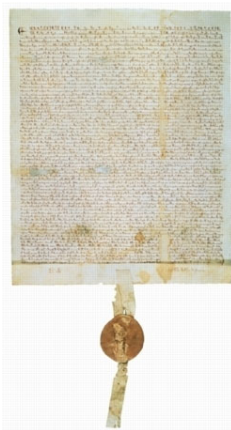




MAGNA CARTA AFTER 800 YEARS: FROM *LIBER HOMO* TO MODERN FREEDOM

In June 2015 we celebrate the 800th anniversary of the signing of one of the key legal documents in English political history, the “Great Charter” ([Magna Carta](#)). When a group of disgruntled Barons forced King John to sign a document in June 1215 at Runnymede near Windsor, listing his political and legal powers (and thus explicitly limiting himself to those defined powers) little did they realise that they would begin a tradition of thinking about the “rights of Englishmen” which would echo down the centuries to our present day. In this Liberty Matters discussion we have invited four leading historians to explain what Magna Carta was, why it has appealed to so many people over the years, the impact it has had on the development of Anglo-American legal and political institutions, and its relevance for us today. The Lead Essay is by Justin Champion, Professor of the History of Early Modern Ideas at Royal Holloway, University of London; with comments by Richard Helmboltz, the Ruth Wyatt Rosenson Distinguished Service Professor of Law at the University of Chicago; Nicholas Vincent, Professor of Medieval History at the University of East Anglia; and David Womersley, the Thomas Warton Professor of English Literature at the University of Oxford.



Magna Carta Clause 39

Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae.

(No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.)

MAGNA CARTA AFTER 800 YEARS: FROM *LIBER HOMO* TO MODERN FREEDOM

by Justin Champion

‘Here are the title deeds of freedom which should lie in every cottage home ... we must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence’.

Winston Churchill, Fulton, Missouri. 5th March 1946.

I

The sealing of the Magna Carta, and the lesser known Charter of the Forests, in 1215 was both an historical event, but also produced a written text which has been

subject to reissue, revision and re-purposing over the subsequent centuries. Magna Carta thus provides a foundational myth of political legitimacy, but also a powerful stream of different types of legacy. 1215 saw a moment where a 'tradition' was seeded, and a point of departure where both the event and the ideas became the substance of significant and powerful interpretation by and for later generations. In the Lincolnian sense of the word, Magna Carta, has become a powerful and perdurable 'myth'. This is not to belittle or reduce Magna Carta to the fictional, literary or 'invented' categories, but to underline that invoking the episode, its values or its meaning, exercises a powerful authority in mobilising support both for the legitimacy of contemporary political actions and institutions, or in the name of legitimate resistance against tyranny or illegal agents. The history of the reception of the Magna Carta has been driven by a series of intimately connected 'moments', where drawing on pre-existing traditions, new voices and communities have deployed the exemplar in the name of justice, freedom, equality and the rule of law.



In the twenty-first century, alongside the commonplace use of 1215 in the defence of civil rights and against illegal detention, the tradition has been cited to support Magna Cartas for the poor in the Philippines, for global union rights at Davos, for new constitutions in Ecuador and underpins the Inter-American Democratic Charter. It has recently been translated into Mandarin.^[1] That the Magna Carta has a powerful public identity can even be seen in its use by musician Jay-Z in his CD release 'Magna carta- Holy Grail', but also in the use of it in the defence of the rights of protest consequent upon the shooting of Michael Brown in Ferguson. All of these invocations of the 'brand' reinforce the persistent but protean qualities

of the tradition. If one were to attempt to provide a narrative for the histories of these 'moments' perhaps the best would be to suggest that the most evident trajectory of change was driven by an increasingly capacious community being identified as demanding protection under the category of *liber homo*. From its narrowest category, in the initial feudal mode which extended only to free men, to successive applications that extended the label to adult men with appropriate property qualifications, and eventually to women. It is possible to see Magna Carta being adapted to reflect changes in broader society and encompassing a new range of humanity according to gender, class and, most recently, ethnicity under the category *liber homo*.

II

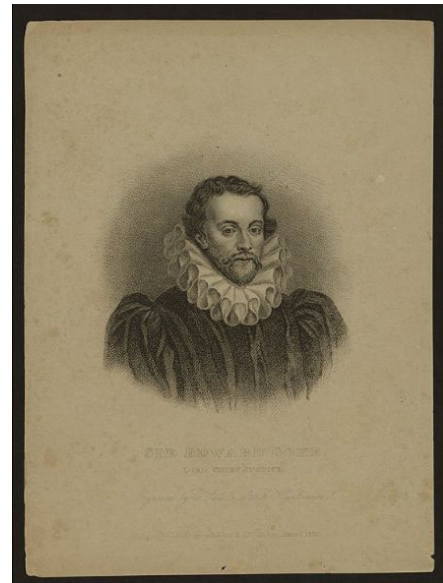
There is a commonplace assumption, certainly dominant in the hinterland of Anglo-American political and jurisprudential discourse, that contemporary principles underpinning democratic liberties can be traced back to, derived and sourced from the iconic Magna Carta moment of June 15th 1215. Both the act of agreement between monarch and baronial elite, and the textual outcomes, are regarded as a 'real living document'. On 30 July 2007 UNESCO admitted the artefacts (there are four surviving copies) to the collection of items identified as important to the 'Memory of the World' in 'recognition of their outstanding universal value'. The Magna Carta then was not simply a local, British, circumstantial, moment, but has been conceived (at least since the nineteenth century) as having a universal human purchase. As the UNESCO citation explains the percussive consequences of the act and the ideas are significant:

"The inscription covers the four surviving copies of the version of Magna Carta forced on King John by the Barons of England at Runnymede in June 1215. Magna Carta is a charter which, for the first time, detailed written constraints on royal authority in the fields of church rights, taxation, feudal rights and justice. It has become an icon for freedom and democracy throughout the world".

At the other extreme, popular tabloid newspapers have been producing material framing the meaning under the headline ‘Magna Carta the unstoppable: 15 facts about the deal that’s reined in royalty for 800 years’. These facts include: ‘For the first time the monarch was subject to the rule of law instead of governing by whim’, ‘The accord with King John was to be overseen by a council of 25 barons, with no taxes imposed without approval. The King was to call meetings by letter and give 40 days’ notice’, this meant as Professor David Carpenter has argued that ‘The Charter played an important part in the development of Parliament, even though the word itself does not appear’. The two most significant clauses suggested legal constraints on regal sovereignty – ‘No free man was to be ‘seized, imprisoned, disseised [have their property confiscated] or outlawed or exiled or in any way destroyed’ without a trial or breaking the law. And justice was not to be delayed, meaning barons couldn’t be locked up and forgotten’. Although this popular account recognises that the impact of the original charter was concerned with elite baronial privilege rather than the unfree peasant population, the later legacy (in a breathtaking piece of historical compression), ‘did become an inspiration to democrats. Parliament used it to argue against King Charles I, in the dispute that ended in the English Civil War and the King losing his head in 1649. And William of Orange cited the Charter to justify overthrowing James II in the Glorious Revolution of 1668-89. It also inspired the Founding Fathers of America when writing their constitution’. Again, in a frequently employed trope, there is a public assumption that ‘Magna Carta’s DNA’ underpins modern Human Rights legislation whether found in the European Convention of Human Rights or in British law. The complexity of making contemporary significance or political value out of a thirteenth century feudal document can be rehearsed in any number of ways: some political traditions argue that the legacy is manifest most effectively in the defence of the principle of the rule of law, by due public process, and the rights of individuals to have access to that process, and not be subjected to illegal imprisonment or detention. An alternative tradition, much evident in the early modern period, argued (in the language of the tabloid

newspaper), that the real heroes ‘were not barons looking out for themselves but Roundheads, Levellers, Tolpuddle Martyrs, Chartists, Suffragettes and all the other unknown radicals who fought for democracy’.^[2] Both traditions are ‘invented’ and perform present-centred functions as much as they recover an authentic historical past.

The 1215 Charter of Runnymede (as it was more commonly known until the end of the thirteenth century) although shaped by commonplace ideas of ‘lordship’ rather than an recognisably modern democratic theory, contained in it (as a by-product of the fierce contests between monarchy (bad King John) and the barons), a potential language of ‘liberties’, which in the right circumstances offered protection to all free men before the law, the rights of trial by peers, and in turn laid the foundations for the modern understanding of *habeas corpus* which renders illegal, improper detention.^[3]



Edward Coke

In the UK from the seventeenth century, Magna Carta became a powerful and protean resource and constitutional icon, being invoked primarily as a foundation stone for the unwritten but an historically authentic ancient constitution which underpinned the rule of law. This 'official' account was also profoundly contested by radical and minority groups, who employed Magna Carta as a means to justify acts of protest and

resistance against political tyranny and injustice. [Sir Edward Coke](#)'s legal erudition saw a public platform in the [Petition of Right \(1628\)](#) and laid the foundations for many subsequent moments of 'resistance' (in the name of the law). In the so-called Exclusion Crisis (1678-1681), The Duke of Buckingham, deployed Magna Carta to demand the recall of Parliament. These principles of liberty were again folded in to the defence of the Glorious Revolution in 1688-89. Later, and most notably in the Wilkite protests of the 1760s, through to the agitation for the extension of the franchise in the nineteenth century, and the demands for Women's rights in the early twentieth century, the authority of Magna Carta and its defence of freedom and 'freeborn English liberties' was a powerful public means of providing legitimacy of action.

These tensions between the usage of the tradition to defend and promote the status quo, the rule of law, and 'democratic' institutions, and the authority of text to legitimise resistance, protest and the rights of marginal and oppressed groups, also persists in the various commemorative activities under way to mark the 800th anniversary. Some traditional interests have put their weight behind promoting the legalistic interpretation under the banner of '800 hundred years of the democratic rule of law'. Others, for example the 'We the People' movement, have called for Magna Carta to be deployed to challenge the corruption of modern British government, and demand the overthrow of the Monarchy. In further developments, environmental groups have recognised that the wider purchase of the Magna Carta and its associated little Charter of the Forests provides a perspective on landownership and the care of the natural world pertinent for current times. More recently, with the NSA and Wikileaks revelations of Assange and Snowden, Tim Berners-Lee has called for a Magna Carta for the World Wide Web and the digital age, to protect the liberties and freedoms of individuals from predatory governments and commercial companies. In other parts of the world - China, Mexico, the Philippines and Burma for example - Magna Carta is being invoked as a means for legitimising resistance and protest, whether by peasant movements, public intellectuals, or political leaders.

III

John Gray has noted that, 'The history of ideas obeys a law of irony. Ideas have consequences, but rarely those their authors expect or desire, and never only those. Quite often they are the opposite'.^[4] These thoughts may help us make sense of the various political traditions which Magna Carta the event and the idea have spawned. Alan Ryan has also reflected recently on the relationship between the exploration of the history of political ideas and the influence such historical ideas wield over contemporary traditions of political thinking. As Ryan has wisely noted human beings are historical minded, and one pattern of thought and behaviour ascribes legitimacy to longevity. As he writes, 'We have a strong sense of the pedigree of our institutions, and of the moral and intellectual commitments they embody. For every person who knows what the contents of Magna Carta actually were, there are hundreds who think that the civil liberties of today descend somehow from that document'. In a reflective review Jeremy Waldron identifies this process, 'We construct and enact our politics—not just our political theory—in ways that are haunted by the past'. Magna Carta, even if we recognise its historically constructed 'meaning', offers an anchor, and a collective social memory upon which many groups can draw. The fact that the 'significance' of the tradition can also point to venerable and authentic artefactual resources that have survived centuries of change suggests that the pedigree of contemporary ideas has legitimacy.^[5]

This essay, taking its starting points from these perspectives, aims to explore how Magna Carta has both been subjected to revision, and acted as a canvas for the production of new ideas and activities. These different aspects have often been pitched as drawing legitimacy from the early tradition, but in fact are evidence of the persisting and repeated reinvention of old institutions and practices. Importantly for the purposes of this essay, this historical process not only valorised the political legitimacy of institutions (representational bodies, or specific legal and judicial processes), but perhaps more importantly empowered specific moments of political and social action. It will be the overarching argument of

the essay, that the future of the tradition of Magna Carta, indeed lies in the imaginative reinvention of these traditions, driven forward not simply by conceptual innovation, but by the changing circumstantial meaning of the core constituency encapsulated by the most protean, but significant vocabulary of *liber homo* (found in the famous [clause 39](#), of the Charter).

Magna Carta is often claimed to be the source that underpinned the origins of the institutions of parliamentary democracy and the creation of an impartial judicial process. Even if, so the argument goes, the statutory elements of the Magna Carta have been gradually whittled down to a remaining four clauses from the original sixty-three, those that remain validate modern freedoms under the law (especially in the most significant clause 39 which preserves each, and everyone, of us from illegal and improper imprisonment). It is a moot point that the text has any serious legal purchase in the UK. The Government website which monitors and identifies the authority of current legal acts - Legislation.gov.uk – notes rather bleakly, ‘There are currently no known outstanding effects for the Magna Carta’.^[6] So we may hold beliefs that the historical document defends our civil rights, but this is not the precise legal case: it is also a moot point whether the local authority of UK law still inspires global approval. It is not the case that, as the legislative instruments have declined in application, or have been superseded, that the legitimising capacity of the event and ideas have been diminished. That is, despite the confident claims of the lawyers, we do not have to depend simply on the rule of law to protect our freedoms, indeed as will be argued later in respect of the intervention of Dame Mary Arden, it may well be that the institutions and rule of law needs to be subjected to radical sociological reform in order that it might serve the liberties of *liber homo*.



John Wilkes

The history of the application of Magna Carta to the tasks and practices of political culture over the passage of the eight centuries from 1215 to 2015 has seen profound changes to the referent community described as *liber homo*: from an elite of free men within the context of thirteenth century feudalism, to the ‘freeborn English man’ of the Age of Coke and later John Wilkes which although it certainly excluded women and many of the poorer lower orders, extended the community to a body which might also be called ‘the people’.

Here is not the place to denote the various changes with precision, but to outline some of the trajectories, all of which of course, provided further evidence of a Magna Carta ‘pedigree of legitimacy’. Edward Coke can be regarded un-controversially as the starting point for the deliberate invocation and mobilisation of the language of the ancient constitution and liberty to reinforce the authority of the parliamentary Gentry and the institution of the House of Commons, alongside the courts of Common Law, both with his perdurable publications, but also the dramatic publicising of the significance of Magna Carta in the public sphere of Westminster and the proliferating print culture on the 1630, 1640s and 1650s.^[7] The authority of the Cokean interpretation of, and application of, Magna Carta to the problem of political tyranny was reused, appropriated and woven into a dominant Whig political narrative throughout the

seventeenth and eighteenth century on both sides of the Atlantic. John Wilkes invoked Magna Carta to protect the lives liberties and estates of freeborn men; by the end of the eighteenth century the polite, sensible liberties enshrined in Magna Carta (loyalty, morality, justice, industry, prosperity and happiness) was contrasted with anarchistic alternative embodied in the French Revolution (which encouraged misery, , cruelty, private ruin and atheism). Over the nineteenth century this tradition became projected as an informal unwritten constitution when combined with the [Petition of Right \(1628\)](#), [The Bill of Rights \(1688\)](#) and the Act of Settlement (1701). The extension of the principles of political liberty drawn from the Magna Carta into written constitutional form was also an imperial project with variable success.^[8] Once again the tradition performed a dual function both in legitimising Imperial government, but also as a means of resistance for subject peoples against discrimination: Ghandi and Nelson Mandela invoked the tradition against racial inequality.^[9] In the USA, the NAACP's then-president Roy Wilkins referred to Civil Rights Law (1964) as 'a Magna Carta for human rights'.^[10]

The twentieth century did not then see a decline in the purchase of the Magna Carta project of freedom, either as a foundation for the rule of law, or as a means for the legitimisation of rights of protest in defence of marginal or oppressed communities. As the British state became more diverse with the legacy of decolonisation the question of the rights of, especially black, minorities became more complex. Arguably the most significant inheritor of Coke's resistance to Stuart tyranny, was Darcus Howe, a British civil rights activist, arrested in 1969 in the so-called Mangrove Nine prosecution and brought to trial in 1971. The British state and Metropolitan Police force, glancing anxiously at the Black Panther movement in the US, claimed that Howe and his associates were involved in a potentially armed conspiracy, and were thus prosecuted for treason.

The trial was the outcome of persistent conflict between the police-force and the black community in Notting Hill that escalated towards the end of the 1960s. The

mobilisation of public protests against police harassment of the successful Mangrove Restaurant in Ladbroke Grove resulted in arrests of nine people under charges such as possession of offensive weapons, incitement to riot, assaults on police officers, and affray. The trial at the Old Bailey concluded in December 1971 with all nine acquitted of the principle charge of incitement to riot, while five of the nine, were also acquitted of all other charges.^[11] Essentially a political trial in which the police and the British state sought to discredit the developing British black power or civil rights movement: invoking Magna Carta was a successful strategy.^[12] The defence developed by Darcus Howe, and radical barrister Ian McDonald included a direct appeal to the rights of Magna Carta: under that precedent since defendants should be tried by a jury of their peers, an all-black jury was appropriate.^[13] Although the attempt failed, the defence was given leeway to exclude racist jurors. The case made legal history when it delivered the first judicial acknowledgement of 'evidence of racial hatred' in the Metropolitan police force.^[14]



The demand for an all-black jury was authorised by the right to be tried by a jury of peers evident in the principles and ancient rights enshrined in Magna Carta. The application for an all-black jury was unsuccessful despite relevant legal precedent which drew from ancient practise of choosing jurors from the neighbourhood of the accused. After a long process of challenging a total of 63 candidates, eventually two black jurors were selected.^[15] Deliberately echoing the times of Edward Coke, the barrister McDonald noted that 'this is not the court of Star-chamber'. His point was that Magna Carta was important to protect Darcus Howe and his co-defendants from 'naked judicial tyranny'. From the

perspective of this essay it is possible to see here how the authority of Magna Carta was turned upon the process of law and the judiciary itself.

IV

This is perhaps the final stage of the eight centuries of protean legacy: rather than citing the power of Magna Carta to defend the rule of law, the process is now applied to the way the rule of law is conducted. A powerful echo of the Mangrove Nine's argument can be explored in Dame Lady Justice Arden's recent call for a radical reform of the social characteristics of the judicial system itself.[\[16\]](#)

The view has been expressed over several decades that there ought to be a more diverse judiciary, that is, a judiciary which is more diverse in terms of gender, ethnicity and sexual orientation. No one suggests that the judiciary should be precisely representative of the population but people are bound to have more confidence that their concerns have been properly and fully considered if the judiciary includes people from their section of society among its own members and the judiciary's own composition reflects the fact that those groups too play an important role in society.[\[17\]](#)

Arden's argument is twofold, drawing from the idea that Magna Carta prescribed an account of the ideal characteristics of the judicial system and its personnel. Judges must have knowledge of the law combined with a loyalty to the rule of law. Importantly judges must compound this technical knowledge with a broad 'social awareness', and an understanding of other, European and International, conceptions of human rights. In essence, because the UK is no longer has the same sociological and ethnic contours of either the distant medieval past or the more recent pre-1945 world, then the process of the administration of justice needs to reflect these changes. Since judicial determination of the rule of law was primarily authorised in Magna Carta, the integrity of the judges ensured both the legitimacy of the process, but also the defence of the individual from abuse. Judicial independence was the underpinning principle that justice

was open, and outwith the prerogatives of sovereign. Given that much law today concerns the complexities of personal, private and family life, an awareness of diversity within these realms, argues Arden powerfully, ought to be a foundational characteristic of any judge. There is a need then for a 'Juridical craftsmanship' which embraces the complexity of the modern world, and is derived from an understanding of people 'in different walks of life and in different cultures'.

According to Arden, such insight cannot simply be learned, but is best developed from experience. A Judicial Appointments Commission which was informed by the tradition of Magna Carta would address the lack of representation along lines of gender and ethnicity in the current community of judges. So, argues Arden, sociological diversity amongst the judges would be best matched by a knowledge of the jurisprudence of the European supranational courts. Although in 1215 Magna Carta was insistent on the legitimacy of law of the 'realm', the changing circumstances of post-war Europe, and its place in the world, implies now the need for adjustment in order to preserve the principles of the liberty for the individual and the general defence of the due process of law.

If the legacy of Magna Carta is to have a future, those appealing to its tradition and legitimacy will need to be flexible in the face of the problems of freedom in the modern world, where the demands of security (both national and private) against liberty, may pose enormous challenges to the tradition. The authority of Magna Carta has been appropriated by many. In the 1940s it was used to mobilise British resistance to Hitler's tyranny. In 1957 it was a powerful shield against Godless Communism in the Cold War. By 2002 the Australian Premier Howard, speaking in Canberra and to the US Congress, drew on Magna Carta as a means to advance the war on Terror.[\[18\]](#) Ambitious semi-utopian projects evident in projects such as the Global Magna Carta, which claims to be 'a People's Manifesto to uphold a Democratic process that empowers and supports the rights and beliefs of the citizens of all Nations', premised upon the adoption of a set of ten core beliefs suggest that the brand still has

potential purchase to shape new political manifestos and actions.^[19] As a source of authoritative and almost universal historical prescription Magna Carta has offered, and will continue to, both opportunity and limitation. Men have made their own histories of liberty by reworking a prescriptive past, and a persisting text. By conjuring up the dead, and commending some, while rejecting others - bad King John, the Barons, Sir Edward Coke – we, collectively, have fashioned legitimacies and challenged authorities. Eight centuries later, working with circumstances and sources defined and transmitted from a long distant past, the opportunities for preserving and extending the rights of the *liber homo* seem manifold. Marx's complaint that 'the tradition of all dead generations weighs like a nightmare on the brains of the living' seems less than accurate in the case of the past and ongoing benefits of the legacy of the Magna Carta.^[20]

Endnotes

[1.] http://congress.gov.ph/download/billtext_15/hbt4484.pdf 'AN ACT PROVIDING FOR A MAGNA CARTA OF THE POOR' enacted by the Senate and House of Representatives of the Philippines in Congress. August 2014. "This year at Davos we will celebrate the 800th anniversary of the Magna Carta, a cornerstone of modern democracy. We should not forget that democracy has been hard-won and we should not let it leak away by continuing down the path of inequality for the benefit of a handful of multibillionaires. We need a new 'Including You' Magna Carta to address the urgency of our times. A Magna Carta for equality, jobs and sustainable growth. 'We the People' have spoken and Davos must listen and act'. <http://www.theguardian.com/business/2015/jan/21/davos-unions-businesses-growth-employees-magna-carta-rights-workers>

[2.] <http://www.mirror.co.uk/news/uk-news/magna-carta-unstoppable-15-facts-5114374>

[3.] <http://www.irr.org.uk/news/farewell-magna-carta-the-counter-terrorism-and-security-bill/> ; <http://wemeantwell.com/blog/2013/02/06/destroying-rights-guaranteed-since-the-magna-carta/>

[4.] J. Gray, 'The original modernizers', in *Gray's Anatomy* (2009), 263-274, at 263.

[5.] J. Waldron, 'How Politics Are Haunted by the Past' NYRB February 21, 2013, review of A. Ryan *On Politics: A History of Political Thought Book One: Herodotus to Machiavelli Book Two: Hobbes to the Present* Alan Ryan (2012) Vol 2, 'Preface', 811.

[6.] See <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/section/XVXVI#Scenario1Help>

[7.] See the essays by J. Champion in the useful collections of commemorative essays, N. Vincent, (ed) *The Magna Carta: The Foundation of Freedom 1215-2015* (2015) and C. Breay, J. Harrison (eds.) *Magna Carta: Law, Liberty, Legacy* (2015).

[8.] B. Bailyn, *The Ideological Origins of the American Revolution* (1967).

[9.] See the essay by Z. Laidlaw in Breay, Harrison (eds.) *Magna Carta: Law, Liberty, Legacy*.

[10.] http://www.huffingtonpost.com/charles-coleman/the-courage-of-sacrifice-b_5529277.html

[11.] R. Bunce, P. Field. *Darcus Howe: A Political Biography* (2013). R. Bunce, P. Field, Paul, 'Mangrove Nine: the court challenge against police racism in Notting Hill', *The Guardian*, 29 November 2010. <http://www.theguardian.com/law/2010/nov/29/mangrove-nine-40th-anniversary>

[12.] <https://magnacartaexhibition.wordpress.com/2015/01/03/mangrove-nine-trial-1971/>

[13.] <http://www.gardencourtchambers.co.uk/barrister/ian-macdonald-qc/>

[14.] Bunce, and Field, *Darcus Howe* see pp. 38-9; 122-4. R. Bunce and Paul Field, 'Frank Critchlow: Community leader who made the Mangrove Restaurant the beating heart of Notting Hill', *The Independent*, 23 September 2010. See also <http://www.newstatesman.com/politics/2014/01/darcus-howe-and-extraordinary-campaign-expose-racism-police>

[15.] Ian Macdonald QC, remains a leading UK authority on anti-racism and immigration law, commented on a case – that of Mr Abu-Jamal - in the US drew on the common legal heritage shared between the UK and the US which, ‘since the time of Magna Carta in 1215, has given pride of place to common notions of due process and a fair trial’. Macdonald’s letter outlined the more notorious breaches of Magna Carta including the systematic removal of Black jurors and the racist bias of trial Judge Albert F. Sabo. ‘Leading UK Lawyers Petition US Appeal Court Re Racism in Case of Death Row Journalist, Press Conference, 19 July, 2006, 6.30pm Garden Court Chambers, 57-60 Lincoln's Inn Fields, London’, http://www.iacenter.org/polprisoners/maj_london-petition0706.htm

[16.] M. Arden, ‘Magna Carta and the Judges – Realising the Vision’ (2011).

[17.] Arden, ‘Magna Carta and the judges’ 16-17.

[18.] J. Holland, *Selling the War on Terror: Foreign Policy Discourses After 9/11* (2012) 160-162.

[19.] <http://www.globalmagnacarta.net/>

[20.] K. Marx *The Eighteenth Brumaire of Louis Bonaparte* (1852).

MAGNA CARTA IS NO ANACHRONISM

by R. H. Helmholz

Justin Champion’s essay performs a valuable service for those of us who share an interest the history and present status of human liberty. It traces the role that a document eight centuries old has played in securing freedom from arbitrary and aggressive action by agents of the government. Magna Carta, in its origins a document produced by a baronial rebellion against an untrustworthy and predatory monarch, has come to be used in circumstances very far removed from its original context. Clauses in the Charter that dealt with what his essay calls “elite baronial privilege” have been invoked to

advance the interests of very different groups – protectors of the environment, advocates of racial equality, and proponents of income redistribution. In modern struggles to achieve political ends, Magna Carta has served as what Professor Champion accurately calls “a powerful and protean resource and constitutional icon.” He marshals abundant and convincing evidence to show how frequently the Charter has been invoked in support of causes the barons at Runnymede could scarcely have imagined. Of some of them, the barons surely would not have approved.

Who can argue with Professor Champion’s account? Not I. He has faithfully traced the uses to which an ancient document has been put in circumstances far removed from those of its origin. Ideas matter. History matters too in the evolutions of ideas. Magna Carta’s history and present role as the source of arguments to advance the cause of civil liberties demonstrate how an old precedent can be given new life.[21]

Admitting the accuracy of these conclusions, readers may nonetheless doubt the legitimacy of some of these modern uses. If, as Professor Champion’s essay shows, advocates of new rights find something in Magna Carta that was not there, do arguments based upon its provisions nonetheless demand any respect? A fair question. If, for example, Magna Carta is wheeled out to support objections to harassment by the today’s police, does it not weaken the argument to discover that there was no police force in 1215? And if no such thing as a jury trial in criminal prosecutions existed at the time the Charter was formulated, does citation of it not weaken the argument that the right to jury trial is a part of our legal heritage? For me at least, citation of Magna Carta works the other way in these cases. It actually diminishes the force of the arguments. Historians have busied themselves exposing “the myth of Magna Carta,” and often they seem to have had much the better of the argument.[22]

I think there is a way out of this dilemma, a way that lends actual support to some (though not all) of the modern uses made of Magna Carta. It requires taking seriously

the jurisprudential assumptions that prevailed during the years when the Charter was formulated. Professor Champion's essay does not attempt this. It is not his subject. However, I think his conclusions might be augmented if he did. According to legal thought current in 1215, all law could be divided into four categories: 1) the law of nature; 2) the *ius gentium*, or law of nations; 3) the *ius civile*, the municipal law, or positive law, of individual kingdoms or territories; and 4) the *ius divinum*, the law of God that had been given to Christians. This is what was taught in the Schools and accepted by lawyers throughout Europe. Subdivisions had to be hived off within each of these categories, but these were the basic divisions. The four were different, but they were not independent. The municipal law built upon the law of nature. That is the relevant point for understanding what Magna Carta was in its time. The law of nations and the municipal law were understood as putting into detailed form the general prescriptions found within the law of nature. The English Charter was itself part of the municipal law. Among other things, it was understood as providing detailed and coercive form to broad principles found both in the natural law and the law of nations.



Hugo Grotius

Let me give a simple example of how this jurisprudential system worked, taking an unlikely (and seemingly strange) one: [Clause 33](#). It reads: "Henceforth all fish-weirs shall be completely removed from the Thames and the Medway and throughout all England." Even apart from

the question of why the barons would have cared about fishing on the Thames, this clause seems anomalous – quite out of place in a charter of English liberties. It looks a good deal more comprehensible, however, if we consider its relation to the law of nature. Under natural-law principles, the seas and other navigable waters were *res nullius*. No one owned them. In the absence of special circumstances, therefore, their use was open to all.^[23] To erect a fish-weir, which is an obstruction placed in the river to direct the passage of fish, one designed to trap them as they swim upstream, was thus to interfere with a natural right held by all men: the right to free passage over navigable waters. It is worth noting that establishment of the freedom of the seas would become the great theme of the *Mare liberum* by Hugo Grotius (1583-1645), the marvel of Holland in the 17th century.^[24] Here it is in the 13th in an only slightly different context. Placing an obstacle like a fish-weir in a navigable river abridged a natural right. It was a local grievance, but within it lay a large principle.

Is it conceivable that such grand principles were embedded in Magna Carta? Can the barons really have known or cared anything about these jurisprudential assumptions? Yes, of course. Many of the Charter's provisions extended to all free Englishmen, not just the nobility. The men who formulated the Charter were not ignorant and selfish ruffians. They were led by Stephen Langton, the archbishop of Canterbury and a product of the medieval schools if there ever was one.^[25] The jurisprudential principles involved were also stated clearly in the two books on English law that were written on either side of the Charter: *Glanvill* (ca. 1187-89) and *Bracton* (ca. 1230).^[26] They were also among widely accepted assumptions about law and justice that appeared in the many foundational documents of law that were compiled on the Continent at about the same time: Philippe de Beaumanoir's *Customs of the Beauvaisis* in France, the *Siete Partidas* in Castile, and the laws of King Magnus Ladulås in Sweden, for example.^[27] Although quite different in many ways from Magna Carta, these documents shared with it an assumption of the truth of a basic core of ideas.

Taking this evidence seriously adds something to our assessment of the Charter, even to matters like the right to jury trial that was later found within it. It is true that [Clause 39](#) could not have been meant to guarantee a right to jury trial in 1215. However, it did state that the King would not take punitive action against any free man unless he did so by lawful means. It turned out that English law adopted jury trial as the ordinary way for persons accused of a crime to be tried. That became the accepted way of determining guilt and innocence. Of course, this was a product of choice. The governments of most European lands chose a somewhat different path. However, the right to a fair trial was what mattered under the law of nature, and in England that right came to include the right to be tried by an impartial jury. Having chosen jury trial as the part of the municipal law, English jurists and even kings were then bound to respect it as part of a larger right anchored in the law of nature.

A nearly identical analysis can be applied to several of Magna Carta's provisions. Elsewhere, the king promised [freedom from new taxation without agreement](#) (12), [proportionality in punishment](#) (20), [lawful weights and measures](#) (35), and [justice freely available for the vindication of legal rights](#) (40). It is true that no real Parliament existed in 1215, but when it did come into existence, contemporaries would have regarded it as one instrument needed for the protection of guarantees such as these. From this perspective, invocation of Magna Carta in the preservation of many modern freedoms actually seems less of an anachronism than it appears to be at first sight.

Endnotes

[21.] Robin Griffith-Jones, *Magna Carta 1215-2015: London's Temple and the Road to the Rule of Law* (London: Pitkin Press, 2014), 37, asserting that Magna Carta is "now a document of all time and of all the world." See also Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Oxford and Portland OR: Hart Publishing, 2014).

[22.] Many of these are detailed in the classic study [William S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, 2nd ed. \(Glasgow: James Maclehose, 1914\)](#). See also Ralph Turner, *Magna Carta through the Ages* (Edinburgh: Pearson Education, 2003), 145-82, bringing out the common "distortions of the English past" involved; a strident but still useful commentary of this sort is Bryce Lyon, "The Lawyer and Magna Carta," *Rocky Mountain L. Rev.* 23 (1950/51), 416-33.

[23.] *Digestum Justiniani* 1.8.2.1: "Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris." See generally Pitman Potten, *The Freedom of the Seas in History, Law, and Politics* (New York: Longmans, 1924), 36-56.

[24.] *The Free Sea*, David Armitage, ed. (Indianapolis, IN: Liberty Fund, 2004), [ch. v, Hugo Grotius, 20-37](#).

[25.] See Daniel Baumann, *Stephen Langton, Erzbischof von Canterbury in England der Magna Carta (1207-1228)* (Leiden and Boston: Brill, 2009), 149-89.

[26.] See Prologue, *Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, G. D. G. Hall ed. (Oxford: Clarendon Press, 1993), 1-3; Introduction, *Bracton on the Laws and Customs of England*, George Woodbine ed. and Samuel Thorne trans. (Cambridge, MA: Harvard University Press, 1968), 19-28.

[27.] Armin Wolf, *Gesetzgebung in Europa: zur Entstehung der Territorialstaaten 1100-1500* (Munich: Beck, 1996), 311.

COMMENT ON JUSTIN CHAMPION

by Nicholas Vincent

Justin Champion advances a powerful case for treating Magna Carta as a liberty document, directed to all free men. In the thirteenth century, its beneficiaries comprised a limited elite of the lawfully 'free': perhaps as few as one in ten, or at most one in five, of the adult male population. By the sixteenth century, with the decline of

serfdom, this had been extended to include all adult males, and arguably all adult women. Since then, and in the words of the UNESCO citation, Magna Carta 'has become an icon for freedom and democracy throughout the world'. Professor Champion notes that [clause 14](#) of the 1215 Magna Carta, by demanding counsel before the grant of any new tax, in effect introduced the idea of a popular assembly, leading in due course to Parliament, and ultimately to that rallying cry of the free-born American colonists: 'No Taxation without Representation'. Certainly, there seems to be universal agreement that Magna Carta [clauses 39](#) and [40](#) (clause 29 of the 1225 reissue, still current in English law today) establish the principle of 'due process'. Under this, the ruler or sovereign, and the administration conducted in the sovereign's name, are brought within the rule of law.



There is a natural tendency to assume here that the 'liberties' (plural) referred to in the text of Magna Carta can be equated with the 'liberty' to which traditions of natural law, the framers of the American Constitution, or modern human rights activists so confidently appeal. This would include the 'liberty' proclaimed amongst the 'unalienable Rights' defined by the 1776 [American Declaration of Independence](#) as the right to 'Life, Liberty and the pursuit of Happiness'. Certainly, Magna Carta has featured high amongst the totems of political rebels, from the 1260s or 1290s, all the way

through to the new 'Barons' Wars' of the 1640s, the Chartist 'uprising' against Victorian oligarchy, or Mexico's Zapatista Army of Liberation in 1994.

As Professor Champion further points out, Magna Carta has tended to be read as all things to all men (and women). Here it commands allegiances across the political spectrum, from its use as a defense of tradition and an 800 year-old line of constitutional monarchy, through to its use by environmentalists, republicans, or cyber-anarchists, keen to break free from state or societal control. Legitimacy here comes from longevity. The laws of unintended consequence dictate that a document that has very little to do with modern ideas, either of democracy or freedom, has somehow been canonized as if it were the foundational creed of liberalism, socialism or green republicanism.

So far, I am in agreement with Professor Champion. Champion's instinct, however, pursued in the main body of his essay, is to demand a continuing 'imaginative reinvention' of Magna Carta. Only thus, he suggests, can the document and its legend be fitted to the needs of posterity. My own instinct, on the contrary, would be for less imagination and more solid fact.

Magna Carta has suffered 'imaginative reinvention' ever since it was first granted in June 1215. Within only a decade of its issue, the text of the Runnymede charter had been revised, reinvented and in many cases deliberately rewritten by contemporaries who had little interest in what had happened at Runnymede but a great deal in establishing that Magna Carta, in one way or another, chimed with their own particular needs or obsessions. It is the responsibility of the historian to establish the reality of events, and thence to measure the gulf between reality and perception. In the case of Magna Carta, this gulf emerged so early, and has grown so wide, that our duty is surely to expose the myths, not simply to peddle them.

As Champion points out, in 1971, Darcus Howe and his lawyers appealed to Magna Carta's insistence on trial by peers, to argue for trial by those of the same color. What he does not allow here is that this was a restrictive interpretation that had already been attempted in the 1230s. It was then that various of the greater barons in

England sought to argue that 'peers' meant the great aristocracy, as in the modern House of Lords, and that therefore the rich and powerful should be tried only by those of similar wealth and power. If racial discrimination was at stake for the Mangrove Nine, then it has to be confessed that Magna Carta [clauses 50](#) and [51](#) (calling for the expulsion of all 'alien' knights and constables) appear to encourage prejudice rather than to prohibit it. Lady Justice Arden's call, meanwhile, for a judiciary no longer drawn from the 'establishment' but from the liberal majority, seems to me directly to echo demands in the seventeenth century, that judges all be good Protestants, or in the eighteenth, that judges not only hate the Pope but serve the King. In all such instances, what is being demanded, surreptitiously or openly, is discrimination by the executive intended to interfere with the independence of the judiciary. As for equality under the law, [clause 20](#) of the 1215 Magna Carta, with its careful distinction between free men, merchants, and villeins, was used in the eighteenth century to argue that inequality was the natural state of man properly instituted, especially in those parts of the British Empire where the right to self-government and slave ownership went hand in hand.

Having established their own constitutional assembly, in an act of 1728 celebrated as Jamaica's 'Magna Carta', British Jamaicans obtained confirmation of the legality of all previous enactments by their assembly together with the right to be governed 'by all such laws and statutes of England as have been at any time esteemed, introduced, used, accepted, or received as laws of this island'. These most definitely did not include equality between slave and slave-owner. Inequality, between the propertied and the propertyless, as between the independent and dependent, remained hard-wired into the British constitutional and imperial systems, however nostalgically such systems looked back to Magna Carta as a foundational rallying point. Here liberty and inequality were paired in ways that made it very hard for free-born Englishmen to stomach the later American or French pairing of liberty and equality.



Sir William Blackstone

Parliament, in the Whig tradition, saw itself in the eighteenth century as embodying everything that Magna Carta had been intended to procure. Through Parliament the propertied and those 'of interest' dispensed justice to the unenfranchised majority. [William Blackstone](#), the greatest modern authority on Magna Carta, was one of the MPs who called loudest for the expulsion from Parliament of John Wilkes, denounced as a demagogue and hero of the mob. The direct connection between Magna Carta, the Whig settlement of 1688, and Parliamentary sovereignty made Magna Carta itself a very difficult pill for the American revolutionaries to swallow. How could Magna Carta, itself conceived of as an act of 'parliamentary' resistance to a tyrant king, be used to contest other such acts - the Sugar Act (1764), the Stamp Act (1765), the Declaratory Act (1766), the Townshend Acts (1767), or the Coercive Acts (1774) - all of which seemed to emanate from Parliament rather than from monarchy? To most native-born Englishmen, indeed, the idea of defying Parliament in the name of Magna Carta appeared a logical absurdity.

Only later, when George III revealed himself just as intractable as the politicians, could Magna Carta be invoked in America as the birth-right of the free. Even then, following American independence, the tendency to deny the liberties of indigenous or slave populations was accentuated rather than resisted in those of the new United States that now not only deliberately expelled their

native inhabitants but imported African slaves to work their land. These were often the States in which 'English' traditions, including Magna Carta, were most loudly proclaimed. Virginia, in 1606, was the first of the American colonies to receive Magna Carta as part of its royal charter of liberties. As the plaque at Jamestown still reads, 'Here the Common Law of England was established on this continent ... (with) Magna Carta, the cornerstone of individual liberties'. Virginia was also, in 1861, one of the first states to secede from the Union.

I am not for a moment here arguing that Magna Carta supplies a natural defense of slavery or secession. On the contrary, those who have argued in this way have distorted the meaning of the charter with just as much anachronism as the Levellers of the seventeenth century, the Chartists of the 1840s, or the Zapatistas of Mexico. What I am suggesting is that that historian's role is to tease out such anachronisms, not to perpetuate them.

For all that is said about Magna Carta, very often by people who have never read it, Magna Carta itself says nothing about democracy, about trial by jury, about the presumption of innocence, let alone about Habeas Corpus. [Clause 14](#) of the 1215 charter, interpreted by some as an embryonic striving after what was later to become Parliament, survived as law in England for less than a dozen weeks. It was dropped after 1215 from all subsequent reissues. Certainly, the 'liberties' to which Magna Carta refers had very little in common with that which today's liberals would regard as freedom under the law. The liberties of 1215, like the 'liberty' of the archbishops of Canterbury, or the 'liberty' of the earls of Essex, were far more akin to today's great multinational franchises: rights and customs associated with property ownership, guaranteed by possession and long use. In other words, they much more resemble the vested interests of those corporate Leviathans against which today's cyber warriors or environmentalists seek redress.

It is one of the wonderful things about Magna Carta that where one most expects it to be specific (trial by jury, Habeas Corpus) it is most vague, and where one would most appreciate vagueness (fish weirs, French constables,

haberjets, and ells within the selvages) it is most specific. It is this, perhaps, that explains its Protean survival. If only, the liberals might argue, [clause 39](#) had spelled out the precise meaning of 'judgment by peers and the law of the land', then there might not be such dispute as to the usefulness of this clause in defense of human rights. If the charter's framers had been more specific, a conservative might reply, then clause 39 would be as filled with feudal specifics as the rest of the document and the whole lot would by now have been consigned to the dustbin of redundant law.

In writing of Magna Carta we need to distinguish myth from reality, the Wizard of Oz from his box of tricks. To allow any particular political party to claim a monopoly of the charter would be to defeat its still valuable purposes. By enshrining the myth that 'liberty' and 'freedom' are fundamental birth-rights of the English-speaking world, Magna Carta has placed a powerful brake upon tyranny and supplied incentives to the spread of values that its original framers might have found not only alarming but positively repulsive. By promoting a royal act of grace, King John's 'Great Charter', as the point of genesis for all subsequent English law, Magna Carta has, ironically enough, helped confirm the sovereign authority of the very dynasty whose powers it was intended to restrict. The Queen, the Prince of Wales, and a whole menagerie of minor royals, can participate in the celebration of Magna Carta's 800th birthday, confident that the charter itself, as a royal act, even as the act of a 'bad' dead king, supports rather than undermines the institution of monarchy.



King John (Lackland)

Meanwhile, radicals should no more be allowed to appropriate Magna Carta than those New Hampshire Republicans who, in 2012, sponsored a bill proposing that a clause of the ‘original’ Magna Carta of King John be cited in every constitutional resolution passed through the state legislature. In seeking such things, the reactionaries of New Hampshire no more cared to be reminded of [clause 10](#) of the 1215 Magna Carta, than the Zapatistas were inclined to recall Magna Carta [clauses 33](#) or [54](#). It is the role of the historian to deliver such reminders. Magna Carta is both the piece of tattered sheepskin issued by King John in 1215, and a beacon of freedom and liberty feted around the world. The document is not the myth, nor is the myth the document. Long may this distinction live. Or as King John might have put it, in his own native tongue: 'Vive la difference!'



James Tyrrell

However, by the time Tyrrell had reached his third volume, the testimony of the past no longer seemed to be either so straightforward or so necessary. The ancient constitution itself now seemed “*dark and perplexed.*” And did the political arrangements of the Saxons really have much relevance to the very different challenges that confronted Englishmen at the dawn of a new century? Perhaps, as Tyrrell conceded, the original constitution of the kingdom was more “*a Question relating to Antiquity, than to the present Constitution of the Government.*”[\[29\]](#)

Tyrrell’s soberness at the end of his historical labors is worth bearing in mind as we consider Magna Carta after eight centuries and so think about English historical-mindedness. Justin Champion quotes Alan Ryan’s observation about the English tendency to confuse longevity and legitimacy. He might equally have invoked Burke, who in 1790 singled out this habit of mind as the palladium of English political life:

We wished at the period of the Revolution, and do now wish, to derive all we possess as an inheritance from our forefathers. Upon that body and stock of inheritance we have taken care not to inoculate any cyon alien to the nature of the original plant.[\[30\]](#)

But what does this English preference for inheritance over invention mean in practice? Not, surely, that English political institutions are immobile, but rather that they must at least *seem* to be grounded in the past. This seeming could shade into sleight of hand. Certainly

MAGNA CARTA IN 2015

by David Womersley

Does Magna Carta mean nothing to you? Did she die in vain? That brave Hungarian peasant girl who forced King John to sign the pledge at Runnymede and close the boozers at half past ten! Is all this to be forgotten?

--Tony Hancock

In 1694 James Tyrrell embarked on the composition of a *General History of England* intended to establish beyond question that England had possessed an ancient constitution embodying principles of liberty, no matter how much the disasters of the intervening centuries and the specious arguments of Royalist historians had obscured the fact. Tyrrell would drag into the daylight what other historians of England had shamefully neglected, namely “the Ancient Saxon Laws and *Original* Constitutions of this Kingdom.”[\[28\]](#)

Burke sails close to the moral wind when he praises Lord Somers for his deceptive rhetoric in the Convention debates of 1689:

In the very act, in which for a time, and in a single case, parliament departed from the strict order of inheritance, in favour of a prince, who, though not next, was however very near in the line of succession, it is curious to observe how Lord Somers, who drew the bill called the Declaration of Right, has comported himself on that delicate occasion. It is curious to observe with what address this temporary solution of continuity is kept from the eye; whilst all that could be found in this act of necessity to countenance the idea of an hereditary succession is brought forward, and fostered, and made the most of, by this great man, and by the legislature who followed him.^[31]

Our desire for the past to corroborate the present is born outside the boundaries of historical study, and so historians are regularly outraged by the political purposes which the past is made to serve. This only goes to show that (in the words of Arnaldo Momigliano) “historians are a rather marginal by-product of history.”^[32]



King Henry III

When in 1237 Henry III confirmed in perpetuity the liberties enshrined in the Charter, what had begun as an

interpretation of custom – as an attempt to reach back and restore the liberties enjoyed by Englishmen during the reigns of Edward the Confessor and Henry I – had been converted into something else. The Charter was now fundamental and inalienable law, limiting on and superior to the crown; and it came gradually to be revered as the source of a body of ancient rights and liberties that were the birthright of the English people.

Over the years the Great Charter came to assume a variety of guises and to play a number of roles in the struggle to preserve individual liberties against the incursions of overweening power, whether of a monarchical or a more anonymously statist complexion. The Charter began life in the 13th century as an instrument of baronial ascendancy over the Crown. But the articles which served that narrow purpose were gradually eclipsed in importance by those other articles of (in Hume’s words) “a more extensive and more beneficent nature,” the inclusion of which the barons had tolerated as the price of associating “the inferior ranks of men” to their essentially narrow and partisan cause.^[33] It was these articles – articles promising freedom of movement, freedom from arbitrary and exorbitant punishments, prompt and due legal process, entitlement to judgement by one’s peers – which gradually assumed greater prominence as the public importance of the Charter’s mitigations and explanations of the feudal law waned.

Although the Charter declined in importance during the 14th and 15th centuries, it revived dramatically in the late 16th and early 17th centuries in the hands of Sir Edward Coke, who boldly claimed that the Charter was declaratory of the principal grounds of the fundamental laws of England, and who deployed it as a weapon against the principles and policies of Stuart government. But the great constitutional crisis of the mid-17th century exposed Coke’s interpretation of the Charter to attacks from two different directions. On the one hand, thinkers such as Filmer and Hobbes undermined the notion of a “higher,” or “fundamental,” law binding on subsequent governments. On the other, some of the more radical political thinkers thrown up by the Civil War found the

protection offered by customary law less compelling than the claims to liberty which could be erected on the basis of abstract natural rights undergirded by reason and equity alone.

After 1660 the Charter was attacked on historical grounds by the defenders of the prerogative of the restored monarchy. In his *Complete History of England* (1685) Robert Brady deplored and despised the fact that “in *spight of Truth and Matter of Fact*, we find nothing in our *Common Histories* of these Times, but the *Brave Feats* performed by the *English* for their Fundamental Rights and Liberties.”^[34] Sir Henry Spelman and Brady himself re-described the Charter as essentially a feudal document, intended to serve the interests of the magnates and therefore intended to bring about an abatement of the rigors of feudal tenures.^[35]



Sir Edward Coke

In the following century Cokean reverence for the Charter was to some extent revived, but sat uneasily alongside the insights produced by the superior historiographical techniques of Spelman and Brady. The result was a kind of historical “doublethink” which can be discerned in the work of Hume, Burke, Blackstone, and even Bentham. Over time, and notwithstanding the critiques to which it had been subjected, what the Charter had been originally intended to achieve by the turbulent barons who had stood up to their king at Runnymede became less significant than the uses to which it had been put by later generations. It came to symbolize the equation of law and liberty. It embodied the Englishman’s belief that the law of the land protects, rather than restricts, his freedom. And it offered implicit

criteria against which official action could be assessed and judged.

When he was puzzling over men’s attachment to patriarchalism, Locke suggested that it was the inheritance of property which had disposed men’s minds to the mistaken belief that political authority was transmitted in the same manner. This had created “[an Opinion, that there was a Natural or Divine Right of Primogeniture, to both Estate and Power](#); and that the Inheritance of both *Rule* over Men and *Property* in things, sprang from the same Original, and were to descend by the same Rules.”^[36] The example of Magna Carta shows that this mental disposition towards conceptualizing politics under the rubric of inheritance might also work in the opposite direction. It might furnish men’s minds with a set of ideas relating to liberty and justice which appear to have the ratification of time, even though the uses to which the original event is put by later generations can have no possible point of genuine contact with the intentions of the original actors.

In Miroslav Holub’s poem “Brief Reflection on Maps,” a group of soldiers who get lost in the Alps eventually find their way back to their companions. When they return to camp, however, it is noticed that the map they have been relying on is actually a map of the Pyrenees. It was the thought of having a map which emboldened the soldiers to keep going, even though the map in fact bore no relation to the terrain through which they were moving.^[37]

Magna Carta is also in this sense a “wrong map.” Academic historical understanding will always chip away at the inspirational power of certain episodes in the past. But such critiques expose only more clearly that inspirational power. As Justin Champion’s article shows, even today people throughout the world are determined to prove that, in Tony Hancock’s brilliant words, the brave Hungarian peasant girl Magna Carta did *not* die in vain — whatever academic historians may mutter to the contrary.

Endnotes

[28.] James Tyrrell, *A General History of England, as well Ecclesiastical as Civil*, vol. I (1696), vi.

[29.] James Tyrrell, *A General History of England, as well Ecclesiastical as Civil*, vol. III (1704), “Preface to the Appendix,” iii and v.

[30.] Edmund Burke, *Reflections on the Revolution in France*, in *The Writings and Speeches of Edmund Burke*, vol. VIII, “The French Revolution 1790-1794,” ed. L. G. Mitchell (Oxford: Clarendon Press, 1989), 81.

[31.] *Ibid.*, 69.

[32.] Arnaldo Momigliano, “The Origins of Universal History,” Creighton Lecture, University of London, 1980-81, published in *Annali della Scuola Normale Superiore di Pisa*, serie III, vol. XII, no. 2, 533-60, quotation on 534.

[33.] David Hume, *The History of England*, 6 vols. (Indianapolis, Ind.: Liberty Fund, 1983), vol. I, 444.

[34.] Robert Brady, *A Complete History of England* (1685), sig. B1r.

[35.] Sir Herbert Butterfield, “Magna Carta in the Historiography of the Sixteenth and Seventeenth Centuries,” *The Stenton Lecture 1968* (Reading: The University of Reading, 1969), 22.

[36.] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1990), 209; Book I, § 91.

[37.] I am grateful to my daughter Kate Womersley for drawing my attention to this poem.

A COMMENT ON MY COMMENTATORS

by Justin Champion

My initial essay attempted to address two intimately connected issues. First, the perdurable legacy of the liberty charters as documentary artifacts, and second, the continuing authority of the tradition of political liberty

regarded as being founded upon the events that produced those charters. Put very simply the intention was to explore how over the 800 years, those events and the textual products have created such a powerful tradition: why the Magna Carta rather than other moments or texts?

The very fine responses from my colleagues have teased out, in different ways, the difficulties of connecting these two primary themes. Over the eight centuries of refashioning and understanding the role and function of both the event and its textual legacy, the use of the past as a source of political legitimacy, and the enquiries and publications of historians detailing or confusing these claims, have been profound. A further question, which, if not explicit, was fundamental to the initial piece, was “Why Magna Carta?” Despite the claims of contemporary nationalists in Scotland, the 1320 Declaration of Arbroath,^[38] perhaps a more radical defense of liberties, has not attracted such global attention, respect, or reuse. So why has the Magna Carta continued to generate such attention and been capable of acting as a source of international legitimacy? Here, the questions of historical prescription and myth are central.

One of the themes resisted by Professor Vincent, in a powerful argument for context and the duties of historians to remain vigilant in avoidance of anachronism, is that the way the meaning has spilled out of its own times is not a legitimate or authentic historical tradition. The evidence of the past eight centuries suggests that the authority of Magna Carta has not been confined to its own historical circumstances. Indeed subsequent historians, especially in the early modern period, keen to establish and describe the ancient constitution, as Professor Womersley explores in elegant detail, drew from Magna Carta (the historical moment and the text) to populate their understandings of a recoverable and present centered “ancient” constitution. The battles of historical erudition fought out between Whig and Tory scholars and political thinkers persisted into the 19th century and was conducted with a keen eye to historical incompetence, error, and deceit.

The recovery of an historical category identified as “feudalism” provided a powerful instrument for

disputing, or neutering, overly ambitious interpretations of Magna Carta and its legacy. The Bradys, Tyrrells, and still later, Burkes, saw no danger of anachronism in the use of the past as long as the historical narratives were undertaken with erudition, integrity, and a commitment to the truth, subscribing as they did to humanist principles of the civic usefulness of the *ars historica*. Of course this meant often, and Valla's exposure of the falsity of the *Donation of Constantine* is the cynosure, that the tools of historical erudition were employed to destroy corrupted documents or illegitimate valorization of their purchase on the contemporary world. Providing an historical pedigree for the legitimacy (or not) of contemporary institutions, principles, or political agents was, and in many senses remains, one of the benefits of having an historically aware community. As Jill Lepore has explored,^[39] the function of ongoing debates about rival interpretations of the founding document of the U.S. Constitution contributes in a powerful way to conceptions of liberty and freedom in modern politics, and political thinking. Anchoring philosophical political concepts to historical foundations provides a wide audience, indeed the public, with a resource to comprehend and legitimize their beliefs. Historians may claim to police the use of the past, but where political and public interests are dominant this claim is often challenged.



While historians may, correctly, be wise to be cautious about this public use of the past, and indeed be vigilant against distorted or incompetent exploitation of the past, they will frequently fail in insulating the past from having a pertinent use for contemporary debates. The unique aspect of Magna Carta is its portability across time and geography. Its legacy has meandered through the

intellectual topographies of many different national contexts. In a similar way, 16th- and 17th-century French audiences became familiar with the reconstructions of an ancient constitution as described in Francois Hotman's *Francogallia* (1572),^[40] but the French construction has not become a widespread model for other contexts and circumstances, although it did get reused in 18th-century commonwealth discourses.

Professor Helmholz's argument that there are indeed significant and important jurisprudential concepts captured amongst the more minor local issues gathered in the charter is powerfully made. That the baronial and ecclesiastical designers of the prose, and the participants in the moment of sealing, were capable of this achievement is remarkable. The historical unfolding and establishment of these core jurisprudential principles as primary values are not, however, necessarily determined by their authority as originally articulated in the artifact or historical moment of 1215. Those initial authors were most definitely not designing a conceptual framework for modern liberties.

Dame Mary Arden's proposals for addressing the social composition of the judicial system, seems to me, do precisely what Professor Helmholz has enjoined. Her arguments recover a core jurisprudential principle and extend its application to the contemporary world. Her case is not that the proposals advanced in Magna Carta can be adjusted to the needs of contemporary social diversity, but that the original jurisprudential claim had embedded in its structure and conceptual intention precisely that capacity to be adaptable to changing circumstances. The extension of the freedoms of the *liber homo* to ever broader social, political, and ethnic communities, and a judicial system which reflected that diversity and enabled their freedoms, is an historical unfolding of principle, rather than an act of wilful anachronism.

Questions which still require historical thought are why the "originality" of the Magna Carta established authority and how that authority was distilled into later historical contexts. Here perhaps more reflection on the nature of mythopoetic functions and processes is necessary. Bruce

Lincoln has given us a very powerful set of distinctions between fable, legend, and myth with which to explore the political uses of the past.^[41] Fable and legend are inevitably literary constructions produced by societies to make sense and meaning of their values. Myth, according to Lincoln, is a more powerful combination of historically verifiable values and shared authorities: a common historical resource which many perspectives can draw upon and indeed make bespoke to their own ambitions. Importantly such myths are very capable of mobilizing individuals and communities to act in defence of values, institutions, and freedoms. An excellent example of this can be seen in the attempt by Winston Churchill to draw the United States into a defensive alliance against Hitler in 1941 by offering the Lincoln Magna Carta as an incentive and marker of a common purpose in defending liberty.^[42]

An alternative but contemporary use for a British audience can be seen in the early 1940s film *Magna Carta, The Story of Man's fight for Liberty*, which narrated, in animated form, the role the "People" had contributed to the development and achievement of civil liberties and freedom.^[43] The Whig historian George Trevelyan may have had a hand in transforming the *liber homo* of 1215, through Wat Tyler's rebellion ("once again the people had to fight to regain their rights"), the rise of Parliament, and the execution of Charles I into the "people" resisting the tyranny of German fascism. This film rather portentously concluded that "The struggle for the rights of man is not ended, the story of the future is yet to be written": the twenty first century has already established that working with the legacy of Magna Carta offers plenty of opportunity for preserving and expanding freedoms. The British Council film may have been very bad history, but it clearly provoked and mobilized popular support for a vision of English liberties that sustained and nourished a communal sense of freedom in difficult times. At later moments in the 1957 opening of the Commemorative Temple funded by the American Bar Association on Runnymede Meadows, Magna Carta was invoked as a powerful Cold War instrument against the threat of "Godless Communism." In 2002 the Australian Prime Minister, opening the exhibition displaying a 1297 Magna

Carta, proclaimed that it was a significant resource to deploy in the war against terror. It is, despite the many pages of historical enquiry, still an imponderable issue of how this ancient manuscript wields a persisting power: the recent Chinese edition may open up yet another reception and legacy.

In conclusion, the legacy of the Magna Carta may tell us something about how we collectively do something called the history of (political) ideas and use that historical dialogue to provide matter for more conceptual thinking. Professor Quentin Skinner, although powerfully enjoining us to contextualize political thinking in order to understand the intentions and political ambitions of the authors, has also underscored that this is a platform for allowing modern communities to think with the past.^[44] Here perhaps the role of historians not just to produce learned and scholarly accounts, but to communicate with the public is important. Good public history will expose deceit and inaccuracy, and scrutinize scholarship, but it also it has a brief to explore historical complexity and communicate that reception and reworking of intellectual traditions to a non-expert audience. Hopefully it is the achievement of the British Library Exhibition^[45] to have achieved exactly the right blend of historical erudition and clarity of understanding which will encourage another generation of minds to explore the meaning of *liber homo*.

Endnotes

[38.] "The Declaration of Arbroath" (6 April, 1320). *The National Archives of Scotland* <<http://www.nas.gov.uk/about/090401.asp>>. Translation <<http://www.nas.gov.uk/downloads/declarationArbroath.pdf>>.

[39.] Jill Lepore, "The Commandments" in the *New Yorker*, at <<http://www.newyorker.com/magazine/2011/01/17/the-commandments>>.

[40.] Translation of Hotman's *Francogallia* by Molesworth in Robert Molesworth, *An Account of Denmark, With Francogallia and Some Considerations for the Promoting of*

Agriculture and Employing the Poor, Edited and with an Introduction by Justin Champion (Indianapolis: Liberty Fund, 2011). <[/titles/2422#lf1577_head_046](#)>.

[41.] Bruce Lincoln, *Discourse and the Construction of Society: Comparative Studies of Myth, Ritual, and Classification* (Oxford UP, 2nd Edition, 2014).

[42.] "Churchill plan to give Magna Carta copy to US revealed", BBC News, 11 March, 2015. <<http://www.bbc.com/news/entertainment-arts-31822545>>.

[43.] "Magna Carta: The Story of Man's Fight for Liberty" (Gaumont, 1946). *The British Film Council* <<http://film.britishcouncil.org/magna-carta>>.

[44.] Quentin Skinner, "On encountering the past" <http://www.concepta-net.org/files/Image/Skinner_Interview.pdf>.

[45.] "Magna Carta: Law, Liberty, Legacy" *British Library Exhibition* <<http://www.bl.uk/events/magna-carta--law-liberty-legacy>>.

OPINION AND TRUTH

by David Womersley

One issue raised by our various essays is the question of how the academic investigation of the past stands in relation to the political and popular use of the past. Whereas one would like the latter to be informed by the former, it does seem to me that these are distinct activities and that historians must not expect to adjudicate in the public realm with the same absolute authority they have in the schools. As Hume understood, politics is a question more of opinion than of truth. It is of course a matter of interest when opinion and what currently seems to be truth are sharply at variance. Nevertheless, opinion is not a dog to be brought to heel by a sharp tug on its historical lead.



David Hume

These questions of theory are of absorbing interest to us academics (and perhaps to us alone). I want therefore to float a more substantive suggestion about the legacy of Magna Carta. Last Thursday I went to Hereford for the post-election party of the local MP, who is a friend of mine. Polling day happened to coincide with the traditional Hereford Mayfair, and as I walked round the city it seemed to me that different kinds of good-humored festivity – the political and the recreational - had been brought together. The following morning I went into the cathedral and saw its engrossment of the 1217 issue of Magna Carta (provocatively enough, displayed alongside the glorious and outlandish medieval [Mappa Mundi](#) – a vivid reminder, if one were needed, that the world of the authors of the Magna Carta was not our world).[46] As I left, I wondered to what extent that unassuming-looking document, rather smaller than a sheet of A3 paper and now shorn of its seal, had contributed to the civilized and orderly political culture I had witnessed the previous day. As Magna Carta was interpreted over the centuries to offer reassurances to the English concerning the possibility of redress against official action, did it eventually help to shape the *largely* tolerant politics of 19th- and 20th-century England?

THE MYTHS OF MAGNA CARTA AND FREEDOM

by Justin Champion



A photograph of the Mappa Mundi (Map of the World) held by Hereford Cathedral



A detail showing the British Isles from the Mappa Mundi (Map of the World) held by Hereford Cathedral

Endnotes

[46.] Hereford Cathedral. Mappa mundi <<http://www.herefordcathedral.org/visit-us/mappa-mundi-1>> and Magna Carta <<http://www.herefordcathedral.org/visit-us/mappa-mundi-1/special-exhibitions>>.



A French Revolutionary era Liberty Cap or Pileus

One of the dominant modes, since at least the 1600s, has been to interpret the meaning and significance of the Magna Carta as underpinning an idea of the ancient constitution. Often this political invention of tradition has acted as a device for legitimizing an authoritative but ultimately limited form of monarchy. Most monarchies, and sovereigns, have assumed that the moment of the Magna Carta was a powerful symbol of their consensual ambitions, rather than a source of their legitimacy. The history established not the origins of regal power, but its willingness to adapt to a good office.

At about the same time in the early 1600s, figures like [Coke](#), then [Lilburne](#) and the new voices of the [English Revolution](#),^[47] saw opportunity to use the ideas and moment of the Magna Carta to underpin radical protest against the illegitimate exercise of contemporary political power. This version of historical understanding was rather more interested in the moment of resistance embodied in 1215 – the legacy of especially clause 61^[48] and the “enforcement” process captured the challenge of the barons to the king and was capable of being represented as an act that defended the community, the people, and the nation. All of this vocabulary was of course a later development designed to defend the

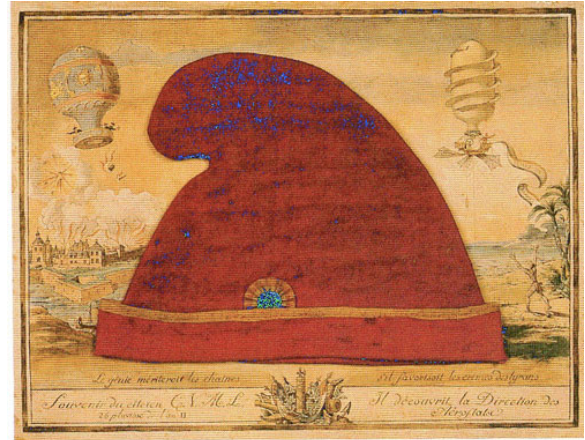
resisting of oppressive political institutions in the name of freedom.

In terms of the different and competing claimants to the legacies of Magna Carta (moment and ideas), it is plausible to argue that monarchists have had the least effective claim, since even in the moderate constitutional form, Magna Carta is usually deployed against the divinity of regal authority, rather than by them against popular dissent or disorder.

As a symbol of resistance, in the name of individual or collective freedoms, the myth of Magna Carta has had a more perdurable and universal appeal. The monarchical use defines the Magna Carta as a very local circumstantial historical tradition; a Magna Carta moment which legitimizes protest and resistance draws from a much more universal application. This aspect of the iconic power of the Magna Carta is seen most visibly in the late 18th-century proposal for a commemorative medal organized by the Royal Society of Arts (see figure 1 below). As is evident, one side of the medal represents the historical moment of the sealing on the meadows with baronial tents, churchmen, and seated monarch. On the reverse the universal meaning of the event is reinforced by a representation of liberty as a woman – Libertas. In her right hand Libertas holds a rod of manumission and a pileus (liberty cap). [49] The staff of manumission was a symbol of being made free, the liberty cap was worn by the freed slave. These iconological elements -- Libertas, liberty cap, staff of manumission -- became a commonly used visual vocabulary identifying public and national commitment to freedom. The U.S. Statue of Liberty and the French Marianne are the most powerful examples.[50] Anchoring the contingent moment of the sealing at Runnymede with these universal traditions of freedom is of course not simply a visual sleight of hand but foundational to the conceptual reinvention of the meaning of Magna Carta for new contexts in the last eight centuries, and indeed into the future.



Figure 1: The Royal Society of Arts commemorative medal



Another Phrygian Cap with hot air balloons in the background

Endnotes

[47.] Editor: In our seven volume collection of [Leveller Tracts](#) there are literally hundreds of references to Magna Carta (or Charta). See for example:

- 8.16. Anon., *Briefe Collections OUT OF Magna Charta: OR, The Knowne good old LAWES OF ENGLAND* (19 May, 1643) (not yet online);
- 3.21. John Lilburne, *Vox Plebis, or The Peoples Outcry Against Oppression, Injustice, and Tyranny. Wherein the Liberty of the Subjects is asserted, Magna Charta briefly but pithily expounded* (19 November, 1646) <[/titles/2596#lf1542-03_head_053](#)>;
- 3.22. John Lilburne, *The Charters of London: or, The second Part of Londons Liberty in Chaines discovered* (18 December 1646) <[/titles/2596#lf1542-03_head_062](#)>

- 5.1. William Prynne, *A New Magna Charta* (1 January, 1648) <</pages/leveller-tracts-5#5.1>>;
- 5.2. William Prynne, *The Petition of Right of the Freeholders and Free-men* (8 January, 1648) <</pages/leveller-tracts-5#5.2>>.
- 5.8. John Lilburne, *The Peoples Prerogative and Priviledges, asserted and vindicated, (against all Tyranny whatsoever.) By Law and Reason. Being A Collection of the Marrow and Soule of Magna Charta* (17 February, 1648) <</pages/leveller-tracts-5#5.8>>

[48.] See the full [Clause 61](#) in the Bibliography below.

[49.] Editor: We have discussed the significance of the "pileus" (the liberty or "Phrygian" cap) in several "illustrated essays" in the section *Images of Liberty and Power* <</images>> , especially "Thomas Hollis and John Locke" <</pages/thomas-hollis-and-john-locke>>, "The Earl of Shaftesbury on Liberty and Harmony" <</pages/the-earl-of-shaftesbury-on-liberty-and-harmony>>, and "New Playing Cards for the French Republic (1793-94)" <</pages/new-playing-cards-for-the-french-republic-1793-94>>. There is also an interesting entry in *Wikipedia* on "Pileus" <http://en.wikipedia.org/wiki/Pileus_%28hat%29>.

[50.] The classic work on the imagery of Marianne is Maurice Agulhon, *Marianne into Battle: Republican Imagery and Symbolism in France, 1789-1880*, translated by Janet Lloyd (Cambridge: Cambridge University Press, 1981.)

HOW CAN THIS ARTIFACT EXERCISE SUCH POWER?

by Justin Champion

David raises a fundamental question about the enduring power of what he elegantly calls “that unassuming-looking document, rather smaller than a sheet of A3 paper and now shorn of its seal.” It has been a constant historical concern, niggling in my encounter with the Magna Carta and its reception, to pose almost the same point. How can an artifact so old and circumstantial

exercise such power over subsequent historical communities? In one sense the medieval historians have in one respect established that the powerful constitutional meaning of the charter was in abeyance between the 13th and 16th centuries although it may have been embedded in the routines of provincial justice, especially in concerns related to property. The transformation of significance does seem to be closely associated with the opportunities for dissemination through print culture in the legal handbooks, but then more dramatically in the form of facsimiles in the 18th and 19th centuries. What did it mean to the construction of political identities to be able to review a facsimile of the charter in the privacy of one’s home or club? Without doubt, and this can be seen in contemporary graphic satire too, representations of Magna Carta supporting particular individuals, institutions, or policies became in the 18th century a powerful and very effective means by which popular support for activities might be mobilized. Magna Carta became then a key element of an iconographic vocabulary of constitutional liberties, alongside the liberty cap, the stave of manumission, and the various temples of liberty which provided a public opportunity to defend or attack threats to freedom. How public discourse connected the ancient artifact of 1215 with the emotive authority invoked by contemporary representation is a tough historical question to pose, but nevertheless demands further thought. For the 800th anniversary there will no doubt be much merchandise for sale – reinforcing the “brand,” but there has also been a return to usage of images of Magna Carta in political commentary and protest – how this process connects to and draws from its origins is complex, and for the moment underexplored.

A BLEND OF FACT AND MAKE-BELIEVE

by Nicholas Vincent

As David Womersley so forcefully reminds us (6 May), even a “Wrong Map” can supply comfort to its users. In the particular case of Magna Carta, there is no doubt that a great deal of what is popularly accepted about English liberties and the Anglophone love of freedom derives from just such a “Wrong Map,” from the fictions of the Ancient Constitution concocted by Edward Coke and his successors, from the 16th century onwards. The consequences of thus blending fact and fiction are with us still. As illustration, I would draw attention to two of the more delicious ironies of Magna Carta’s 800th anniversary celebrations. Magna Carta is in many ways a deeply anti-monarchical document, and yet throughout 2015, those organizing its birthday celebrations have been at pains to involve members of the British royal family. Exhibitions in Washington and London have been ceremonially opened by the children of the Queen (Prince Charles and Princess Anne), and the Queen herself serves as honorary president of the Magna Carta anniversary committee. In February 2015, she hosted a reception for lawyers and others interested in Magna Carta at Buckingham Palace.^[51] The local council authorities at Runnymede have chosen to mark this anniversary year by erecting a large bronze statue of Her Majesty, in questionable taste, but nonetheless a powerful indication of the ways in which Magna Carta can both be presented as a radical riposte to monarchy and as a royal charter, itself granted by a King of England, confirming the king as ultimate source of law.^[52] Who else but the King was there in 1215 to establish, according to the terms of [Magna Carta c.39](#), whether any particular judgment was or was not “lawful”? Who more appropriate today than the Queen of England to act as figurehead for an 800 year-old constitutional settlement?



Image of the plaster version of the 60th Anniversary bronze statue designed by James Butler. QE2 is wearing "full Garter robes"

These ironies extend today across the Atlantic to the land of the free. The rejection of monarchy in the American colonies of the 1770s was accompanied by a violent revolution fought against the government of King George III at least in part in the name of Magna Carta and liberty. In North America today, organizations still exist whose purpose is not only to celebrate the English monarchy but to trace and (for a price) authenticate the family trees of those claiming descent from one or other of the 25 barons of Magna Carta.^[53] Since these barons were themselves of aristocratic and in many cases ultimately of royal descent, a great deal of the thrill of becoming a modern “Dame” or “Baron” of Magna Carta is to know that, ultimately, one is descended from Charlemagne or another great king of the medieval past. Quite how this sits with the American celebration of freedom from royal tyranny remains hard to determine. Magna Carta thus serves both reactionary and radical agendas. As any student of American politics can affirm, these two impulses are notoriously hard to tell apart. Meanwhile, the distant past still exercises an attraction for those in the present looking for the roots and justifications of liberty and freedom.

As Justin Champion and David Womersley also remind us, this was an imperative felt very strongly in the 16th and 17th centuries. It was felt no less strongly, particularly at times of perceived social or political disruption, in more distant antiquity. Englishmen in the aftermath of the Norman Conquest of 1066 did their best to seek for precedents and safeguards against Norman tyranny in the freedoms of the prelapsarian Anglo-Saxon past. To support their case here, they resorted to forgery on a heroic scale, inventing laws and law codes which were then foisted upon Anglo-Saxon kings (Cnut,

Edward the Confessor) as a guarantee of their authentic antiquity^[54]. It was precisely this desire to locate freedoms and privileges in the distant past that persuaded the barons of King John's reign to demand that John renew the "Laws of Edward the Confessor," even though such laws were in reality a product not of the Confessor but of the 1120s and 1130s. Nor does the story end there. The Anglo-Saxons themselves, long before 1066, had developed an idea of liberty that itself derived in part from an anachronistic reading of the Christian Bible, in part from charters granted by the earliest Anglo-Saxon kings, in many cases subsequently rewritten or improved by their beneficiaries. The insertion into such charters, either by their original royal grantors or in the course of post-Conquest forgery, of claims to "liberties" or "immunities" rendered them potentially hostile to the king's claims to sovereignty. "Libertas" in this reading became the negation not only of slavery, in its Roman or post-Roman sense, but of whatever term, up to and including "lordship" ("dominium") might be adopted by kings to designate their own particular brand of lordship.^[55]

Such efforts were founded upon a shadowy collaboration between fact and fiction. Yet there can be little doubt that as early as the 13th century they contributed to a sense that England was a nation with a particular concern for "liberties" in the institutional and plural sense, if not as yet in the private and singular. Here indeed the defense of aristocratic or ecclesiastical "privilege" produced, almost as an unintended consequence, a consensus that property-holding served as a necessary prerequisite for personal liberty. Back in the 1970s, Alan Macfarlane incurred the wrath of academe for arguing that, as early as the 13th century, the English were fundamentally different from other European peoples, as their family structures, their legal tradition and their property-holding peasant class increasingly ensured them freedom from the burdens of servitude.^[56] Macfarlane drew here on a tradition of legal anthropology pursued since at least the time of [Sir Henry Maine](#).^[57] The debate on serfdom has moved on a long way since then.^[58] Nonetheless, and here returning to the world of Magna Carta, there seems little doubt that the assizes

of the 12th-century extended a degree of security of tenure in real property transactions, both for land and for merchandise, far beyond the barons and knights for whom these assizes were chiefly intended.^[59]

Were we looking for explanations here, a great deal might be blamed on the laws of unintended consequences. Another explanation can be traced via the 12th-century reverence for the Anglo-Saxon past, back through the forged or improved law codes of the 12th century such as the *Leges Edwardi Confessoris* or the *Instituta Cnuti*, reinventing pre-Conquest "liberties" and "laws" with no real risk that the new Norman conquerors would be in a position to challenge what were claimed as privileges from the far-distant past. Another explanation, more traditional and yet still persuasive, would be to trace genuine evidence of the equation between law and liberty back before the Conquest of 1066, to the traditions of the Anglo-Saxons themselves, to the free peasantry of East Anglia and the Danelaw (an area of England from which came so many of the barons of 1215), to the legal tradition of Ine, Alfred, and their successors, and ultimately to the Germanic tribes of Tacitus, even perhaps to the prehistoric past.^[60]

In other words, for all that the lawyers and constitutionalists might pretend otherwise, our ideas of "Liberty," from Tacitus onwards, have been compounded from a rich and still volatile blend of fact and make-believe. It is this rich tradition, not merely an 800-year-old piece of parchment, that deserves celebration in Magna Carta's anniversary year.

Endnotes

^[51.] See <https://www.law.umich.edu/newsandinfo/features/Pages/magnacartaqueen022715.aspx> here

^[52.] For a positive assessment of the Runnymede statue, see <http://www.queenjubileestatue.co.uk/>, noting that a similar statue may be commissioned for the Channel Islands. The reaction by the people of Runnymede has been less positive

^[53.] See here The National Society Magna Charta Dames and Barons <http://www.magnacharta.org/>

[54.] Bruce O'Brien, *God's Peace and King's Peace: The Laws of Edward the Confessor* (Philadelphia 1999); idem, "Pre-Conquest Laws and Legislators in the Twelfth Century," *The Long Twelfth-Century View of the Anglo-Saxon Past*, ed. Martin Brett and David A. Woodman (Farnham 2015).

[55.] The fundamental study here remains that by Julia Crick, "'Pristina Libertas': Liberty and the Anglo-Saxons Revisited," *Transactions of the Royal Historical Society*, 6th ser. 14 (2004).

[56.] Alan Macfarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Oxford 1978).

[57.] In particular, Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London 1861). Online version: *Ancient Law, its connection with the early history of society and its relation to modern ideas, with an introduction and notes by Sir Frederick Pollock*. 4th American from the 10th London edition (New York: Henry Holt and Co., 1906). </titles/2001>. For a modern study of Maine (1822-1888), see Karuna Mantena, *Henry Maine and the Ends of Liberal Imperialism* (Princeton 2010).

[58.] See here in particular, and in many ways from opposite perspectives, Paul Hyams, *Kings, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford 1980), and Mark Bailey, *The Decline of Serfdom in Late Medieval England* (Woodbridge 2014).

[59.] For highlights from a vast literature here, see John Hudson, *The Oxford History of the Laws of England. Volume II: 871–1216* (Oxford 2012).

[60.] This was the tradition inherited by Sir Frank Stenton (1880-1967), in part from the "tribal" enquiries of Frederic Seebohm (1833-1912). See in particular Seebohm, *The English Village Examined in its Relations to the Manorial and Tribal Systems* (London 1983). In turn, it remains a tradition fundamental to the writing both of the Rosamond Faith, *The English Peasantry and the Growth of Lordship* (London 1997), and, massively influential, Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, left uncompleted at the author's death,

with only volume 1 published as *Legislation and its Limit* (Oxford 1999). For influences over Wormald, see in particular the collected essays of James Campbell, *Essays in Anglo-Saxon History* (London 1986), still the most cogent defense of English legal and social particularism.

MAGNA CARTA: AN ADDITIONAL THOUGHT AND A FURTHER EXAMPLE

by Richard Helmholz

Reading the discussion of Magna Carta's continuing importance has been useful for me. It shows the continuing interest in the subject of course. But it has done more. At least as I evaluate the evidence of Magna Carta's current reputation, it is hard to think of an historical event in which the divide is any greater between the general treatment and scholarly treatment of the same document. The latter is what has been held about it among professional historians, not all of them perhaps, but a very large majority. The former consists of the shared views of most modern lawyers who invoke Magna Carta as a means of establishing the legitimacy of social reforms or of celebrating the rule of law. One of the merits of the book of essays on Magna Carta edited with an introduction by Ellis Sandoz is that he confronted this question head on.[61] Reading the comments on the subject in this Liberty Fund dialogue about the subject and seeing Professor Sandoz's earlier work mentioned motivated me to look back at his treatment of the Charter. Most of what he then said was occasioned by J.G.A. Pocock's book on the "common law mentality" of Sir Edward Coke,[62] but his discussion remains as pertinent to the larger problem as it was then.



Sir Edward Coke

The problem has persisted. There is a continuing divide. The “popular view” holds that contemporary principles underpinning democratic liberties can be traced back to Magna Carta. Both the act of agreement between monarch and baronial elite and the textual outcomes are regarded as a “real living document.” For example, on 30 July 2007 UNESCO admitted it to the collection of items identified as important to the “Memory of the World” in “recognition of their outstanding universal value.” The Magna Carta, then, was not simply a local, British, circumstantial moment. It had a universal human purchase.

The “scholarly view” takes pretty much the opposite position. Magna Carta was a baronial document, occasioned by a conflict with King John and aimed at entrenching baronial privileges. The later use made of Magna Carta (by Coke and others) was mostly invention. For example, Coke used the Charter to establish the principle that the monarch could not tax his subjects without Parliamentary consent. However, say critics like Professor Pocock, the connection between the Charter and that principle was tenuous at best. Parliament did not exist in 1215. The later use of the Charter was either the product of an invented myth or the consequence of willful blindness on the part of lawyers like Coke.

What Professor Sandoz added to this debate was a more measured discussion of the concept of liberty as it was understood in the 16th century, and I tried also to add

something to what he said in my first intervention in this discussion. I now think it would be useful to add one other example of the common use of legal texts in medieval times. It does not concern Magna Carta directly, but it is relevant to the ways in which texts like Magna Carta were then commonly understood before the age when legal positivism came to dominate jurisprudence.

My example comes from the use commonly made of the maxim *Quod omnes tangit ab omnibus approbari debet*. It means simply that what touches all should be approved by all, and it comes from a law of the Emperor Justinian (Codex 5.59.5.2). It was used in the Middle Ages to justify the power of representatives of the people in early parliaments to bind the people they represented and to advance the growth of parliaments. As found in the Codex, however, it said nothing of the sort. It simply stated that when several persons had been appointed as *tutores* (guardians) for a minor or person under a disability, all of them had to be summoned before a court before action to terminate the joint grant of *tutela* could occur. Were any fair-minded person to take a cynical look at the subject, the extension of this text to justify the growth and power of parliaments would be an artificial stretch – too far-fetched to attract the attention of a serious student of the subject. However, it happened, and it happened because medieval lawyers saw in this text an underlying principle that was connected with due process of law. If it was applied in the case of guardianship, its rationale might legitimately be extended to cover a situation that had not occurred in ancient Rome. Its principle might legitimately apply more widely.

What this means for the history of medieval due process of law is that the medieval jurists found a general concept stated and applied at several places in the Roman and canon law texts.^[63] They used those texts; they expanded them; and they struggled with determining what they should mean in practice. Some of their answers fit modern ideas about the subject. Some of them did not. Some we still disagree about.

It was the merit of Professor Sandoz’s discussion of 1993 that he saw and discussed this way of understanding the use later made of Magna Carta. Its texts, even some of

those that seemed to relate solely to baronial privilege, were capable of treatment similar to that given *Quod omnes tangit*. Sir Edward Coke did so treat them, and he was not thereby doing something underhanded or wholly anachronistic. What I wanted to add to the discussion of Magna Carta was simply another example – one shared by English lawyers and Continental jurists -- of how jurists of his age regarded the texts at their disposal. Coke was doing something with the clauses of Magna Carta that did not differ greatly from what other jurists did with the maxim *Quod omnes tangit*. Professor Sandoz did not discuss this example, but he understood it.

Endnotes

[61.] *The Roots of Liberty: Magna Carta, Ancient Constitution and the Anglo-American Tradition of Rule of Law*, Ellis Sandoz ed. (Columbia, MO, 1993), reprinted by Liberty Fund in 2008. Online: <[/titles/2180](#)>.

[62.] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*, 2d ed. (Cambridge 1987).

[63.] For fuller treatment see Gaines Post, “A Romano-canonical Maxim, *Quod omnes tangit*, in Bracton and in Early Parliaments,” *Viator* 4 (1946), 197-251, revised and reprinted in idem, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton NJ 1964), 163-238; Yves Congar, “*Quod omnes tangit ab omnibus tractari et approbari debet*, *Revue historique de droit français et étranger*,” 4th ser. 36 (1958), 210-59; Bruce Brasington, “‘A Divine Precept of Fraternal Unions’: The Maxim *Quod omnes tangit* in Anglo-American Thought to the Ratification of the Constitution,” in *Bridging the Medieval-Modern Divide: Medieval Themes in the World of the Reformation*, James Muldoon ed. (Farnham 2013), 205-23.

is possibly a unique example of a continuous but profoundly contested commemorative tradition: arguably the British monarchy may be another example, but it has neither the global appeal nor the constitutional significance. I was reminded reading and thinking about Richard’s last reflection of Plato’s Euthyphro dilemma: are the principles we can draw from Magna Carta good because they are philosophically correct or because they were uttered and confirmed in the Magna Carta and therefore wield a sort of historical prescription? A tricky question: indeed if the principles are independently “good” what does the Magna Carta moment bring to them other than the excuse to return to them on significant historical anniversaries?

One of our collective themes has discussed the imaginative ways in which later minds, groups in specific moments for deliberate purposes, have been able to find something valuable – especially in the legal principles and language, which repay unfolding in powerful ways. I’ve touched on some of the ways in which visual culture and graphic satire used and reused images of liberty and Magna Carta to stigmatize or valorize contemporary figures or policies.

There have been powerful literary responses too – stirring verse from Kipling, Tennyson, and before them Mark Akenside 1720-1770, who according to Samuel Johnson had an “outrageous zeal for liberty.” Akenside prepared a short verse for a “Column at Runnymede”:

Thou, who the verdant plain dost traverse here
While Thames among his willows from thy view
Retires; O stranger, stay thee, and the scene
Around contemplate well. This is the place
Where England's ancient barons, clad in arms
And stern with conquest, from their tyrant king
(Then rendered tame) did challenge and secure
The charter of thy freedom. Pass not on
Till thou hast blest their memory, and paid
Those thanks which God appointed the reward
Of public virtue. And if chance thy home
Salute thee with a father's honour'd name,
Go, call thy sons: instruct them what a debt
They owe their ancestors; and make them swear

MAGNA CARTA'S RESONANCE

by Justin Champion

The conversation with my colleagues about the meaning and legacies of Magna Carta has consistently returned my thoughts to the question of reception. The Magna Carta

To pay it, by transmitting down entire
Those sacred rights to which themselves were
born.

Again here, the themes of memory, place, and the process of historical transmission are powerfully captured in the short verse.

A bolder reimagining was undertaken in 1965 by the playwright John Arden, who was commissioned by the City of London to commemorate the 750th anniversary, producing “a play of discussion” – *Left-handed Liberty*, performed before the Queen at the Mermaid Theatre.^[64] As a Brechtian, Arden ensured that the drama made explicit the act of memory and the political resonances to be drawn between past and present. In Act 3, scene 7 King John, stepping out of character casting aside his armor and sword, addresses the audience with a question, brandishing the great historical study by McKechnie: what did his “frantic history mean, what use was it?” As he continued, “What use am I myself, a bogey man or ghost seven hundred and fifty years old and still mouldering – set down to prance before you in someone else’s body. What in fact have you seen tonight?” (84). As John answers his own question, “A document signed and nobody knew what for, or at least, nobody knew or could possibly know the ultimate consequences thereof.” Arden’s point was to reinforce that the relevance of the moment was remade for each generation – his achievement was to write in the voice of women (pushy princesses keep demanding to being removed from the periphery and refuse to go to their rooms, citing the *liber homo* clause, which John insists does not apply to them!). Arden’s play is worth revisiting because it imaginatively engages with the process of making meaning out of the past. The story of the Magna Carta was not a fairy tale; it became a cornerstone of ideas of English liberties. As Arden powerfully notes in his introduction,

An agreement on paper is worth nothing to anybody unless it has taken place in their minds as well: and that if we want liberty we have to make sure that (a) we know what sort of liberty we are fighting for, (b) our methods of fighting are not such as to render that liberty invalid

before we even retain it, (c) we understand that we are in more danger of losing it once we have attained it than if we had never had it (xi-xii).

These are powerful warnings, and indeed have greater purchase 50 years later, when the battle between civil liberties and the demand of national security seem ever more brutal.

Endnotes

[64.] John Arden, *Left-Handed Liberty: A Play about Magna Carta* (London: Methuen, 1965), “Author’s notes.”

THE RISKS INVOLVED IN DISSEMINATING MAGNA CARTA

by Nicholas Vincent

Various of the more recent posts make me ponder the lessons taught by the board game "Risk". In the English and American versions of this game, players are instructed to "annex" or "conquer" a certain number of countries. Rebranded in Germany as "Risiko", the instructions turn matters on their head by insisting that players must "liberate" the requisite number of states. What to the victorious can seem "liberation", to the defeated often appears brute conquest. One person's defense of national security is another person's infringement of civil liberties. With specific reference to Magna Carta, the matter was put rather well, back in 1947, by K.W. Blaxter, a senior civil servant in the Colonial Office. In a departmental memorandum never intended for publication, Blaxter rejected recent proposals that 15 June be set aside each year as Magna Carta Day. There were grave risks, he suggested, in disseminating Magna Carta:

In some colonies where ill-disposed politicians are ever on the lookout for opportunities to misinterpret our good intentions, its celebration might well cause embarrassment, and in general there is a danger that the Colonial peoples might

be led into an uncritical enthusiasm for a document which they had not read but which they presumed to contain guarantees of every so-called "right" they might be interested at the moment in claiming.^[65]

This is an argument of stunning candour, reminiscent in many ways of the refusal of the worst of the sixteenth-century popes to sanction vernacular translations of the Christian Bible. Magna Carta, so it suggests, is too precious to those who enjoy its privileges to be made more widely available to those less fortunate. One person's good intentions are all too often another person's display of condescension or self-congratulation. In this eight-hundredth anniversary year, amidst the celebrations we must beware of hubris. In so far as the events at Runnymede gave rise to "liberty" they did so as idea rather than as historical reality. In the wrong hands, "liberty" can all too easily become a weapon in the arsenal of tyranny. Rousseau and Popper both knew this. It is one of the duties of historians, both of events and ideas, not only to commemorate but to police such distinctions.

Endnotes

^[65.] K.W. Blaxter, Memorandum of 21 January 1947, *The National Archives* FO 371/61073, (London).

MAGNA CARTA AND THE TENSION BETWEEN THE SECURITY AND THE LIBERTY OF SUBJECTS OF THE REALM

by David Womersely

As our conversation has developed, we have been fascinated by the ironies, discontinuities, and even at moments the absurdities, of the reception and re-application of Magna Carta. To put it aphoristically: we academics live in a world shaped by Coke, but our minds are in thrall to Brady. All the participants in this online

conversation are agreed on the deep, and deceptively narrow, gulf separating 2015 from 1215. I want in this post to change slightly the angle of vision, and (picking up Justin's sharp formulation of our current discontents as involving a conflict between civil liberties and national security) to reflect on the *prospects* for Magna Carta. Will it continue to be invoked as a talisman of freedom? Or are the current threats to liberty such that the applicability of Magna Carta will be reduced?

A bet against Magna Carta would of course be wildly against the form-book, since it has shown such an extraordinary potency for re-deployment against targets utterly foreign to its moment of composition. Strict applicability, at least as understood by the academic mind, has in the past proved no obstacle to repeated invocation.

And yet: is it not true that Magna Carta envisages the threat to liberty arising from the excesses of an exorbitant autocracy - in other words, arising out of government which has become autotelic and oblivious of the genuinely public ends (provision of justice, security of property, security of the realm) which alone supply its *raison d'être*?

However, today in western democracies the threat to individual liberty does not arise from this direction. Today our liberties are threatened most grievously by the demands of security. Our current dilemma is that one legitimate end of government (the security of the realm and of its subjects) is steadily being elevated over another (the liberty of the subject).



Anthony de Jasay

In *The State*^[66] Tony de Jasay set out an independent-minded argument contending that the state's avowals of pursuing ends beyond or outside its own self-aggrandisement are illusions (in which the state's own functionaries may of course themselves be trapped - his argument does not depend on proving bad faith on their part). The state has always been, and will always be, autotelic.

If de Jasay is right, then the prospects for Magna Carta look bright: the modern, Lockean state is really just the old state in a posture of (deceptive) concern, and the provisions of the charter can, with no unprecedented degree of stretching, be applied in the future with the same degree of pertinence which obtained in the past.

The problem is that de Jasay's argument is not so much evidence-based as temperamental. If you tend to see things his way, you'll be convinced by what he says; but if not, then not. It also looks rather like an a-historical shortcut: though our problems may feel new, in fact they are just the perennial problems of exorbitant autocracy in new clothes. It would, in a sense, be too conveniently easy (though also very depressing) were de Jasay right.

But if he is wrong, then Magna Carta will become a map so very wildly removed from our current political terrain that the wishes of academic historians may soon come true. Magna Carta will dwindle into the late feudal document they have always insisted it really was - and they alone will read it.

Endnotes

[66.] Anthony de Jasay, *The State* (Indianapolis: Liberty Fund, 1998). <[titles/319](#)>.

activity. His research interests include the history of political liberty, the radical English Enlightenment, and the impact of epidemic disease in London.

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