then condemned and punished petty offenders in a summary manner.”).

213. See *id.* at 314–17 (discussing the roles and functions of constables, coroners, and bailiffs).

214. See *id.* at 310 (claiming the Magna Carta was only declaratory of existing practice).

215. See *id.* (“All that Magna Carta did was to insist that no sheriff or local magistrate should encroach on the province reserved for the royal justices, namely the final ‘trying’ of such grave crimes as had now come to be recognized as ‘pleas of the Crown.’”).

216. See *Praecipe*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“At common law, a writ ordering a defendant to do some act or to explain why inaction is appropriate.”). *Praecipe* can alternatively be spelled, as it is in Clause 34, *praecipe*. See *id.* (“Also spelled *praecipe*.”).

217. 1215 Magna Carta, *supra* note 8, at cl. 34 (emphasis added) (internal footnote added).

218. See CHARLES A. KEIGWIN, CASES IN COMMON LAW PLEADING 7 (1924) (discussing the “juridical revolution” under Henry II (1154–1189), which greatly expanded the jurisdiction of the King’s courts); see also BAKER, *supra* note 15, at 14 (stating that during the reigns leading up to the Magna Carta, “the provision of law and order was profitable”); see also Turner, *supra* note 9, at 49 (“Litigation in the courts . . . was a source of large revenues to the governing body through whom the courts function[ed], and thereupon a sharp conflict arose between the ecclesiastics, the King[,] and the [b]arons as to their respective jurisdictions . . .”).

219. See MCKECHNIE, *supra* note 16, at 346 (emphasizing Clause 34 “proved [to be] a vital factor in the history of royal jurisdiction in England”).



barons gained something of infinitely greater value” because Clause 34 reversed “a line of policy vigorously pursued [by kings] for half a century.”<sup>220</sup> However, there is no reason to think the operations of the feudal courts were more consistent with the Rule of Law than the operation of the royal courts.<sup>221</sup> Indeed, the contrary seems more likely. Consequently, the lesson that relates to the Rule of Law is subtle. 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 *praecipe* did not require an “allegation of failure of justice but simply ignored the lord’s jurisdiction”<sup>222</sup> by ordering the sheriff to command the tenant to deliver disputed land to another or to “appear before the royal court to explain his reasons for disobedience.”<sup>223</sup> Jurisdictional disputes between courts are inevitable, but they must be sorted out based on principle.<sup>224</sup> In a world where kings and judges were often bribed, a procedure like the writ *praecipe*—by which a “feudal lord . . . was . . . robbed by the King of his jurisdiction,”<sup>225</sup>—invited abuse. That type of legal mechanism undermines the foundations of the Rule of Law.<sup>226</sup> It was therefore appropriate for the Magna Carta to curb that practice.

### C. *Accessibility and Transparency*

The Rule of Law demands that justice be both accessible<sup>227</sup> and transparent.<sup>228</sup> Thus, it is not surprising The World Justice Project

220. *Id.*

221. See Turner, *supra* note 9, at 49 (“[T]he . . . people were subjected to the oppression[] not only of the King but of the Barons and their overlords as well.”).

222. MCKECHNIE, *supra* note 16, at 347.

223. *Id.*

224. See *id.* at 346–48 (detailing the methods employed by kings to obtain jurisdiction over pleas without violating a principle, which only allowed interference on the grounds for a failure of justice).

225. *Id.* at 348.

226. See *id.* (exploring the “excellent opportunities for the insidious encroachments of the royal courts at the behest of powerful kings”).

227. See Mariana Hernandez Crespo G., *From Noise to Music: The Potential of the Multi-Door Courthouse (Casas De Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America*, 2012 J. DISP. RESOL. 335, 358 (“[E]xperts seem to agree that for the [R]ule of [L]aw to be advanced in any society, there must be widespread access to justice.”); see also Charles P. Kindregan & Edward M. Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 ST. MARY’S L.J. 673, 693 (1987) (“The right of access to the courts is inherent in the fundamental notion of due process which has guided the common law since the days of the Magna Carta.”).

228. See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368, 406–07 (1979) (Blackmun, J., concurring in part and dissenting in part) (warning of the consequences of excluding the public from a suppression hearing), *superseded by statute*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United*

defines the Rule of Law as requiring “a robust and accessible process in which rights and responsibilities based in law are enforced impartially.”<sup>229</sup> Nor is it surprising the former Lord Chief Justice and President of the Courts of England and Wales, Sir Igor Judge, stated that, “[I]n any society which embraces the [R]ule of [L]aw, it is an essential requisite of the criminal justice system that it should be administered in public and subject to public scrutiny.”<sup>230</sup>

### 1. The Problems of Peripatetic Justice

It can be difficult for a court to be accessible and transparent if it is continually on the move.<sup>231</sup> However, until the late twelfth century, it was the custom of the royal courts to travel with the King as he handled the realm’s affairs.<sup>232</sup> This often forced litigants and observers to traverse great distances and incur substantial expenses in order to participate in court proceedings.<sup>233</sup> According to Stenton, “This tiresome travelling in pursuit of the [K]ing’s judges was as tedious in some trivial suit for a few acres of land as it was burdensome for litigants following up an important and fiercely contested plea before the King himself.”<sup>234</sup>

As early as 1178, Henry II had established a fixed bench at Westminster.<sup>235</sup> However, that did not resolve the problems related to a

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States, 483 U.S. 171, 181 (1987). According to Justice Harry Blackmun,

[O]pen judicial processes, especially in the criminal field, protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts. Publicity is essential to the preservation of public confidence in the [R]ule of [L]aw and in the operation of courts.

*Id.* at 448.

229. Sara Beezley, *Rule of Law Conference Held at Kansas History Center*, 77 J. KAN. B. ASS’N, July–Aug. 2008, at 22, 22.

230. Frank Richardson, *The E-Justice Revolution*, 64 INT’L B. NEWS, Oct. 2010, at 37, 38 (quoting Sir Igor Judge).

231. See MCKECHNIE, *supra* note 16, at 262 (illustrating the “intolerable delay, annoyance, and expense” of common pleas that had “to follow the King from place to place”).

232. See BAKER, *supra* note 15, at 16 (“Every so often a ‘general eyre’ would visit a county . . .”); *id.* at 15 (noting “travelling justices” formed a nucleus of “justices of all England”). During the reign of Henry II (1154–1189), “the coming of the itinerant justices [who travelled without the King] took place only at intervals of about seven years.” MCKECHNIE, *supra* note 16, at 306.

233. See MCKECHNIE, *supra* note 16, at 262 (detailing the case of Richard of Anesty, who followed the King for five years and incurred substantial traveling debt); see also BAKER, *supra* note 15, at 16 (referring to the “detailed picture” left by “one litigant who sought royal justice”).

234. STENTON, *supra* note 57, at 12.

235. See MCKECHNIE, *supra* note 16, at 265 (indicating that some “common pleas still ‘followed the King’” because Henry II set apart five judges who were instructed not to leave his court).

peripatetic court system.<sup>236</sup> The practices at Westminster changed and in any event, the royal courts included not only the justices who traditionally travelled with the King but also other varieties of royally dispatched “itinerant justices.”<sup>237</sup> Thus, the problems caused by court movement continued. To address the issues related to the convenience and cost of litigation, three provisions were inserted into the Magna Carta.<sup>238</sup>

Clause 17 provides:

Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.<sup>239</sup>

Though no particular place was named, Westminster was “probably intended.”<sup>240</sup> Presumably this is why, years later, Sir Frederick Pollock wrote, “We may al[most] say that [the] Magna Carta gave England a capital.”<sup>241</sup> Clause 17 made clear King John was not to try common pleas other than at the fixed location.<sup>242</sup> However, royal pleas, in which the Crown had a special interest, were treated differently.<sup>243</sup> They continued to travel with the King, at least as late as 1300 in the reign of Edward I.<sup>244</sup>

236. In the current digital age, the challenges posed by distance to the administration of justice have been greatly reduced. Appearances and depositions can take place via Skype or similar Internet-based video services. (In 2011, I gave an expert deposition via Skype; I was in Beijing; the lawyer taking the deposition was in Los Angeles; and the lawyer defending it was in Dallas.). See generally William R. Simpson, Jr. et al., *The Invalidity of a Plea of Guilty to a Criminal Offense Made by Video Teleconferencing When the Defendant Is Not Present in Open Court*, 34 U. ARK. LITTLE ROCK L. REV. 383, 383 (2012) (“The taking of guilty pleas from defendants in criminal cases by video teleconferencing . . . is becoming more common . . .”). In addition, documents can be instantly transmitted or accessed online. However, distance continued to pose great obstacles to court operations until relatively recent times. See Johnson, *supra* note 201, at 1008–13 (discussing the challenges faced by a judge on the New York state high court, circa 1980, whose judicial schedule alternated between three weeks in midtown Manhattan and two weeks in Albany).

237. See STENTON, *supra* note 57, at 8 (“[E]very few years . . . itinerant justices . . . sat in every shire . . .”); see also MCKECHNIE, *supra* note 16, at 270 (clarifying the distinction between the itinerant justices and the judges who travelled with the King and those who settled at Westminster).

238. See MCKECHNIE, *supra* note 16, at 262 (noting Clause 17 attempted “to render royal justice cheaper and more accessible”); *id.* at 277 (asserting the intent of Clause 18 was “to meet the convenience of litigants”); see also *id.* at 282 (discussing how Clause 19 supplemented Clause 18).

239. 1215 Magna Carta, *supra* note 8, at cl. 17. In another translation, the words translated here as “ordinary lawsuits” were translated as “common pleas,” and “common pleas” were defined as “[l]aw-suits in which the Crown had no special interest.” MCKECHNIE, *supra* note 16, at 261–63.

240. MCKECHNIE, *supra* note 16, at 263.

241. *Id.* (quoting FREDERICK POLLOCK, *The History of English Law as a Branch of Politics*, in *ESSAYS IN JURISPRUDENCE AND ETHICS* 209 (London, MacMillan & Co. 1882)).

242. See *id.* at 266 (noting, in 1215, it was considered an abuse for King John to try a common plea somewhere other than Westminster).

243. See *id.* at 267 (contrasting common pleas with royal pleas).

244. *Id.*

## 2. The Popular Petty Assizes

Henry II, John's father, was a legal innovator, perhaps the greatest in English history.<sup>245</sup> Among his reforms were three petty assizes: *novel disseisin*,<sup>246</sup> *mort d'ancestor*,<sup>247</sup> and *darrein presentment*.<sup>248</sup> These efficient<sup>249</sup> dispute resolution mechanisms proved popular. They quickly resolved questions about possession of real property even though they left ultimate questions of ownership unresolved,<sup>250</sup> pending possible later determinations in proceedings before the more-cumbersome Grand Assize.<sup>251</sup>

The barons' grievance was that the popular and efficient petty assizes were too infrequent.<sup>252</sup> To address this concern, Clause 18 of the 1215 Charter states:

Inquests of *novel disseisin*, *mort d'ancestor*, and *darrein presentment* shall be taken only in their proper county court. We ourselves, or in our absence abroad our chief justice, will send two justices to each county four times a year, and these justices, with four knights of the county elected by the county itself, shall hold the assizes in the county court, on the day and in the place

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245. See PAUL JOHNSON, *THE OFFSHORE ISLANDERS: ENGLAND'S PEOPLE FROM ROMAN OCCUPATION TO THE PRESENT* 86–87 (1972) (asserting that by embarking “on a vigorous policy of law enforcement” and relying on “the ubiquity of a centrally administered system . . . [to] erode regional variations . . . Henry II carried out a legal revolution?”); see also GOODHART, *supra* note 40, at 7–8 (stating Henry II, “probably the greatest monarch in all English history,” chose to unify the nation through law).

246. An “assize” is “[a] session of a court or council.” *Assize*, BLACK'S LAW DICTIONARY (10th ed. 2014). “Petty assizes were characterized by the form of the writ, which specified the questions to be put to the panel, and ordered that a panel be assembled. The petty assizes were *novel disseisin*, *mort d'ancestor*, *utrum*, and *darrein presentment*.” *Id.* An “assize of *novel disseisin*” involves the issuance of “[a] writ for a tenant who has been disseised of lands and tenements.” *Id.*

247. A trial *mort d'ancestre* involved the “death of the ancestor.” *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 325 n.13 (1964).

248. “The assize of *darrein presentment* . . . summoned a jury-like body called an ‘assize’ of twelve free and lawful men from a particular location to resolve a question . . . [of] which patron presented the last parson who was now dead to the church in a stated village, which church was alleged to be vacant and of which church the plaintiff claimed the advowson.” Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 AM. J. LEGAL HIST. 280, 306–07 (2006) (emphasis added). This question was important because it determined who was allowed to make the appointment to the vacant post, which might afford “a living for a younger son or needy relative.” MCKECHNIE, *supra* note 16, at 276.

249. See, e.g., MCKECHNIE, *supra* note 16, at 275 (writing that *novel disseisin* “was a rapid and peaceable method of ascertaining, . . . whether an alleged recent eviction had really taken place”).

250. See *id.* at 274 (“These petty assizes, . . . related to questions of ‘possession,’ as opposed to ‘ownership.’”).

251. See *id.* at 276 (evaluating the benefits and limitations of the petty assize of *mort d'ancestor*).

252. See *id.* at 276–77 (stating sessions were not held regularly or “often enough”).

where the court meets.<sup>253</sup>

Clause 19 further mandates:

If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind, of those who have attended the court, as will suffice for the administration of justice, having regard to the volume of business to be done.<sup>254</sup>

Together, Clauses 18 and 19 made popular legal procedures more readily available and by doing so, recognized the fact that administration of justice should be reasonably convenient<sup>255</sup> and subject to public scrutiny.<sup>256</sup> It matters little that it was quickly recognized that the new procedures were too expensive and otherwise imperfect<sup>257</sup> or that the rules governing the frequency and place of court sessions soon changed.<sup>258</sup> Those later modifications simply illustrate that any legal system must continually struggle with the question of how to make justice optimally available in a world of limited resources. The provisions in the Magna Carta make clear “the King had been forced to look at the working of his courts purely from the litigants’ point of view,”<sup>259</sup> which was something revolutionary. The three above-named provisions—Clauses 17, 18, and 19—are consistent with the modern understanding of the Rule of Law because they were committed to the idea that justice should be accessible and affordable.<sup>260</sup>

### 3. Undermining Trial by Combat

Clause 36 of the 1215 Charter advanced the administration of justice in the medieval world in ways consistent with the modern Rule of Law. Clause 36 provides:

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.<sup>261</sup>

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253. 1215 Magna Carta, *supra* note 8, at cl. 18 (emphasis added).

254. *Id.* at cl. 19.

255. See MCKECHNIE, *supra* note 16, at 277 (“No inquiry of the kind was to be held elsewhere than in the county where the property was situated. This was intended to meet the convenience of litigants . . .”).

256. See *id.* at 282–83 (requiring “assizes in the normal case should be held in the county court . . . was a salutary provision, since a healthy publicity accompanied the proceedings”).

257. See *id.* at 277 (“Within two years it was seen that this provision went too far.”).

258. See *id.* (“The Charter of 1217 . . . provided that circuits should be made only once a year.”).

259. STENTON, *supra* note 57, at 13.

260. See MCKECHNIE, *supra* note 16, at 262 (noting Clause 17 attempted “to render royal justice cheaper and more accessible”).

261. 1215 Magna Carta, *supra* note 8, at cl. 36.

This reform was important. In the twelfth century, trial by combat—which sometimes amounted to nothing more than “legalized private revenge”<sup>262</sup>—was an established,<sup>263</sup> but despised, method for resolving disputes. Henry II did not abolish trial by combat entirely but set upon a course designed to undermine it.<sup>264</sup> To do this, he invented the writ of inquisition.<sup>265</sup> That writ allowed certain criminal defendants to avoid, or at least delay, trial by combat while a diversionary procedure played out. As explained by McKechnie, that procedure allowed the accused “to refer the question of guilt or innocence to the verdict of his neighbours.”<sup>266</sup> Thus, under the writ of inquisition, a preliminary plea was made to “twelve recognitors.”<sup>267</sup> “If his neighbours upheld the plea, further proceedings were quashed,” and trial by combat was avoided.<sup>268</sup> Eventually, “the main issue of guilt or innocence, not merely the preliminary pleas, came to be determined by the neighbours’ verdict, which was treated as final.”<sup>269</sup>

The problem during King John’s reign was 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.<sup>270</sup> Not only was justice sold—and at a high price—but it was sold with full knowledge that those who could not afford to buy a writ of inquisition would be relegated to the vicissitudes of the widely scorned system of trial by combat.

Consequently, Clause 38, which made the writ freely available,<sup>271</sup> was laudable on many counts.<sup>272</sup> It moved the legal system toward processes under which decisions would be based on relevant evidence rather than physical might. It limited the corrupt practices of selling justice only to the

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262. MCKECHNIE, *supra* note 16, at 360.

263. *See id.* at 359 (“‘Combat’ became the normal mode of deciding pleas among the upper classes.”).

264. *See id.* at 360 (“[Henry] would gladly have abolished . . . [trial by combat], but followed the more subtle policy of undermining its vitality.”).

265. *See id.* at 359 (“The writ . . . had been invented by Henry II. to obviate the judicial duel . . .”).

266. *Id.*

267. *Id.* at 362.

268. *Id.*

269. *Id.*

270. *See id.* at 363 (“John . . . listened only to suitors with long purses . . .”).

271. *See id.* (“John’s acceptance of . . . [the barons’ demands that the writ should be issued free of charge to all who needed it] was repeated in all reissues, [of the Magna Carta] and apparently observed in practice.”).

272. *But see* MCKECHNIE, *supra* note 16, at 362 (opining Clause 36 is erroneously given credit for being a “direct antecedent” of habeas corpus).

wealthy. And, it made access to justice accessible to everyone who was subject to a criminal charge that fell within the writ.

#### D. *Prompt Remedies*

Legal procedures do not comply with the Rule of Law if the investigation of claims and the availability of remedies are unnecessarily delayed.<sup>273</sup> Six provisions in the 1215 Magna Carta demonstrate there was a concern for the timeliness of remedies.<sup>274</sup> The most surprising of these provisions imposed tight deadlines for the investigation and abolition of certain “evil” customary practices. Clause 48 provides:

All evil customs relating to forests and warrens, foresters, warreners, sheriffs and their servants, or river-banks and their wardens, are at once to be investigated in every county by twelve sworn knights of the county, and within forty days of their enquiry the evil customs are to be abolished completely and irrevocably. But we, or our chief justice if we are not in England, are first to be informed.<sup>275</sup>

Aside from this provision’s unrealistic expectations about the speed with which permanent remedies could be implemented to resolve unspecified problems, it raises serious questions about the wisdom of committing to local ad hoc groups the definition of “evil customs.”<sup>276</sup> King John commenced the implementation of this Clause as early as June 19, 1215, but the renewed civil war soon intervened and the provision was not included in later reissues of the Magna Carta.<sup>277</sup>

A second provision concerning the promptness of remedies dealt with the property of felons. Until “the Forfeiture Act of 1870 abolished

273. Justice Hassan B. Jallow offers a different perspective:

International standards help establish the Rule of Law by entrenching certain fundamental principles . . . such as the right to be informed promptly and in detail in a language which the accused understands of the nature and cause of the charge against him or her . . . and to be tried in public and without undue delay.

Justice Hassan B. Jallow, *Justice and the Rule of Law: A Global Perspective*, 43 INT’L LAW. 77, 78–79 (2009).

274. See generally Nancy Nowlin Kerr, Case Note, *Sixth Amendment Right to Speedy Trial Does Not Apply During Interim Between Dismissal of Charges and Subsequent Indictment by Same Sovereign*, 14 ST. MARY’S L.J. 113, 114 (1982) (tracing the roots of the Sixth Amendment right to a speedy trial back to the Magna Carta).

275. 1215 Magna Carta, *supra* note 8, at cl. 48.

276. MCKECHNIE, *supra* note 16, at 440.

277. See *id.* (“The dangerous experiment of leaving the definition to local juries in each district was not repeated.”).

'corruption of blood'<sup>278</sup> and deprived the Crown of all interest in the estate of felons,"<sup>279</sup> the Crown had an interest in the land and chattels of a convicted felon. However, that right was limited and after a year and a day, "[c]ustom gave the felon's land to his feudal lord, and his chattels to the lord who tried him."<sup>280</sup> To address John's abuse of these rights, Clause 32 imposed a strict deadline that conformed to custom. It states:

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.<sup>281</sup>

A third provision, Clause 52, established a general principle that required prompt remedies for violations of rights, but with a significant exception that was applicable to certain cases if King John was on a Crusade. In his developing struggle with the disaffected barons, John cloaked himself with the protection of Pope Innocent III by pledging fealty and promising—disingenuously—to become a crusader.<sup>282</sup> Clause 52 provides:

To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgment of his equals, we will at once restore these. In cases of dispute the matter shall be resolved by the judgment of the twenty-five barons referred to below in the clause for securing the peace (§ 61). In cases, however, where a man was deprived or dispossessed of something without the lawful judgment of his equals by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period [three years<sup>283</sup>] commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. On our return from the Crusade, or if we abandon it, we will at once render justice in full.<sup>284</sup>

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278. "Corruption of blood" is defined as "[a] defunct doctrine, now considered unconstitutional, under which a person loses the ability to inherit or pass property as a result of an attainder [conviction] or of being declared civilly dead." *Corruption of Blood*, BLACK'S LAW DICTIONARY (10th ed. 2014).

279. MCKECHNIE, *supra* note 16, at 342.

280. *Id.* at 337.

281. 1215 Magna Carta, *supra* note 8, at cl. 32.

282. See VINCENT, *supra* note 23, at 58 (discussing John's token gestures to fulfil his vow); see also MCKECHNIE, *supra* note 16, at 449 (noting the barons viewed John's vow as "notorious perjury").

283. MCKECHNIE, *supra* note 16, at 449.

284. 1215 Magna Carta, *supra* note 8, at cl. 52. Clause 61, which deals with securing the peace provides,

SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of



In a fourth provision concerned with timeliness, the “crusade exception” was also applied to the resolution of legal disputes involving forests and certain other matters. There were many such controversies<sup>285</sup> because, over the course of several reigns, English kings had appropriated forests for their exclusive use as sources of wealth and recreation.<sup>286</sup> The

our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us—or in our absence from the kingdom to the chief justice—to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.

Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.

If one of the twenty-five barons dies or leaves the country, or is prevented in any other way from discharging his duties, the rest of them shall choose another baron in his place, at their discretion, who shall be duly sworn in as they were.

In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.

The twenty-five barons shall swear to obey all the above articles faithfully, and shall cause them to be obeyed by others to the best of their power.

We will not seek to procure from anyone, either by our own efforts or those of a third party, anything by which any part of these concessions or liberties might be revoked or diminished. Should such a thing be procured, it shall be null and void and we will at no time make use of it, either ourselves or through a third party.

*Id.*

285. See STENTON, *supra* note 57, at 8 (“[R]oyal forests . . . necessitated another series of courts, [which were] extremely unpopular . . .”).

286. See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 255 (1996) (“Although for many years the forests were used for recreational hunting by the sovereign, in later years British monarchs built ships with the timber and offered it for sale to build new empires across the sea.”)

royal appropriation of forests seriously interfered with the ability of commoners to forage for food and fuel. Clause 53 provides:

We shall have similar respite in rendering justice in connexion with forests that are to be disafforested,<sup>287</sup> or to remain forests, when these were first afforested by our father Henry or our brother Richard; with the guardianship of lands in another person's 'fee,' when we have hitherto had this by virtue of a 'fee' held of us for knight's service by a third party; and with abbeys founded in another person's 'fee,' in which the lord of the 'fee' claims to own a right. On our return from the Crusade, or if we abandon it, we will at once do full justice to complaints about these matters.<sup>288</sup>

Finally, Clauses 56 and 57 indicated that Welshmen were entitled to prompt remedies. The crusade exception was incorporated into Clause 57, which dealt with deprivations attributable to King John's predecessors, but not into Clause 56, which addressed the actions of King John himself. Clause 56 provides:

If we have deprived or dispossessed any Welshmen of lands, liberties, or anything else in England or in Wales, without the lawful judgment of their equals, these are at once to be returned to them. A dispute on this point shall be determined in the Marches by the judgment of equals. English law shall apply to holdings of land in England, Welsh law to those in Wales, and the law of the Marches to those in the Marches. The Welsh shall treat us and ours in the same way.<sup>289</sup>

Clause 57 states:

In cases where a Welshman was deprived or dispossessed of anything, without the lawful judgment of his equals, by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. But on our return from the Crusade, or if we abandon it, we will at once do full justice according to the laws of Wales and the said regions.<sup>290</sup>

Together, these six provisions—Clauses 32, 48, 52, 53, 56, and 57—demonstrate there was a concern for the promptness of justice that is in

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(citing F.A. Inderwick, *THE KING'S PEACE: A HISTORICAL SKETCH OF THE ENGLISH LAW COURTS* 139 (London, Swan Sonnenschein & Co. 1895)).

287. See *supra* note 31 and accompanying text; LINEBAUGH, *supra* note 31, at 31 ("To *disafforest* meant to remove from royal jurisdiction; it did not mean to clear-cut timber or destroy the trees.").

288. 1215 Magna Carta, *supra* note 8, at cl. 53 (internal footnote added).

289. *Id.* at cl. 56.

290. *Id.* at cl. 57.

keeping with the demands of the Rule of Law as that concept is understood today.

## V. RESPECT FOR HUMAN DIGNITY

The Rule of Law demands that legal rules and practices respect human dignity.<sup>291</sup> The 1215 Magna Carta did so in two ways: first, by endorsing the idea of proportionality of punishment; and second, by addressing the needs of some of the most vulnerable persons.<sup>292</sup>

### A. Proportionality

Proportionality of punishment is an important concern in twenty-first century jurisprudence, generally,<sup>293</sup> and in Rule of Law jurisprudence, in particular.<sup>294</sup> Similar concerns were addressed, in eloquent terms, in the 1215 Magna Carta. Clause 20 states:

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

291. See *Thomas v. St. Martin Parish Sch. Bd.*, 245 F. Supp. 601, 604 (W.D. La. 1965) (“[T]he [R]ule of [L]aw demands recognition of each individual’s claim to basic human dignity.”); see also *Dretke v. Haley*, 541 U.S. 386, 399–400 (2004) (Kennedy, J., dissenting) (treating innocence as “a mere technicality . . . would miss the point” because “[i]n a society devoted to the [R]ule of [L]aw, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail”).

292. See Craig M. Jacobs, Comment, *The Constitutionality of Collateral Post-Conviction Claims of Actual Innocence*, 42 ST. MARY’S L.J. 455, 488 n.138 (2011) (“The basic concept of the Eighth Amendment, which is ‘nothing less than the dignity of man,’ finds its roots in the Magna Carta.” (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))).

293. See Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 113 (2008) (“According to the U.S. Supreme Court, the Constitution requires that punishment in its various forms . . . be proportional to the wrongful conduct that justifies punishment.”); see also Gerald S. Reamey, *The Growing Role of Fortuity in Texas Criminal Law*, 47 S. TEX. L. REV. 59, 64 (2005) (“[P]roportionality in punishment demands more emphasis on culpability than on harm.”).

294. See Michal Tamir, *Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, 12 TEX. J. C.L. & C.R. 43, 66 (2006) (“The principle of proportionality is ‘at the heart of the European legal order and increasingly recognized as a key component in the [R]ule of [L]aw’ in many countries around the world.” (quoting Michael Fordham & Thomas de la Mare, *Identifying the Principles of Proportionality*, in UNDERSTANDING HUMAN RIGHTS PRINCIPLES 27, 27 (Jeffrey Jowell & Jonathan Cooper eds., 2001))); see also Jamal Greene, *The Rule of Law as a Law of Standards*, 99 GEO. L.J. 1289, 1293 n.31 (2011) (“David Beatty has called proportionality ‘the ultimate [R]ule of [L]aw’ because he believes it ‘is an integral, indispensable part of every constitution that subordinates the system of government it creates to the [R]ule of [L]aw.’” (quoting DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 160, 163 (2004))); Cristina M. Rodríguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 126 (2010) (calling for “a balanced appreciation for the [R]ule of [L]aw that includes valuation of proportionality, accountability, and fairness”).

shall be spared his merchandise, and a villein<sup>295</sup> the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.<sup>296</sup>

This provision reflects a humane preference not to strip a person convicted of a crime of the ability to earn a living.<sup>297</sup> “[P]arallels have . . . been drawn between the livelihood-protection provisions of the Magna Carta and state homestead laws,”<sup>298</sup> which today protect certain items of personal and real property from being taken to satisfy judgments.<sup>299</sup>

The same proportionality principle was echoed in two other provisions dealing with earls, barons, and ordained religious. Clause 21 provides:

Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.<sup>300</sup>

Clause 22 states:

A fine imposed upon the lay property of a clerk in holy orders shall be assessed upon the same principles, without reference to the value of his ecclesiastical benefice.<sup>301</sup>

#### B. *Legal Protection of the Vulnerable*

In the feudal world, “much of the sovereign’s revenue came from feudal incidents resulting from the [K]ing’s control of persons under disabilities, the most well known of which were the wardships and marriages of the minor heirs of his tenants in chief.”<sup>302</sup> The 1215 Magna Carta contained many provisions designed to reduce abuse of these royal privileges by addressing the rights of widows, minors, and heirs, as well as the duties of guardians.

295. *Villein*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“[A] peasant occupier or cultivator entirely subject to a lord . . . or attached to a manor . . .”).

296. 1215 Magna Carta, *supra* note 8, at cl. 20 (internal footnote added).

297. See MCKECHNIE, *supra* note 16, at 292 (indicating the provision is usually interpreted as reflecting a “humane desire not to reduce a poor wretch to absolute beggary”).

298. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 898 n.227 (2013).

299. See, e.g., TEX. PROP. CODE ANN. § 41.001(a) (West 2014) (“A homestead . . . [is] exempt from seizure for the claims of creditors . . .”).

300. 1215 Magna Carta, *supra* note 8, at cl. 21.

301. *Id.* at cl. 22.

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

### 1. Widows and Surviving Children

In the words of Geoffrey Hindley, in the late twelfth and early thirteenth centuries a widow “could be married at the wish of her feudal overlord to any man willing to pay the going rate.”<sup>303</sup> However, in rare cases, a widow was sufficiently wealthy to be able to outbid suitors and buy a charter from her lord guaranteeing she would not be forced to remarry.<sup>304</sup> Rich widows were often eager to do so.<sup>305</sup> According to McKechnie, the payments—which sometimes included chattels (such as hunting animals) as well as money—“testif[ied] eloquently to the greed of the King, the anxiety of the victims, and the extortionate nature of the system.”<sup>306</sup>

According to historians Frances and Joseph Gies, “Until [the] Magna Carta curbed the [K]ing’s powers to sell the remarriage of widows, 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.”<sup>307</sup> In addition, the King made a practice of “selling the hand of wealthy widows to the highest bidder.”<sup>308</sup> These deeply resented practices<sup>309</sup> prompted calls for reform, and the barons won concessions from King John in the Magna Carta.<sup>310</sup>

In Clauses 7 and 8 of the Charter, the language favoring widows is so strong that it has caused some modern observers to call the 1215 Magna Carta a landmark in the recognition of women’s rights.<sup>311</sup> 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

303. HINDLEY, *supra* note 17, at 167.

304. *See id.* at 170 (discussing Alice, Countess of Warwick, in 1205).

305. *See* MCKECHNIE, *supra* note 16, at 220 (“Wealthy widows were glad to escape from John’s clutches by agreeing to buy up the Crown’s rights for a lump sum.”).

306. *Id.*

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

308. R.H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 DUKE L.J. 1207, 1212.

309. *See* MCKECHNIE, *supra* note 16, at 212 (“The Crown’s right to regulate the marriages of wards had become an intolerable grievance. . . . [involving] maids of fourteen and widows alike.”).

310. *Id.*

311. *See* HINDLEY, *supra* note 17, at 173 (“One commentator on Magna Carta wrote that one of the great stages in the emancipation of women is to be traced to the Charter’s provision that they should not be distrainted to marry for a second time without their consent.”). Presumably, King John despised Clauses 7 and 8 as much as the other parts of the Charter; however, it is possible that his strong mother, Eleanor of Aquitaine, might have felt differently. *See id.* at 162 (“Eleanor’s amazonian entourage at the time of the Second Crusade had mesmerized European society.”).

without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of.<sup>312</sup>

The victory for women was qualified. This was only a prohibition against a forced *second* or subsequent marriage. Moreover, most widows had no option other than to remarry because there were few career opportunities. The alternatives were to face financial destitution<sup>313</sup> or enter a nunnery, thus forfeiting their fiefs<sup>314</sup> and becoming “dead in the eyes of the law.”<sup>315</sup> Consequently, to evaluate fairly Clause 8, it is important to focus on its notice and consent provisions, which preserved the lords’ rights, and to understand the nature of the barons’ concerns.

“[T]he barons at Runnymede desired to place restrictions on the King, not upon themselves.”<sup>316</sup> According to Hindley:

The barons did not object to the principle of . . . the sale of heiresses’ marriages: they too found them a valuable source of revenue in their own domains. But they did object to John’s penchant for marrying ladies of great families to lowborn “new men” or even mercenary captains, either because they simply had the money or as a reward for military services.<sup>317</sup>

Thus, Clause 8 may have been rooted more in concerns about the reputation and status of noble families than in solicitude for widows.<sup>318</sup> Such familial concerns are reflected in Clause 6 of the 1215 Magna Carta, 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.<sup>319</sup>

Clause 6 addressed in bland language an issue that must have provoked outrage.<sup>320</sup> Moreover, the terms of Clause 6 were problematic. “Lower social standing” was, and remains, an elusive concept. For a half century

312. 1215 Magna Carta, *supra* note 8, at cl. 8.

313. See HINDLEY, *supra* note 17, at 166 (“They ran the risk of virtual pauperdom.”).

314. See MCKECHNIE, *supra* note 16, at 213 (“[T]hose who objected to mate with the men to whom John sold them . . . might . . . forfeit their fiefs to escape the burdens inherent in them . . .”).

315. HINDLEY, *supra* note 17, at 167.

316. MCKECHNIE, *supra* note 16, at 217.

317. HINDLEY, *supra* note 17, at 168.

318. See *id.* at 169 (“[B]aronial indignation was probably more through sympathy for the nobility . . . than because of personal feelings for the women themselves.”); *id.* at 165 (stating the ability to choose a marriage partner “affected family politics among the nobility”).

319. 1215 Magna Carta, *supra* note 8, at cl. 6.

320. See HINDLEY, *supra* note 17, at 168 (discussing how the term “disparagement” is often translated to “loss of status” but the translation does not adequately convey the outrage felt against King John when he abused his power).

after 1215,<sup>321</sup> England debated the nuances of this question, including whether forced marriage to a foreigner or a person with disabilities was prohibited.<sup>322</sup>

At the time of the Magna Carta, "It was customary for a land-owner to bestow marriage portions [of his land] on his daughters."<sup>323</sup> In addition, it was usual for a new husband to establish a dowry for his wife as they were leaving the altar.<sup>324</sup> If the husband failed to do so, the law stepped in and remedied the omission by fixing the dower at one-third of his lands.<sup>325</sup> The problem for a widow was that she could enter into possession of those lands only if she had the permission of the King, who had superior rights and could seize everything.<sup>326</sup> Clause 7 of the 1215 Charter addressed this dilemma:

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.<sup>327</sup>

This provision was important to women for it limited the King's prerogative and affirmed the customary rule that a widow was entitled to a third of her husband's lands for her lifetime.<sup>328</sup> However, Clause 7 only dealt with real property.<sup>329</sup> Issues remained relating to personal property, including food and other necessities. Those matters were expressly addressed in the last sentence of Clause 26, which provided limited

321. See VINCENT, *supra* note 23, at 77 ("[F]ifty years before 'disparagement' was precisely defined . . .").

322. See HINDLEY, *supra* note 17, at 168 (discussing the various commentaries and concerns regarding what the term "disparagement" meant).

323. MCKECHNIE, *supra* note 16, at 216.

324. See *id.* at 215–16 (explaining the custom was to set aside the dowry for a bride on the wedding day, which formed a picturesque backdrop to a marriage "taking place literally at the church door").

325. See *id.* at 216 (stating the law stepped in "on the presumption that the omission had been unintentional").

326. See *id.* at 215 (explaining how the King retained superior rights under the authority of primer seisin).

327. 1215 Magna Carta, *supra* note 8, at cl. 7.

328. See GIES & GIES, *supra* note 307, at 122 (explaining the Magna Carta codified the customary practice); see also MCKECHNIE, *supra* note 16, at 215 (noting a widow "had a right . . . to one-third of the lands of her husband . . . in addition to any land she might have brought as a marriage portion").

329. See MCKECHNIE, *supra* note 16, at 218 ("[Clause 7] says nothing . . . [about] money or chattels . . .").

protection to widows and 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. Clause 26 provides:

If at the death of a man who holds a lay 'fee' of the Crown, a sheriff or royal official produces royal letters patent of summons for a debt due to the Crown, it shall be lawful for them to seize and list movable goods found in the lay 'fee' of the dead man to the value of the debt, as assessed by worthy men. Nothing shall be removed until the whole debt is paid, when the residue shall be given over to the executors to carry out the dead man's will. If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children.<sup>330</sup>

The interests of widows and surviving children (as well as other heirs or creditors) were protected by the first two sentences of Clause 26, which greatly improved the handling of estates.<sup>331</sup> As explained by McKechnie, "[t]he sheriff and bailiffs of the district, where [the] deceased's estates lay, were in the habit of seizing everything" to secure the interests of the King.<sup>332</sup> They "sold chattels out of all proportion to the sum actually due" and often refused to disgorge the surplus.<sup>333</sup> Clause 26 laid out procedures to minimize these abusive practices. Royal letters patent had to vouch for "the existence and the amount of the Crown debt",<sup>334</sup> the value of the goods seized had to approximate the value of the debt,<sup>335</sup> and the process had to be superintended by worthy men "whose function it was to form a check on the actions of the sheriff's officers."<sup>336</sup> Thus, Clause 26 protected vulnerable widows and surviving children from common abuses and was structured in a manner consistent with the demands of due process<sup>337</sup> and legal transparency.<sup>338</sup>

These various provisions, qualified though they were, may have seemed "extravagantly enlightened" at the time the Magna Carta was sealed—at

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330. 1215 Magna Carta, *supra* note 8, at cl. 26.

331. See MCKECHNIE, *supra* note 16, at 322 (explaining how Clause 26 was meant to define a set of procedures to remove irregularities in the passing of personal property).

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 322–23.

336. *Id.* at 323.

337. See discussion *supra* Section II.B.

338. See discussion *supra* Section IV.C.



least in comparison to other parts of the world.<sup>339</sup> “[A]ttention to the rights of women in any context was unusual for the period.”<sup>340</sup> To the extent these provisions demonstrated concern for some of the most vulnerable members of society, they manifested a respect for human dignity consistent with the modern understanding of the Rule of Law.

## 2. Heirs

In the barons’ eyes, the greatest of King John’s abuses were “his arbitrary increase of feudal obligations.”<sup>341</sup> To address these concerns, 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:

If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a ‘relief,’<sup>342</sup> the heir shall have his inheritance on payment of the ancient scale of ‘relief.’ That is to say, the heir or heirs of an earl shall pay £100 for the entire earl’s barony, the heir or heirs of a knight 100s. at most for the entire knight’s ‘fee,’ and any man that owes less shall pay less, in accordance with the ancient usage of ‘fees.’<sup>343</sup>

Clause 3 then exempted minor male heirs from any such obligation:

But if the heir of such a person is under age and a ward, when he comes of age he shall have his inheritance without ‘relief’ or fine.<sup>344</sup>

This provision was intended to prevent a sort of “double dipping” by forbidding the Crown from exacting relief or a fine in cases where it had already benefitted from wardship.<sup>345</sup> As discussed below, wardship was an often detested feudal incident,<sup>346</sup> and the benefits and abuses could be considerable.<sup>347</sup> “[W]ardship’ placed [both] the property and person of

339. HINDLEY, *supra* note 17, at 172.

340. *Id.* at 166.

341. MCKECHNIE, *supra* note 16, at 196.

342. A “relief” was “[a] payment made by an heir of a feudal tenant to the feudal lord for the privilege of succeeding to the ancestor’s tenancy.” *Relief*, BLACK’S LAW DICTIONARY (10th ed. 2014).

343. 1215 Magna Carta, *supra* note 8, at cl. 2 (internal footnote added).

344. *Id.* at cl. 3.

345. *See* MCKECHNIE, *supra* note 16, at 203 (“The Crown is here forbidden to exact relief where it had already enjoyed wardship.”).

346. *See id.* at 206 (describing “wardship” as “a much-hated feudal incident”).

347. *See* discussion *infra* Section V.B.3.

the heir at the mercy of the Crown,”<sup>348</sup> for the King could confer the office of guardian on “whomsoever he would,”<sup>349</sup> although, as noted above,<sup>350</sup> Clause 6 protected heirs from marriage to a person of lower social standing.<sup>351</sup>

### 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.”<sup>352</sup> To protect minor heirs from these abuses, Clause 4 of the 1215 Magna Carta went into considerable detail:

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. If we have given the guardianship of the land to a sheriff, or to any person answerable to us for the revenues, and he commits destruction or damage, we will exact compensation from him, and the land shall be entrusted to two worthy and prudent men of the same ‘fee,’ who shall be answerable to us for the revenues, or to the person to whom we have assigned them. If we have given or sold to anyone the guardianship of such land, and he causes destruction or damage, he shall lose the guardianship of it, and it shall be handed over to two worthy and prudent men of the same ‘fee,’ who shall be similarly answerable to us.<sup>353</sup>

Interestingly, McKechnie describes this provision as “too timid and half-hearted.”<sup>354</sup> Whether he is correct depends on how the provision is interpreted. If Clause 4 means the unfaithful guardian must only refund what he has stolen and lose his office if he is caught, but suffer no other penalty, then perhaps McKechnie is right. As evidence of the possibility of drafting a more demanding standard, he cites a statute enacted long after 1215. It provided that “escheators, guilty of waste, should ‘yield to the heir treble damages.’”<sup>355</sup> However, McKechnie concedes that “[e]ven the milder provision of [the] Magna Carta was an innovation,” though

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348. MCKECHNIE, *supra* note 16, at 206.

349. *Id.* at 207.

350. *See* 1215 Magna Carta, *supra* note 8, at cl. 6 (addressing the familial concerns about marriage for heirs of noble descent).

351. *See id.* (“Heirs may be given in marriage but not to someone of lower social standing.”).

352. MCKECHNIE, *supra* note 16, at 207.

353. 1215 Magna Carta, *supra* note 8, at cl. 4.

354. MCKECHNIE, *supra* note 16, at 207–08.

355. *Id.* at 209.

“there is no evidence that it was ever put in[to] force.”<sup>356</sup>

Clause 5 of the 1215 Magna Carta specified, in positive rather than negative terms, the obligations owed by guardians. Clause 5 provides:

For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.<sup>357</sup>

These two provisions dealing with guardians—Clauses 4 and 5—reflect a concern for the rights and welfare of minors that is consistent with the modern understanding of the Rule of Law.

#### 4. Debtors

One further provision in the 1215 Charter displayed an important measure of respect for human dignity as it relates to the treatment of debtors. Clause 9 provides:

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. A debtor's sureties shall not be distrained upon so long as the debtor himself can discharge his debt. If, for lack of means, the debtor is unable to discharge his debt, his sureties shall be answerable for it. If they so desire, they may have the debtor's lands and rents until they have received satisfaction for the debt that they paid for him, unless the debtor can show that he has settled his obligations to them.<sup>358</sup>

The first sentence of this clause had the effect of requiring “[t]he personal estate of a debtor” to be exhausted by creditors before the debtor could be stripped of real estate or related revenues.<sup>359</sup> In an agrarian society, seizing a debtor's land was likely to take away the debtor's livelihood.<sup>360</sup> To that extent, this provision is infused by the same spirit as the clause on proportional punishment, discussed above, which dictates that punishment should not be so hard as to deprive one of making a living.<sup>361</sup> However, Clause 9 does not explain why sureties stand in a more favorable position than creditors and, under the language of the last

356. *Id.*

357. 1215 Magna Carta, *supra* note 8, at cl. 5.

358. *Id.* at cl. 9.

359. See MCKECHNIE, *supra* note 16, at 222 (explaining the rules laid down for debt collection).

360. See *id.* (“[C]hattels [alone] could not yield a permanent revenue.”).

361. See discussion *supra* Section V.A.

sentence, “may have the debtor’s lands and rents” as well as moveable goods.<sup>362</sup>

## VI. EQUAL TREATMENT

The subject on which the Magna Carta is most at odds with modern sensibilities is precisely where one would expect the feudal world to differ from the modern: the issue of equal rights. Thus, while the modern Rule of Law demands equal justice under law,<sup>363</sup> the Magna Carta of 1215 often comes up short.

### A. *Free Men*

The final sentence of Clause 1 seems to make clear that the Magna Carta is a Charter of liberties only for free men. Clause 1 provides:

FIRST, THAT WE HAVE GRANTED TO GOD, and by this present [C]harter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church’s elections—a right reckoned to be of the greatest necessity and importance to it—and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs,<sup>364</sup>

In addition, the most important provision in the Magna Carta—Clause 39,<sup>365</sup> which guaranteed protection from criminal sanctions, except as imposed by a judgment of equals or the law of the land—expressly limited its protection to free men.<sup>366</sup> This was the norm for the era. In protecting all “free-holders . . . [from being] tried by their inferiors . . .

362. See 1215 Magna Carta, *supra* note 8, at cl. 9 (outlining the action taken if a principal debtor defaults).

363. See *Smith v. United States*, 423 U.S. 1303, 1307–08 (1975) (“[A]ll constitutional guarantees extend both to rich and poor alike, to those with notorious reputations, as well as to those who are models of upright citizenship. No regime under the [R]ule of [L]aw could comport with constitutional standards that drew such distinctions.”).

364. 1215 Magna Carta, *supra* note 8, at cl. 1.

365. See discussion *supra* Section II.A.

366. See 1215 Magna Carta, *supra* note 8, at cl. 39 (“No free man shall be seized or imprisoned . . .”).

English custom did not differ from the procedure prescribed by feudal usage on the continent of Europe.”<sup>367</sup>

However, there was at least a hope that non-free men might receive treatment that was in some measure consistent with the guarantees set forth in the charter. Thus, Clause 60 states:

All these customs and liberties that we have granted shall be observed in our kingdom in so far as concerns our own relations with our subjects. Let all men of our kingdom, whether clergy or laymen, observe them similarly in their relations with their own men.<sup>368</sup>

More importantly, the elegant clause on access to justice did not purport to exclude anyone. It said simply, “*To no one* will we sell, to no one deny or delay right or justice.”<sup>369</sup>

Finally, the ultimate clause of the 1215 Magna Carta spoke expansively of the rights of “men,” rather than “free men.” Clause 63 states:

IT IS ACCORDINGLY OUR WISH AND COMMAND that the English Church shall be free, and that men in our kingdom shall have and keep all these liberties, rights, and concessions, well and peaceably in their fullness and entirety for them and their heirs, of us and our heirs, in all things and all places for ever.

Both we and the barons have sworn that all this shall be observed in good faith and without deceit. Witness the above[-]mentioned people and many others.

Given by our hand in the meadow that is called Runnymede, between Windsor and Staines, on the fifteenth day of June in the seventeenth year of our reign . . . .<sup>370</sup>

## B. *Jews in England*

Present in England since before the Norman Conquest,<sup>371</sup> and banished from England in 1290,<sup>372</sup> Jews occupied an untenable position in the feudal world and were at various times tolerated, protected, and persecuted.<sup>373</sup> Operating under many disadvantages and risks, including

367. MCKECHNIE, *supra* note 16, at 377–78.

368. 1215 Magna Carta, *supra* note 8, at cl. 60.

369. *Id.* at cl. 40 (emphasis added).

370. *Id.* at cl. 63.

371. See MCKECHNIE, *supra* note 16, at 225 (discussing the history of the Jewish people in England).

372. *Id.*

373. See *id.* (identifying three periods of policy).

attacks in public,<sup>374</sup> Jews in England lent money at rates ranging between “43 1/3% to 86 2/3% per annum.”<sup>375</sup> However, they did business only at the mercy of the King, who raked off much of the profits in the form of “tallages,”<sup>376</sup> arbitrary taxes, which sometimes required the payment of “enormous” sums.<sup>377</sup> Thus, according to McKechnie, “[i]f John saved . . . [the Jews] from being robbed by his Christian subjects, it was [so] that they might be better worth the robbing by a Christian [K]ing.”<sup>378</sup>

The baronial insurgents felt no sympathy for the Jews, and some of them stopped in London to rob and murder Jews en route to Runnymede on May 17, 1215.<sup>379</sup> The barons, many of whom were in debt,<sup>380</sup> discovered a way to strike at both the Jewish moneylenders and at John. That cause was the plight of heirs whose fortunes were likely to be depleted or entirely wasted by the high interest rates on loans made to the deceased. “During his nonage a ward had nothing wherewith to discharge either principal or interest, since he who had the wardship drew the revenue.”<sup>381</sup> Then, “[a]t the end of a long minority, an heir would have found the richest estates swallowed up by a debt which had increased automatically ten or twenty-fold.”<sup>382</sup> Thus, Clause 10 in the 1215 Charter provides:

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, irrespective of whom he holds his lands. If such a debt falls into the hands of the Crown, it will take nothing except the principal sum specified in the bond.<sup>383</sup>

Clause 10 would deprive Jews of interest on the money they lent. A second clause—framed in terms of the interests of widows and surviving children—then struck at the assets often used as security for loans. Clause 11 provides:

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374. *See id.* (describing a “general massacre” in 1189); *see also* JOHNSON, *supra* note 249, at 107 (“There were pogroms in London, Norwich, Lincoln and Stamford; and in York 150 Jews . . . were massacred.”).

375. MCKECHNIE, *supra* note 16, at 224.

376. *See Tallage*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A levy demanded by a feudal lord from tenants in lieu of the tenants’ provision of goods and services.”).

377. *See* MCKECHNIE, *supra* note 16, at 228 (describing the heavy tallage Jewish people were compelled to pay the Crown).

378. *Id.* at 229.

379. *See id.* at 228 (“[U]sing the stones of their houses to fortify the city walls.”).

380. JOHNSON, *supra* note 245, at 106–07.

381. MCKECHNIE, *supra* note 16, at 224.

382. *Id.*

383. 1215 Magna Carta, *supra* note 8, at cl. 10.

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 residue, reserving the service due to his feudal lords. Debts owed to persons other than Jews are to be dealt with similarly.<sup>384</sup>

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.<sup>385</sup> What remained was further reduced by amounts needed to provide necessities for minor children or repay feudal lords (such as the barons who forced John to sign the Magna Carta). Presumably, it was not much consolation to Jewish moneylenders that the final clause provided repayment of debts to other persons would be treated similarly.

Clauses 10 and 11 were dropped from the 1216 Magna Carta and never reappeared in later versions.<sup>386</sup> However, the substance of those provisions was reenacted in other laws. Historian Paul Johnson concludes the "Magna Carta undermined the economic basis of English medieval Jewry."<sup>387</sup>

### C. *Testimony by Women*

The 1215 Magna Carta confirmed the existing rule,<sup>388</sup> which held the testimony of women was in many instances legally insignificant. Clause 54 states:

No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.<sup>389</sup>

This clause, which dealt only with cases involving murder, declared "that no woman has the right to institute proceedings in this way for the death of [her] father, son, or friend, but only for that of her husband."<sup>390</sup> The Charter recognized no such disability in the case of men.

Clause 54 had the effect of often depriving women of their day in court. There are entries on the plea rolls showing that women presented claims

384. *Id.* at cl. 11.

385. See MCKECHNIE, *supra* note 16, at 231 ("[O]nly two-thirds . . . remaining . . .").

386. See *id.* (citing the omission of provisions in the Magna Carta).

387. JOHNSON, *supra* note 245, at 107.

388. See MCKECHNIE, *supra* note 16, at 453 ("[T]he barons here made no change on existing law.").

389. 1215 Magna Carta, *supra* note 8, at cl. 54.

390. MCKECHNIE, *supra* note 16, at 453.

“for the death of a son, a brother, a nephew or a mother.”<sup>391</sup> However, according to Faith Thompson, “whenever the Great Charter was invoked . . . [the women were] non-suited.”<sup>392</sup>

#### D. *Earls and Barons*

Earls and barons were extensively insulated from criminal liability<sup>393</sup> 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.<sup>394</sup>

In the early thirteenth century, the number of earls and barons was small.<sup>395</sup> It is easy to envision how this type of provision might have been conducive to a “conspiracy of silence” whereby there was a tacit agreement among the barons not to condemn one another. However, the alternative is also possible, namely that earls and barons might hold their own to a higher standard. In one instance, a “Thomas de Furnivall was confident a local jury would ‘tax’ him at a lower figure than that fixed by the Exchequer barons.”<sup>396</sup>

#### E. *Immigrants*

One serious concern for the barons was the fact that French supporters of King John during his military quests in France had been promoted to positions of power and authority in England, thus diminishing the barons’ influence. To remedy this problem, King John was forced to promise they would be dismissed. Thus, in a sharp turn from the Magna Carta’s magisterial principles of due process and good governance, Clause 50 launches an *ad hominem* attack against persons whose names are now oddly memorialized in the Great Charter. That provision bluntly states:

We will remove completely from their offices the kinsmen of Gerard de Athée, and in future they shall hold no offices in England. The people in

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391. FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300–1629*, at 55 (1948) (citation omitted).

392. *Id.*

393. “The House of Lords (except in cases involving the dignity or status of a peer) has never claimed to act as a court of first instance in civil cases to which a peer was a party.” MCKECHNIE, *supra* note 16, at 392.

394. 1215 Magna Carta, *supra* note 8, at cl. 21.

395. *Cf.* TURNER, *supra* note 48, at 18 (“[A]bout 165 men ranked as barons at the end of the twelfth century . . . [and earls numbered] fourteen or fifteen on John’s accession in 1199.”).

396. MCKECHNIE, *supra* note 16, at 297.



question are Engelard de Cigogné, Peter, Guy, and Andrew de Chanceaux, Guy de Cigogné, Geoffrey de Martigny and his brothers, Philip Marc and his brothers, with Geoffrey his nephew, and all their followers.<sup>397</sup>

There is no indication these persons were to be accorded due process or judged on the merits—which is what the Rule of Law requires.<sup>398</sup> Far from being accorded equal treatment by the law, the designated individuals were summarily singled out for an unavoidable penalty based on nationality.<sup>399</sup> The only consolation is that many of them are now remembered in the text of one of history's most famous documents.

#### F. *On Balance*

As the foregoing sections make clear, the 1215 Magna Carta was in no sense a model of equal treatment under the law. However, this is not surprising. “‘Equality’ is essentially a modern ideal . . . .”<sup>400</sup> The concept that all persons are created equal and should enjoy equal rights did not take root politically until centuries later,<sup>401</sup> and even then legal practices often fell (and still fall) short of the underlying ideals.

However, it is important to remember 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;<sup>402</sup> the rights of “all merchants”<sup>403</sup> and “any man”<sup>404</sup> to travel; the liberties, customs, and

397. 1215 Magna Carta, *supra* note 8, at cl. 50.

398. *See* Codd v. Velger, 429 U.S. 624, 632 (1977) (Stevens, J., dissenting) (noting Justice Douglas's concurring opinion for the principle that in a society that prizes the Rule of Law, “the guilty as well as the innocent are entitled to a fair trial” (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring))).

399. *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting) (suggesting that “respecting the rights of foreign nationals” is required by the Rule of Law).

400. MCKECHNIE, *supra* note 16, at 114.

401. Lincoln's objective in the Civil War was to save a form of government “whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life.” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 438 (Roy P. Basler et al. eds., 1953).

402. *See* 1215 Magna Carta, *supra* note 8, at cl. 1 (“[T]he English church shall be free, and shall have its rights undiminished and its liberties unimpaired . . .”).

403. *Id.* at cl. 41. Clause 41 provides:

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. This, however, does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too.

obligations of cities<sup>405</sup> or similar entities;<sup>406</sup> and the interests and needs of hostages<sup>407</sup> and mercenaries,<sup>408</sup> as well as the rights of widows, surviving children, heirs, and wards,<sup>409</sup> not to mention persons accused of crime.<sup>410</sup>

Rather than condemn the 1215 Charter for failing to meet twenty-first century standards regarding equal treatment, it is better to recognize the Magna Carta was an important landmark in legal development. It eventually moved legal institutions across the globe closer to the ideal of equal justice under law and practices that are consistent with the Rule of Law.

## VII. OTHER PROVISIONS

Not every laudable modern legal concept can be traced to the Magna Carta. So too, not every provision in the Magna Carta relates to the modern Rule of Law. There are many provisions in the 1215 Magna Carta that deal with other miscellaneous issues, which were generally matters of only temporary importance. Such clauses dealt with feudal obligations<sup>411</sup>

*Id.*

404. *Id.* at cl. 42. Clause 42 provides:

In [the] future it 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. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants—who shall be dealt with as stated above [*see supra* note 403, discussing 1215 Magna Carta cl. 41]—are excepted from this provision.

*Id.*

405. *See id.* at 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.”); *id.* at cl. 23 (“No town or person shall be forced to build bridges over rivers except those with an ancient obligation to do so.”).

406. *See id.* at cl. 25 (“Every county, hundred, wapentake, and tithing shall remain at its ancient rent, without increase, except the royal demesne manors.”). A “hundred” was “a county subdivision that had its own local court.” *Hundred*, BLACK’S LAW DICTIONARY (10th ed. 2014). “In some English counties,” a “wapentake” was “a division corresponding to the hundred or ward in other counties.” *Wapentake*, BLACK’S LAW DICTIONARY (10th ed. 2014). “Ridings” were “[o]ne of the three administrative districts into which Yorkshire was formerly divided . . .” *Riding*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

407. *See supra* note 49 and accompanying text.

408. *See* 1215 Magna Carta, *supra* note 8, at 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.”).

409. *See* discussion *supra* Section V.B.

410. *See* discussion *supra* Part II.

411. *See* 1215 Magna Carta, *supra* note 8, at 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.* at cl. 29 (“No constable may compel a knight to pay money for castle-guard if the knight is willing to undertake the

and taxes;<sup>412</sup> intestate distribution;<sup>413</sup> forests<sup>414</sup> and rivers;<sup>415</sup> standardized units of measure;<sup>416</sup> founders of abbeys;<sup>417</sup> and pardons.<sup>418</sup>

### VIII. CONCLUSION

Today, authors are quick to point out that only four of the original sixty-three provisions in the 1215 Magna Carta are still good law in England.<sup>419</sup> Two of those provisions guarantee the freedom of the English Church<sup>420</sup> and the rights of the city of London.<sup>421</sup> The other

guard in person, or with reasonable excuse to supply some other fit man to do it. A knight taken or sent on military service shall be excused from castle-guard for the period of this service.”); *id.* at 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 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. We will hold the ‘escheat’ in the same manner as the baron held it.”).

412. *See id.* at 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.”).

413. *See id.* at 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.”).

414. *See id.* at 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 or are sureties for someone who has been seized for a forest offence.”); *id.* at cl. 47 (“All forests that have been created in our reign shall at once be disafforested.”).

415. *See id.* at cl. 33 (“All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.”).

416. *See id.* at 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, namely two ells within the selvages. Weights are to be standardised similarly.”).

417. *See id.* at cl. 46 (“All barons who have founded abbeys, and have charters of English kings or ancient tenure as evidence of this, may have guardianship of them when there is no abbot, as is their due.”).

418. *See* 1215 Magna Carta, *supra* note 8, at cl. 62. Clause 62 states:

We have remitted and pardoned fully to all men any ill-will, hurt, or grudges that have arisen between us and our subjects, whether clergy or laymen, since the beginning of the dispute. We have in addition remitted fully, and for our own part have also pardoned, to all clergy and laymen any offences committed as a result of the said dispute between Easter in the sixteenth year of our reign (i.e., 1215) and the restoration of peace.

In addition we have caused letters patent to be made for the barons, bearing witness to this security and to the concessions set out above, over the seals of Stephen [A]rchbishop of Canterbury, Henry [A]rchbishop of Dublin, the other bishops named above, and Master Pandulf.

*Id.*

419. *See, e.g.,* VINCENT, *supra* note 23, at 4 (stating “all but four” of the “clauses ha[ve] been declared obsolete”).

420. *See* 1215 Magna Carta, *supra* note 8, at cl. 1 (“[T]he English church shall be free, and shall have its rights undiminished and its liberties unimpaired . . .”).

two provisions deal with the legal system, guaranteeing justice will not be sold or denied<sup>422</sup> and that persons will be punished only in accordance with the lawful judgment of their equals or “the law of the land.”<sup>423</sup>

It is not surprising 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 Magna Carta’s diminished scope as a repository of currently applicable legal rules does not detract from its status as a landmark in the development of the law. In its time, it was “a revelation of the possibility of freedom to the [medieval] world.”<sup>424</sup> There had never been anything remotely similar, and “[a]fter this long list of liberties had been conferred upon Englishmen, nothing could ever be quite the same.”<sup>425</sup> As Ralph V. Turner observed, “[t]he Great Charter’s capacity for growth, as long after 1215 as the seventeenth century [in England] and as far away as [the] eighteenth[] century [in] North America, makes it a unique political document, a standard for judging a state’s treatment of its citizens today.”<sup>426</sup>

Rich in detail<sup>427</sup> and concerned about issues that will always be at the center of the search for justice, the Magna Carta was unprecedented. Over the course of eight centuries, it has inspired reformers and catalyzed the development of a robust modern formulation of the Rule of Law.<sup>428</sup>

“The Great Charter set the expectations that for 800 years have shaped the development of the law in England, America, and around the globe.”<sup>429</sup> Like a blazing light in the medieval darkness, “the Magna Carta illuminated the importance of legal principles, fair procedures,

421. *See id.* at cl. 13 (“The city of London shall enjoy all its ancient liberties and free customs, both by land and by water.”).

422. *See id.* at cl. 40 (“To no one will we sell, to no one deny or delay right or justice.”).

423. *Id.* at cl. 39.

424. STENTON, *supra* note 57, at 3 (alteration in original) (quoting WILLIAM STUBBS, *EPOCHS OF MODERN HISTORY: THE EARLY PLANTAGENETS* 158 (Edward E. Morris et al. eds., N.Y.C., Charles Scribner’s Sons, 8th ed. 1896)).

425. *Id.*

426. TURNER, *supra* note 48, at 8.

427. *See* VINCENT, *supra* note 23, at 22 (“What was unusual about Magna Carta was . . . the detail . . .”).

428. *See* JOHN E. BEBOUT, *AN ANCIENT PARTNERSHIP: LOCAL GOVERNMENT, MAGNA CARTA, AND THE NATIONAL INTEREST* 20–21 (1966) (“The special meaning of the [R]ule of [L]aw in English and American government . . . is a result of the way in which the common law evolved in the decisions of the courts during the Middle Ages.”).

429. Vincent R. Johnson, *The Magna Carta and the Expectations It Set for Anglo-American Law*, *SAN ANTONIO LAW*, Mar.–Apr. 2015, at 5, 5; *see also* Vincent R. Johnson, *The Great Charter*, 78 *TEX. B.J.* 266, 266–69 (2015) (discussing the influence of the Magna Carta on the law of Texas).

proportional punishment, official accountability, and respect for human dignity.”<sup>430</sup> It undoubtedly ranks among the most important legal documents ever written.<sup>431</sup>

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430. *Id.*

431. Some of the language and ideas contained in this work first appeared in a much shorter magazine article written by the author. *See* Johnson, *supra* note 429, at 5.

APPENDIX A

**The State of Texas  
House of Representatives**

H.R. No. 2402

RESOLUTION

WHEREAS, The year 2015 marks the 800<sup>th</sup> anniversary of the signing of the Magna Carta, one of the foundational documents of our system of government, law, and jurisprudence; and

WHEREAS, In the early years of the 13<sup>th</sup> century, the barons of England rose up in rebellion against their monarch, King John; they objected to his excessive taxation, punitive fines, and manipulation of the legal system, and they forced the king to negotiate with them at Runnymede, along the River Thames in Southern England; and

WHEREAS, On June 15, 1215, King John and the barons agreed upon the Magna Carta, or “Great Charter”; drafted in Latin, this remarkable document addressed the grievances of the barons and put limits on the executive power of the king, initiating a tradition of individual liberty and rule of law that has since echoed around the globe; and

WHEREAS, The Magna Carta strongly influenced the constitutions of both the United States and Texas; it was relied upon by the drafters of the 1836 Constitution of the Republic of Texas, and it is one of the sources for the Texas Bill of Rights; in the early 20<sup>th</sup> century, the Texas Supreme Court declared that “all grants of power are to be interpreted in the light of the maxims of Magna Carta; and

WHEREAS, Among the document’s most famous and influential provisions is Clause 39, which declares that no one shall be imprisoned or stripped of his rights, “except by the lawful judgment of his equals or by the law of the land”; from this clause derives an individual’s right to due

process of law and trial by jury, as well as the concept of habeas corpus, which protects citizens against illegal imprisonment; and

WHEREAS, Also influential is Clause 40, which states that “To no one will we sell, to no one deny or delay right or justice”; this elegant formulation is the basis of the “open courts” provision in the Texas Constitution, which guarantees that all litigants have the opportunity to redress their grievances and receive their day in court; and

WHEREAS, On a summer’s day eight centuries ago, in a field by the bank of the Thames, the English people lit a flame of liberty that continues to burn brightly in the Lone Star State, ensuring that all Texans are guaranteed their fundamental rights to justice and fair treatment under the law; now, therefore, be it

RESOLVED, That the House of Representatives of the 84<sup>th</sup> Texas Legislature hereby commemorate the 800<sup>th</sup> anniversary of the Magna Carta.

Joe Straus  
**Speaker of the House**

I certify that H.R. No. 2402 was adopted by the House on May 7, 2015, by a non-record vote.

Robert Haney  
**Chief Clerk of the House**

Four Price  
**State Representative  
District 87**