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Magna Carta and the Fundamental Right to Due Process

Joshua C. Tate

MAGNA CARTA AND THE FUNDAMENTAL RIGHT TO DUE PROCESS

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The 800th anniversary of Magna Carta has been marked by many lectures, conferences, and other commemorations in England and around the world. While most commentators have taken this opportunity to praise the lasting contribution of Magna Carta to the history of law, there have also been dissenting voices[2]. Some critics have focused on the well-known fact that Magna Carta was of greater importance to the powerful than the powerless[3]. A few have mocked the obsolescence or obscurity of certain provisions, such as the prohibition on fish weirs in the Thames[4]. Others attribute great significance to the fact that King John

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2 *See, e.g.*, Tom Ginsburg, *Stop Revering Magna Carta*, **N.Y. Times**, Jun. 14, 2015; Jill Lepore, *The Rule of History*, **New Yorker**, Apr. 20, 2015; Eduardo Reyes, *Magna Carta – Was It All That?*, **Law Soc'y Gazette**, Feb. 4, 2015.

3 This point was made most memorably by Sellar and Yeatman, who wryly explained, in their classic *1066 and All That*, that Magna Carta was "a *Good Thing* for everyone (except the Common People)". Walter Carruthers Sellar & Robert Julian Yeatman, **1066 and All That**: A Memorable History of England 26 (1930). For recent variations on the argument, see Sarah Lyall, *Magna Carta, Still Posing a Challenge at 800*, **N.Y. Times**, Jun. 14, 2015 (quoting Nicholas Vincent, who refers to the mythology surrounding Magna Carta a "load of tripe," but nonetheless a "very useful myth," and Akhil Amar, who calls the Charter "one of the many, many things in the Anglo-American legal tradition that will eventually grow and mutate and be misinterpreted as something that's important").

4 *See, e.g.*, Reyes, *supra* note 2.

had his Charter annulled shortly after it was sealed, as though the reissues by John's successors owe nothing to his Charter[5]. Although it may be fashionable in 2015 to trivialize the events at Runnymede, celebrating the original Charter ought to be seen as more appropriate, rather than less, in light of its reinvigoration in the intervening centuries[6].

Without detracting from the celebratory mood, however, one may note that Magna Carta has been endowed with more meaning than it had eight centuries ago. For example, the famous reference in Clause 39 to judgement by one's peers cannot have been interpreted in 1215 as extending trial by jury to criminal cases, which were then commonly resolved by judicial ordeals or trial by battle[7]. Moreover, John's promise in Clause 40 not to sell, deny, or delay justice was too vague to be of great practical use in everyday litigation. Nevertheless, Magna Carta did make a meaningful and concrete contribution to due process in 1215, as shown by certain provisions that are seemingly overlooked by critics eager to downplay the Charter's importance.

In this article, I will highlight two lesser known clauses of Magna Carta that had real contemporary significance in guaranteeing the availability of jury trial for some categories of civil litigation. The ringing promises of Clauses 39 and 40 may have inspired great jurists and founders of nations, but the more humble Clauses 17 and 18 – specifying the proper location and manner of hearing certain civil cases – must also be taken into account in assessing the Charter's importance. I will first address the traditional account of Magna Carta's protection of due process and jury trial, which reflects a misunderstanding of the historical context. I will then explain how Clauses 17 and 18 addressed specific concerns about the administration of justice in John's reign. I conclude that the notion of due process in Clauses 17 and 18, while more limited than the broad guarantees in Clauses 39 and 40, nonetheless implicates a fundamental right as defined in modern jurisprudence. The Great Charter of 1215 was a meaningful step forward in its time, albeit not in the precise way that has been commonly assumed.

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5 *See, e.g.*, Ginsburg, *supra* note 2 (calling the Magna Carta of 1215 a "failure" because it did not constrain King John, while acknowledging the frequent reissues of the Charter by John's successors).

6 As Noah Feldman notes, "[i]t's a mistake to think that a document's importance can be measured solely by the immediate context in which it's produced". Lyall, *supra* note 3.

7 *See* Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury*, in **Magna Carta**: Muse and Mentor 139, 142-46 (Randy J. Holland ed., 2014).

I.

As critics of this year's Magna Carta celebrations like to remind us, most of Magna Carta is no longer good law today, having been repealed at one time or another[8]. There are, however, a few exceptions, including provisions derived from Clauses 39 and 40 of the original Charter. In its original form, Clause 39 provided that "*[n]o free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgement of his peers or by the law of the land*"[9]. Clause 40 went on to promise that "*[t]o no one will we sell, to no one will we deny or delay, right or justice*"[10]. Together, these stirring lines have been the subject of much attention and admiration, but also a source of great misunderstanding.

The "lawful judgement of his peers" of Clause 39 is not a synonym for jury trial, despite the frequent pronouncements by certain jurists and pundits to the contrary. Rather, it embodies a more general principle: that men, regardless of rank, could not be tried by those who ranked below (or above) them in the feudal hierarchy, and that freemen could not be tried by the unfree[11]. The mechanisms that were used to resolve criminal cases, including the ordeal of water, might fall under the heading of "the law of the land", but were quite dissimilar from jury trial[12].

In his *Commentaries*, Blackstone cited the language of Clause 39 for the proposition that "*trial by jury, or the country, **per patriam**, is also that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter*"[13]. The U.S. Supreme Court has generally followed Blackstone's misinterpretation[14]. The connection, however, likely reflects "*a tendency of later generations*

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8 *See* J.C. Holt, **Magna Carta** 33 (3d ed. 2015).

9 *Nullus liber homo capiatur, vel inprisonetur, aut dissaisatur, aut utlaghetur, aut exuletur, aut aliquo alio modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iuditium parium suorum vel per legem terre.* (David Carpenter, **Magna Carta** 52-53 (2015). All quotations from the 1215 Charter in this article use Carpenter's new (and excellent) English translation)

10 *Nulli vendemus, nulli negabimus, aut differemus, rectum aut justitiam*. *Id.*

11 *See* William Sharp McKechnie, **Magna Carta**: A Commentary on the Great Charter of King John (1914).

12 *See* McSweeney, *supra* note 7, at 142-49.

13 4 William Blackstone, Commentaries *342-43.

14 *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 308-09 (1879) (citing Blackstone).

to explain what was unfamiliar in the Great Charter by what was familiar in their own experience"[15].

It is fair to say, therefore, that Clause 39 of Magna Carta did not secure the right to trial by jury for Englishmen accused of crimes. The sweeping language of Clause 40, on the other hand, raised more questions than it answered. Certainly the clause did not prohibit the king from charging for royal writs[16]. Although John's majestic promise in Clause 40 is worthy of being inscribed on a courthouse wall[17], it would have been of little use to actual litigants in 1215, since it is broad enough to support virtually any argument, yet vague enough to be rejected in every case.

II.

If Clauses 39 and 40 contained all that Magna Carta had to say on the subject of due process, it might be fair to conclude that the Charter's principal contribution to legal history was the inspiration it gave to future generations. There is more to the Charter than those two clauses, however. In particular, two lesser-known clauses relating to the location of and procedure for hearing common pleas also promote the right to due process, and had meaningful and concrete significance for litigants in 1215. By ensuring that these pleas, which made use of jury-like bodies to resolve disputes, would be heard according to regular procedures and not follow King John around the country, the Charter limited the king's ability to interfere in the course of justice.

Clauses 17 and 18 of the original Charter of 1215 provided as follows:

> *17. Common pleas are not to follow our court but are to be held in some specified place*[18].
>
> *18. Recognitions of novel disseisin, of mort d'ancestor, and of darrein presentment, are not to be taken unless in their counties and in this way*[19].

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15 *See* McKechnie, *supra* note 11.

16 *See id.*

17 The courthouse in Denver, Colorado, named for Justice Byron White of the U.S. Supreme Court contains a paraphrase of Clause 40 of Magna Carta inscribed on one of its sides. Ironically, White was one of the few U.S. Supreme Court justices to take a critical view of the Magna Carta myth. *See* Williams v. Florida, 399 U.S. 78, 91 n. 27 (1970) (noting that "*[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*").

18 *Communia placita non sequantur curiam nostrum sed tenantur in aliquot certo loco*. Carpenter, *supra* note 9, at 44-45.

The "recognitions" referred to in Clause 18 all summoned a jury-like body called an "assize," composed of freemen from a particular area, to resolve a question or questions specified in the writ[20]. The most famous of the three was the assize of novel disseisin, which provided a remedy in the royal courts for a freeholder put out of his landholding unjustly and without a judgment[21]. The recognition of mort d'ancestor allowed an heir to recover the seisin of his ancestor at the time of his death[22]. Finally, the assize of darrein presentment resolved disputes about the patronage of vacant churches, by reference to the patron who presented the last parson to the church[23].

Clauses 17 and 18 did not create these remedies, nor did they guarantee that property disputes would be resolved by jury trial. Rather, the clauses relieved litigants of the necessity of following the king in his travels around the country[24]. The original intent seems to have been that the king's justices would visit the counties more frequently to hear the recognitions, although this was not what actually happened in the years after 1215[25].

John was a restless king who travelled frequently over wide areas of England, particularly after the loss of his continental possessions[26]. Bringing a lawsuit before John's court meant aiming at a moving and sometimes disappearing target[27]. The drafters of Clause 17 and 18 must have had these practical problems in mind. When considered together with the famous Clause 40, however, these two clauses might also be seen as an attempt to limit opportunities for inappropriate royal intervention.

The surviving plea rolls from the reign of King John provide evidence that he did, on occasion, personally intervene to delay or deny justice while presiding over his court. This may be seen, for example, in

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19 *Recognitiones de nova dissaisina, de morte antecessoris, et de ultima presentatione, non capiantur nisi in suis comitatibus et hoc modo. Id.*

20 **The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill** (G.D.G. Hall ed. and trans., 1965), XIII, p. 148-70.

21 *See* Donald W. Sutherland, **The Assize of Novel Disseisin** 1-2 (1973).

22 *See* Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 **Colum. L. Rev.** 433, 440 (1988).

23 *See* Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 **Am. J. Legal Hist.** 280, 306-07 (2006).

24 *See* Paul Brand, *Magna Carta and the Courts*, at 1 (unpublished manuscript, on file with author).

25 *See id.* at 9-14.

26 Carpenter, *supra* note 9, at 204-05.

27 *See* Brand, *supra* note 24, at 1.

three cases involving advowsons of churches[28]. In Easter Term 1201, John ordered his justices not to hear an assize of darrein presentment brought by Robert de Buillers and his wife Hillary against William of Firsby, archdeacon of Stow, until his preferred candidate, Roger de Beaumont, was accepted by the chapter of Lincoln as bishop to replace the recently deceased Hugh of Avalon[29]. In Hilary Term 1203, King John prohibited a lawsuit from being heard concerning the church of St. Decuman's as long as the bishop of Bath had taken the sign of the cross[30]. In Trinity Term 1208, a dispute over the church of Wimpole in the diocese of Ely between Saer de Quenci, earl of Winchester, and Robert de Insula was abruptly called to a halt with the explanation that "*the lord king does not want the lawsuit to proceed (**dominus rex non vult quod loquela illa procedat**)*"[31].

Interventions such as these are certainly exceptional. In the vast majority of cases recorded in the plea rolls, no personal involvement from the king is noted. However, if John was perceived as a king who was not entirely fair in his treatment of litigants – as Clause 40 of Magna Carta might suggest – then he might have been faulted not only for the instances where he publicly intervened, but for other occasions when one of the litigants suspected (or hoped for) an intervention, whether it occurred or not.

Clauses 17 and 18 of Magna Carta did not prevent John or his successors from intervening with the functioning of the royal courts. They did, however, raise the stakes for such intervention. When lawsuits followed the king, he could speak or stay silent at his pleasure. It would not so easy for the king to make his views known about lawsuits being heard outside his presence, unless one of the parties sought the king's formal intervention by writ.

III.

Although Clauses 17 and 18 did not guarantee trial by jury in property disputes, they did make the institution more convenient for some

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28 *See* Joshua C. Tate, *Episcopal Power and Royal Jurisdiction in Angevin England*, *in* **Studies in Canon Law and Common Law in Honor of R.H. Helmholz** (Troy L. Harris ed., 2015), at 15, 19.

29 1 CRR 442 (Pas. 1201) [hereinafter CRR]; **The Life of Saint Hugh of Lincoln** (Herbert Thurston trans., 1898), 565-66.

30 2 CRR 179 (Hil. 1203).

31 1 CRR 442 (Pas. 1201).

litigants, and they served to protect the rule of law from inappropriate interference. Would it be right to say that those clauses served to protect the fundamental right of due process? By commonly accepted definitions, the answer appears to be yes.

The European Charter of Fundamental Rights classifies the right to property as a fundamental right, providing that "*[n]o one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss*"[32]. The Charter further provides that those whose rights are violated have "*the right to an effective remedy before a tribunal*", including "*a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*"[33]. King John's promise in Magna Carta that his courts would be accessible to subjects claiming certain violations of property rights would promote these fundamental rights as defined in the modern EU Charter.

In the U.S., the right to be secure in one's property has long been accepted as fundamental, although the emphasis placed on property rights as opposed to personal rights in U.S. jurisprudence has shifted over time[34]. At least some property rights are protected by a constitutional right to jury trial. The Seventh Amendment provides that "*[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law*"[35]. The right to jury trial in civil cases is thus limited both by the type of dispute and the nature of the property involved. The protection offered to common law recognitions under Clause 17 and 18 was also limited, but it similarly helped to preserve a jury-like remedy in the three assizes mentioned in Clause 18.

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32 Charter of Fundamental Rights of the European Union, art. 17, 2000 O.J. (C 364) 1, 12.

33 *Id.* art. 47, 2000 O.J. (C 364) at 20.

34 *See* Bernard Schwartz, **The Great Rights of Mankind**: A History of the American Bill of Rights 216-19, 223-24, 236-37 (1992). Although the Declaration of Independence speaks of "Life, Liberty, and the pursuit of Happiness", its author, Thomas Jefferson, firmly believed in a fundamental right to property. *See* **The Declaration of Independence** para. 2 (U.S. 1776); Michael P. Zuckert, *Thomas Jefferson on Natural Rights*, *in* **The Framers and Fundamental Rights** (Robert A. Licht ed., 1992), at 137, 158-59.

35 **U.S. Const**. amend. VII.

IV.

Had Magna Carta been of no real significance in 1215, its 800th anniversary would still be worthy of celebration. As a symbol of freedom under law, the Great Charter unquestionably influenced jurists and political leaders at key moments in the development of the Anglo-American legal and constitutional traditions, in ways that the parties involved in the document's creation could not have imagined. Nevertheless, careful study shows that even in June 1215, Magna Carta offered important and meaningful guarantees of fundamental rights, such as the right to be protected against wrongful disseisin of one's property, as vindicated through royal writs that made use of jury trial. Magna Carta is a treasure of history that deserves to be remembered, not just this year, but every year in the future, as long as nations choose to govern themselves according to the rule of law.

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