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# The Myth of Magna Carta Revisited

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## THE MYTH OF MAGNA CARTA REVISITED\*

R. H. HELMHOLZ\*\*

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### INTRODUCTION

Few historical documents have both received more attention and spawned a greater division of opinion than Magna Carta. On one side stands its popular reputation; on the other its reputation among most scholars. The former is the enthusiastic opinion commonly expressed by speakers at meetings and dinners held to celebrate King John's acceptance of the Great Charter at Runnymede in 1215. They praise Magna Carta's role in establishing the rule of law. The Charter is said to have provided the foundation for later assertions of the supremacy of that salutary principle in the common law of England. It also influenced the constitutional system of the early American republic, and, even today, its relevance to securing the protection of human rights has not altogether disappeared. The latter, a negative opinion that a majority of professional historians seem to share, regards Magna Carta's exalted reputation as a myth. In its origins, historians say, the Charter did little or nothing to promote good government. Nor, they add, did it serve to protect the legal rights of the great majority of English men and women. It served only the baronial class. Its glorification was a later invention, attributable to myth-making

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lawyers like Edward Coke in the seventeenth century and William Blackstone in the eighteenth.<sup>1</sup>

This Article addresses primarily the second of these two opposing opinions. It has an object in view—to narrow the gap between the scholarly view and the popular opinion by examining the jurisprudential assumptions that prevailed at the time the Charter became part of English law. These assumptions were not identical to those that dominate modern legal thought, and they need to be better understood if we are to evaluate fairly Magna Carta's place in the history of our law. Such an evaluation will not prove that everything commonly said in praise of the 1215 Charter is true. Some of it is myth. But it is not all myth. Many of the negative characterizations of the Charter's character simply reflect a different way of thinking about law than that which prevails today.

### I. THE GREAT CHARTER AS MYTH

The argument that Magna Carta's reputation as a guarantee of civil liberties and human rights is misleading, even false, seems first to have been articulated clearly more than one hundred years ago by Edward Jenks.<sup>2</sup> Reacting against the fulsome praise for the Charter found in Bishop William Stubbs's *Constitutional History of England*,<sup>3</sup> the then-dominant opinion on the subject, Jenks fastened on the restriction to free men in some of the Charter's guarantees. He sought to bring these restrictions to light in order to unmask "the false glamour which invests Magna Carta."<sup>4</sup> In fact, he said, it is likely that

1. See EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND \*46 (stating that no man may be "dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties, or free customes . . . as belong to him by his free birth-right, unlesse it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the Law of the Land"); see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*424 ("[Magna Carta] protect[s] every individual of the nation in the free enjoyment of his life, his liberty and his property . . ."). For a current statement of the Charter's status as discussed in academic literature, including examples, see generally NICHOLAS VINCENT, MAGNA CARTA: A VERY SHORT INTRODUCTION 92–109 (2012) (discussing the Charter's role as "totem and as artefact").

2. See Edward Jenks, *The Myth of Magna Carta*, 4 INDEP. REV. 260, 260–61 (1904); see also Bryce D. Lyon, *The Lawyer and Magna Carta*, 23 ROCKY MTN. L. REV. 416, 416–18 (1951).

3. See 1 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 579 (lib. ed. 1880) (describing the Charter as "the first great public act of the nation after it ha[d] realised its own identity"). For a more recent and favorable evaluation of Stubbs's treatment of constitutional questions, see James Campbell, *The Anglo-Saxon Origins of English Constitutionalism*, in LAW, GOVERNANCE, AND JUSTICE: NEW VIEWS ON MEDIEVAL CONSTITUTIONALISM 15, 23–25 (2013).

4. Jenks, *supra* note 2, at 268.

in 1215 only about one-sixth of the adult male population would have qualified for even the limited protection offered in the Charter's clauses. Villeins, women, and some others were excluded.<sup>5</sup> Most of the other clauses would also have had little positive effect in practice, even when their wording might seem to have applied. These clauses were reactionary in character. Many were actually harmful. "As a matter of fact," Jenks concluded in discussing the institution of trial by jury, the Charter "delayed indefinitely the adoption of that wholesome reform."<sup>6</sup> The character of its clauses, attached as they were to the ancient privileges and immemorial customs of the baronage, infected the whole. They were the opposite of what was needed to safeguard English liberties. In short, Magna Carta was a document designed for the magnates, occasioned by their personal conflicts with the King, aimed at entrenching baronial privileges, and marred by an unwarranted reverence for outworn prejudices of the past.

Most, though not quite all, of these negative characterizations were confirmed by the fundamental work on the provisions of Magna Carta by William McKechnie a few years after Jenks's article appeared.<sup>7</sup> For example, McKechnie argued that the intent of the barons was thoroughly backward-looking; they "professed to be demanding nothing new."<sup>8</sup> The correct reading of "freemen" who could claim protection under clause 34 was restricted to "landowner[s] with a manorial court."<sup>9</sup> It did not protect ordinary men and women.<sup>10</sup> Constitutional principles like equality before the law and the availability of writs of habeas corpus, both of which "ha[d] been discovered in various clauses of the Great Charter," were

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5. "Villein" was the term commonly used by English lawyers to describe men and women held in a form of servitude to a lord. However, they were treated as free as to everyone else; they were not slaves. There was also a considerable variety in the services they owed to their lords.

6. Jenks, *supra* note 2, at 270. Jenks repeated this argument in his later work, EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW: FROM THE EARLIEST TIMES TO THE END OF THE YEAR 1911, at 48 (Little, Brown & Co. 1913) (describing the supposed connection between Magna Carta and jury trial as "so long and so profoundly misunderstood").

7. See WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 109–38 (2d ed. 1914).

8. *Id.* at 111.

9. *Id.* at 115.

10. See, e.g., Janet S. Loengard, *What Did Magna Carta Mean to Widows?*, in MAGNA CARTA AND THE ENGLAND OF KING JOHN 134, 139–40 (J. Loengard ed., 2010) (noting that even the limited protection extended to widows did not apply if either they or their husbands were villeins).

not actually there.<sup>11</sup> McKechnie concluded that what Stubbs and others had done in making a link between those principles and the clauses of the Great Charter had “diffused false notions of the development of English law.”<sup>12</sup> It was commonly called “Great” only because it was long.<sup>13</sup>

This negative depiction of the Charter’s place in English history received an emphatic boost from the publication, in 1957, of an influential book by J. G. A. Pocock: *The Ancient Constitution and the Feudal Law*.<sup>14</sup> His conclusions echoed the equally influential work of Christopher Hill: *Intellectual Origins of the English Revolution*.<sup>15</sup> Both used Sir Edward Coke, whose attitude towards the common law Pocock described as being “as nearly insular as a human being’s could be” in order to show that English lawyers regarded the law of their own times as having existed unchanged from time immemorial.<sup>16</sup> In the seventeenth century, Coke is said to have believed, the common law was as it had been in 1215. In fact, he seems to have thought that the common law had not changed materially since before the Conquest. Institutions like trial by jury and government by Parliament had existed time out of mind; thus, they were unchanged and unchangeable. This was the “myth of the ancient constitution” in which Magna Carta played a prominent part.<sup>17</sup> As portrayed by Pocock, Coke’s argument was that Magna Carta merely codified what had always been the common law, and that opinion was obviously false.

11. MCKECHNIE, *supra* note 7, at 133.

12. *Id.*; see also GEORGE BURTON ADAMS, THE ORIGIN OF THE ENGLISH CONSTITUTION 243 (1912) (dealing with the famous clause 39 (c. 29 of the statutory version) and concluding that it was “strictly feudal in character”).

13. Jenks, *supra* note 2, at 261.

14. J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 56 (1957). Professor Pocock reissued this book thirty years later, with an addition in which he retreated slightly from his depiction of the insularity of the common law and also sought to clarify, but not to change, his position on the immutable character of English law as portrayed by Coke and others. See J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A REISSUE WITH A RETROSPECT 337–41 (1987) [hereinafter POCOCK, REISSUE].

15. Compare POCOCK, *supra* note 14, at 56 (chastising Coke’s alleged belief that the law was unchanging), with CHRISTOPHER HILL, INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION: REVISITED 229 (1997) (characterizing Coke’s anachronistic interpretations as having been made “so lovingly and so inaccurately”). For a summary of the praise and the criticism for Pocock’s depiction of Coke, see DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS 10–13 (2014).

16. POCOCK, REISSUE, *supra* note 14, at 56.

17. *Id.* at 36.

Of course, it is true that neither jury trial nor the House of Parliament existed in 1215.<sup>18</sup> Instead, they were the products of historical development. It is also true, as critics pointed out,<sup>19</sup> that the Great Charter of 1215 did not afford any direct protection to the vast majority of the English population. Clause 21, for example, stated that “Earls and Barons are not to be amerced save by their peers . . . .”<sup>20</sup> Such a provision might protect ancestors of the Earl of Grantham and his residence at Downton Abbey, but it did nothing for the medieval antecedents of the middle class. It was the proper task of the modern historian, therefore, to recognize and make public the anachronistic assumptions about the Charter which had come to be revered as a palladium of liberty and due process. Coke and Blackstone shared responsibility with other members of their profession for creating this illusion of the Charter’s wide purpose.<sup>21</sup> Revealing what they had done required telling the truth about the contents of Magna Carta.<sup>22</sup> Sometimes it required more; it required taking a thoroughly skeptical view of the enduring worth of the Charter’s provisions in modern jurisprudence. Viewed for what it was in 1215, the Charter was irrelevant in the modern world, critics said. This conclusion is the source of its separation from the popular view.

18. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 205–07, 507–08 (4th ed. 2002).

19. See, e.g., Jenks, *supra* note 2, at 267–69 (noting that many of the privileges recognized in Magna Carta pertained only to the aristocratic landowning class).

20. MAGNA CARTA ch. 21 (1215), reprinted and translated in DAVID CARPENTER, MAGNA CARTA 46–47 (2015).

21. See, e.g., CHARLES OGILVIE, THE KING’S GOVERNMENT AND THE COMMON LAW: 1471–1641, at 1446 (1958).

22. See, e.g., CLAIRE BREAY, MAGNA CARTA: MANUSCRIPTS AND MYTHS 28 (British Lib. 2010) (stating that the Charter was “not a statement of fundamental principles of liberty, but a series of concessions addressing long-standing baronial grievances”); CARPENTER, *supra* note 20, at 435–43 (discussing the many failures in Magna Carta’s enforcement); Jane Frecknall-Hughes, *Re-examining King John and Magna Carta*, in MAKING LEGAL HISTORY: APPROACHES AND METHODOLOGIES 244, 246 (Anthony Musson & Chantal Stebbings eds., 2012) (arguing that the Charter was “primarily a tax rebellion”); Craig S. Lerner, *Magna Carta and Modern Myth-Making: Proportionality in the ‘Cruel and Unusual Punishments’ Clause*, in MAGNA CARTA AND ITS MODERN LEGACY 147, 148 (Robert Hazell & James Melton eds., 2015) (arguing that, despite popular myth, the Charter did not support a proportionality of punishment principle as was later adopted by the Eighth Amendment to the U.S. Constitution); ROBERT M. PALLITTO, IN THE SHADOW OF THE GREAT CHARTER: COMMON LAW CONSTITUTIONALISM AND THE MAGNA CARTA 16–18 (2015) (describing the “Myth of Magna Carta,” which argues that what the document meant to its signatories was quite different from “what is commonly supposed”); Michael Dillon, *Magna Carta and the United States Constitution: An Exercise in Building Fences*, in MAGNA CARTA AND THE RULE OF LAW 81, 98–105 (D. Magraw et al. eds., 2014) (devoting a section to “Creating the Myth of Magna Carta”).

It is this skeptical position that this Article challenges.<sup>23</sup> Making good on this challenge requires examining the text of Magna Carta as it was understood and interpreted in earlier centuries. That examination must start with a look at the principles of interpretation of statutes and other legal texts that were prevalent in both the century in which the Charter was written and in which Coke and other common lawyers interpreted its clauses.

## II. MEDIEVAL AND EARLY MODERN INTERPRETATION OF STATUTE LAW

Magna Carta was taken to be a statute almost from its inception. It was an extraordinary statute, since it was “declaratory of the principall grounds of fundamentall Laws of England,” but it was still a statute.<sup>24</sup> It could be (and was) amended. Of course, it had not been “enacted” by King and Parliament in 1215. This procedure did not exist at that time. However, it was very soon given the authority of a statute and treated as such by commentators.<sup>25</sup> The Great Charter was not unique in this respect; several other early enactments that were treated as statutes shared an equal uncertainty about the authority by which they had been issued.<sup>26</sup> Moreover, the Charter was expressly referred to as a statute in official documents from at least as early as the reign of Edward I.<sup>27</sup> It maintained its place as a statute thereafter. The English “canon of statutes began with the confirmation of Magna Carta in 1225.”<sup>28</sup> It was taken to be the first and oldest of the statutes. That was a position it did not relinquish—from the production of manuscript copies of the “Old Statutes” during the Middle Ages to the publication of the double folio

23. For more moderate views, recognizing the ambiguities in the evidence, see ANDREW BLICK, *BEYOND MAGNA CARTA: A CONSTITUTION FOR THE UNITED KINGDOM* 37–44 (2015); J. C. HOLT, *MAGNA CARTA* 314–44 (3d ed. 2015); JOHN HUDSON, 2 *OXFORD HISTORY OF THE LAWS OF ENGLAND*, 871–1216, at 847–63 (2012).

24. COKE, *supra* note 1, at \*A Proeme.

25. See Margaret McGlynn, *From Charter to Common Law: The Rights and Liberties of the Pre-Reformation Church*, in *MAGNA CARTA, RELIGION AND THE RULE OF LAW* 53–69 (Robin Griffith-Jones & Mark Hill eds., 2015). See generally 132 *SELECTED READINGS AND COMMENTARIES ON MAGNA CARTA 1400–1604* (John Baker ed., 2015) (covering readings on English statutes at the Inns of Court that so treated the Great Charter).

26. See BAKER, *supra* note 18, at 204–12.

27. See *Assize of Novel Disseisin* (Hereford 1291), reprinted in *PLACITORUM IN DOMO CAPITULARI WESTMONASTERIENSI ASSERVATORUM ABBREVIATIO* 286 (1811) (referring to Magna Carta as “statutum de Ronemedē”).

28. BAKER, *supra* note 18, at 205.

volumes of the *Statutes of the Realm* between 1810 and 1822.<sup>29</sup> When Sir Edward Coke placed Magna Carta first in the Second Part of *Institutes*, which he devoted to the exposition of English statutes, he was doing no more than following a habit normal among English lawyers. Any assessment of its interpretation (and its worth) must therefore take account of the Charter's statutory character.

So what? Does this classification matter? This Article argues that it does. Among other things, it matters because it requires us to seek a greater understanding of how statutory texts were interpreted in the centuries when Magna Carta was formulated and when Coke described its consequences in law. As Charles Donahue has said, "If we do not think about it, we are likely to assume that the men and women of the later Middle Ages shared our ideas."<sup>30</sup> Sometimes they shared our opinions, but sometimes they did not. On this subject in particular, time and distance separate the attitude of lawyers in earlier centuries from our own. I begin with the textbook examples, taken from the storehouses of the European *ius commune*.

#### A. Continental Examples

The normal starting point for describing and justifying the civil law's method of statutory interpretation was a text from the Roman law. A provision in the first book of the Codex contains an imperial decree declaring that: "To follow the words of the law and not its mind is to offend against the law."<sup>31</sup> The decree proceeds to "command that all interpretation of the laws, both old and new, shall be carried out accordingly."<sup>32</sup> Other provisions in the texts illustrate how this might be done. In medieval practice, the principle that statutes should be interpreted according to established principles of law wherever feasible often dispensed with literal reading of legal texts, particularly when the literal reading led to results perceived to be unjust. This imperial decree was not simply a statement that no one should be punished in the absence of a clear law prohibiting what

29. See DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES FROM THE MAGNA CHARTA TO THE TWENTY-FIRST OF JAMES I CAP. XXVII, at 1–3 (4th ed. 1775) (referring to the Charter as the "most ancient of our statutes, which may at present be enforced").

30. Charles Donahue, Jr., *Conclusion: Comparative Approaches to Marriage in the Later Middle Ages*, in REGIONAL VARIATIONS IN MATRIMONIAL LAW AND CUSTOM IN EUROPE, 1150–1600, at 289, 291 (Mia Korpiola ed., 2011).

31. CODE JUST. 1.14.5 (Constantine 439) (Fred H. Blume trans., 2d ed. 2008), <http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/books/book1/book%201-14rev.pdf> [<http://perma.cc/6CGZ-YP6W>].

32. This is the summary from the *glossa ordinaria ad id*.



he had done. In fact, it could function as the reverse; it could extend to punishing actions that were contrary to the intention of a decree even though they were not covered by the words themselves.<sup>33</sup>

A simple example, one that would have been well known to every European law student who attended to his studies, was this<sup>34</sup>: A statute enacted for the city of Bologna punished any person who shed blood in the municipal palace. It so happened that a barber shaving a client within the palace cut him by accident, shedding his blood and thus falling afoul of the statute's prohibition. Was he in violation of the statute? Did respect for a statute law require that hard result? No, the student would have learned. It did not. The purpose of the statute—its “mind”—was to punish those who purposefully shed blood in a location where peace should reign. It had not been meant to punish inattentive barbers. The statute's drafters would themselves have provided for an exception had the barber's case been called to their attention. One lesson this case imparted to the student, therefore, was that statutes were not always to be read literally. They were to be interpreted according to their purposes. How did one identify the purpose? That was pretty obvious in this case: to prevent intentional attacks in which blood was shed. The Bolognese example is analogous to the case of a sign reading “No Vehicles in the Park” in modern academic jurisprudence. Such a sign prohibits driving a vehicle into the park. It does not prohibit a statute which includes the depiction of a vehicle. Its words might cover erection of such a statute, but its intent would not.

If the Bolognese barber's case was the most familiar example of statutory construction in the Middle Ages, it now seems a slightly unfortunate one. Its result is too obvious. The greatest of medieval legists, Bartolus de Saxoferrato, said that the opposite result “would be absurd” and he was clearly right<sup>35</sup>. Moreover, this widely known example is actually an understatement of how far jurists were sometimes willing to stray from a strict interpretation of statutes. A better example that went a little further—also a common one in the early training of lawyers—was the question of whether a city's statute criminalizing grain exportation in times of scarcity also forbade the

33. See DIG. 1.3.29 (Charles Henry Monro trans., 1904). See generally IAN MACLEAN, INTERPRETATION AND MEANING IN THE RENAISSANCE 142–52 (1992) (discussing the interpretations of the text of ancient Roman statutes).

34. See, e.g., Guido Calabrese, *Two Functions of Formalism: In Memory of Guido Tedeschi*, 67 U. CHI. L. REV. 479, 481 (2000) (describing a slightly different version of the same example).

35. See BARTOLUS DE SAXOFERRATO, COMMENTARIA, COD. 1.14(17).5, no. 12 (Venice, 1570–1571).

export of flour.<sup>36</sup> Under the proper reading of the statutory prohibition, the jurists concluded, flour was covered as well as wheat. The statute's coverage extended even to the export of bread, because bread was made in part from grain.<sup>37</sup> The logic here seemed convincing from the point of view of the statute's larger intent. Its extension achieved the opposite of the result that would have been reached had the rule of lenity applied. Yet, flour was merely grain in a different form, and the preservation of grain generally for the benefit of the people in the affected area was the statute's object. Hence it should be extended beyond its words to cover what had been within the "mind" of the statute. The example would also have shown that invocation of a statute's larger intent could expand its coverage as well as restrain it, as it had done in the Bolognese barber's case.

Another instructive example, one that modern scholars have investigated with care, moved far beyond the relatively timid steps towards expansive methods of statutory interpretation endorsed by the first two. Occupying the opposite end of the spectrum of juristic freedom in textual interpretation, this example illustrates the possibilities inherent in the methods just described. It comes from the use that medieval lawyers commonly made of the text: *Quod omnes tangit ab omnibus approbari debet*. The words meant simply that what touches all should be approved by all, and they came from a law of the Emperor Justinian.<sup>38</sup> The same text was also included in the *Regulae iuris* of the medieval canon law,<sup>39</sup> and it was commonly used in the Middle Ages to require the consent of those affected by taxation before they could be required to pay.<sup>40</sup> The provision also served to justify granting the power of consent to representatives of the people required to pay the taxes. It thus served to advance the

36. See GUIDO PAPA, IN AUGUSTISSIMO SENATU GRATIANOPOLITANO DECISIONES, Dec. 373 (Geneva, 1667) ("Et quia ubi mens legis, idem plus habet quam verba, attendi debet ad mentem, sicut ad verba."); see also JOANNES BAPTISTA HODIERNUS, ELABORATAE ADDITIONES ET ANNOTATIONES AD DECISIONES MANTUANI SENATUS JO. PETRI SURDI, DECISIONES MANTUANAE UNIVERSAE, Dec. 139, no. 2. (Naples, 1643).

37. See, e.g., BARTOLUS, *supra* note 35, at COD. 1.14(17).5, no. 10.

38. CODE JUST. 5.59.5.2 (Justinian 531) (Fred H. Blume trans., 2d ed. 2008) [http://www.uwyo.edu/lawlib/blume-justinian/\\_files/docs/book-5pdf/book%205-59.pdf](http://www.uwyo.edu/lawlib/blume-justinian/_files/docs/book-5pdf/book%205-59.pdf) [http://perma.cc/VPC4-K83N]. A few other texts in Roman law contained the same idea, but always in the context of private law. See Constantin Fasolt, *Quod omnes tangit ab omnibus approbari debet: The Words and the Meaning*, in IN IURE VERITAS: STUDIES IN CANON LAW IN MEMORY OF SHAFER WILLIAMS 21, 25–26 (1991).

39. VI.5.12.29.

40. See Orazio Condorelli, *Quod omnes tangit debet ab omnibus approbari: Notes on the Origin and Use of the Principle from the Middle Ages to the Early Modern Era*, 53 IUS CANONICUM 101, 114 (2013).

growth of parliaments and other European representative institutions. In England, the words from Justinian's Codex found an echo in Bracton<sup>41</sup> and were used expressly in writs of summons to the "Model Parliament" of 1295.<sup>42</sup>

As found in the Codex itself, however, the text said nothing of the sort. The words of the text simply stated that when several persons had been appointed as *tutores* (guardians) for a minor or other person under a disability, all of them had to be summoned to appear before termination of the joint grant of tutorship could occur.<sup>43</sup> Were any fair-minded person to take a narrow look at the subject, the extension of this text to justify the growth and power of parliaments would seem an artificial stretch—too far-fetched to attract the attention of a serious student of the subject. However, the extension to cover taxation did in fact occur,<sup>44</sup> and it happened because medieval lawyers saw in this text an underlying principle that was connected with due process of law. The "mind" of the text was applicable in public law, just as it was in the administration of private law. As guardians of infants have power to arrange the affairs of those infants they represented, so too could members of assemblies bind the people they had been appointed to represent. Although the public could be represented by delegates they had chosen, full consent of those affected by taxation was necessary. If this principle were to be applied in the case of guardianship, jurists thought, its rationale might legitimately be extended to cover a situation that had not occurred in ancient Rome. Its principle might apply more widely.

This interpretation's importance for the more general history of medieval law is that Continental jurists sometimes found a general concept or principle stated and applied within Roman and canon law texts.<sup>45</sup> They so used those texts, expanding them and determining

41. 2 BRACTON DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 21 (Samuel E. Thorne trans., George E. Woodbine ed., 1968).

42. 1 THE PARLIAMENTARY WRITS AND WRITS OF MILITARY SUMMONS 30 (Francis Palgrave ed., 1827).

43. CODE JUST. 5.59.5 (Justinian 531) (Fred H. Blume trans., 2d ed. 2008) [http://www.uwyo.edu/lawlib/blume-justinian/\\_files/docs/book-5pdf/book%205-59.pdf](http://www.uwyo.edu/lawlib/blume-justinian/_files/docs/book-5pdf/book%205-59.pdf) [http://perma.cc/VPC4-K83N].

44. Gaines Post, *A Romano-canonical Maxim, 'Quod omnes tangit,' in Bracton*, 4 TRADITIO 197, 236 (1946).

45. For fuller treatment see Bruce Brasington, "A Divine Precept of Fraternal Union": *The Maxim Quod omnes tangit in Anglo-American Thought to the Ratification of the Constitution*, in BRIDGING THE MEDIEVAL-MODERN DIVIDE 205–06 (2013); Yves Congar, *Quod omnes tangit ab omnibus tractari et approbari debet*, 36 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 210–59 (4th ed. 1958); Post, *supra* note 44.

what they could mean in practice. The juristic technique known as *aequiparatio*—finding equality between terms that at first seemed distant from each other—proved particularly fruitful in this context.<sup>46</sup> It meant that where the reason behind a statute was clear, its remedy might be extended to a case not covered by its words.<sup>47</sup> Some of the equivalences that early jurists discovered in the texts fit modern ideas about the subject. Some did not. More important than this speculative tie to the assumptions of modern law was the principle that the “mind” of the law was what mattered, and that this “mind” was presumed to stand in accord with recognized principles of justice.<sup>48</sup> Among other things, it provided an opening for application of principles drawn from the law of nature. Wherever possible, the words of a statute should therefore be brought to an understanding that was “sane, good, civil, and alien to evil.”<sup>49</sup> Doing so facilitated occasional imaginative leaps, of which the use of *Quod omnes tangit* is but one example.<sup>50</sup>

One should not, however, regard this particular example as a frequent event in earlier centuries. Jurists within the traditions of the *ius commune* were cautious men. They would not expand coverage of a statute if the statute’s “mind” was itself doubtful.<sup>51</sup> They did not respond directly to the changing mores of the time, and they rarely made arguments without support from the authoritative texts and the opinions of their fellow jurists. Perhaps their expansive use of *Quod omnes tangit* was encouraged by the commonly accepted principle that rulers should act with good counsel, not least in matters touching

46. The common example was the interpretive efforts of medieval law professors to extend the privileges granted to soldiers in Roman law to themselves. The argument was that the *Doctores* were thought to be of equal “dignity.” See, e.g., BARTOLUS, *supra* note 35, at COD. 12.1.1.

47. See, e.g., STEPHANUS GRATIANUS, DISCEPTATIONUM FORENSIUM IUDICIORUM, Tom I, cap. 82, no. 20 (Venice, 1649) (“Statuta enim extenduntur ex identitate rationis . . . praesertim cum statutum loquatur per dictiones multum generales.”)

48. E.g., D. CAESARE BARZIO, DECISIONES ALMAE ROTAE BONONIENSIS, Dec. 97, nos. 35–36 (Venice, 1610) (“[R]atio sit sicut anima et spiritus legis, verba autem sint sicut corpus et superficies, ratio legis est quae ipsam legem regulat.”); see also 2 ENNIO CORTESE, LA NORMA GIURIDICA: SPUNTI TEORICI NEL DIRITTO COMUNE CLASSICO 317–20 (1964).

49. G. B. COCCINI, DECISIONES SACRAE ROMANAE ROTAE, Dec. 70 (Lyon, 1623) (“Verborum enim significatio debet ad intellectum sanum bonum civilem et vitio carentem applicari.”).

50. See JAMES GORDLEY, THE JURISTS: A CRITICAL HISTORY 43–46 (2013).

51. BARTOLUS, *supra* note 35, at COD. 1.14(17).5, no. 5. (“[S]ed si mens esset dubia non posset recedi a verbis[.]”).

the interests of their subjects.<sup>52</sup> However, the jurists themselves did not say so.<sup>53</sup> Except as one part of establishing a lawful custom, public opinion rarely counted as a formal source of guidance for the jurists. The example shows what was possible under principles the jurists accepted. It was not, however, an everyday occurrence in European courts.

### B. *English Examples*

Many commonalities existed between the early development of European and English common law; for example, the method of interpreting statutes found in the *ius commune* was also used in England from the common law's early days. Sir Edward Coke himself began his commentary on Magna Carta by stating that the Charter's "mind" was surely great even though it was contained within a small body.<sup>54</sup> Common lawyers had their own textbook examples paralleling the case involving the Bolognese prohibition against shedding blood,<sup>55</sup> and they recognized examples of interpretation that departed even further from a literal interpretation. Some early English judges could even add words to statutes they believed had been omitted by oversight, thus providing a remedy in a case where a literal reading of a statute would have left aggrieved parties without relief.<sup>56</sup> What was called the "equity of a statute" sometimes allowed courts of the common law to extend statutory protection in similar circumstances even where the words of the statute taken literally would not cover them.<sup>57</sup>

52. For relevant textual authorities and discussion, see R. H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297, 322–24 (1999).

53. See, e.g., Emanuele Conte, "Defensa": Resistance Against Unjust Power in the Medieval Learned Law (12th–13th Centuries), in REVOLTEN UND POLITISCHE VERBRECHEN ZWISCHEN DEM 12. UND 19. JAHRHUNDERT 121, 123 (2013) (noting the "isolation" of legal science from the political and social "realities" during the late medieval period).

54. COKE, *supra* note 1, at \*A Proeme ("Mens tamen in parvo corpore magna fuit," comparing it to Alexander the Great, whose prowess was great even though his body was small).

55. See, e.g., *Reniger v. Fogossa* (1550) 75 Eng. Rep. 1, 29; 1 Plowden 1, 18 (laws against beating not applicable to beating a person of unsound mind in order to prevent a greater harm likely to be initiated by the person beaten).

56. See J. H. BAKER & S. F. C. MILSON, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 52–53 (1986) (detailing the 1312 English case *Belyng v. Anon*).

57. For examples, see NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 104–07 (1990). For later examples, see generally *Rex v. Slaughter* (1699) 90 Eng. Rep. 936; *Holt K.B.* 69; *Acton v. Pitcher* (1599) 74 Eng. Rep. 723; 4 Leo. 51; *Smith v. Vanger Colgay* (1595) 78 Eng. Rep. 630; *Cro. Eliz.* 384; *Milward v. Clerk* (1590) 78 Eng. Rep. 446; *Cro. Eliz.* 190.

This approach survived the Middle Ages. Edmond Plowden (d. 1585) expressed it with clarity in a Tudor case:

It is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, but the sense and reason of the law is [its] soul.<sup>58</sup>

Lord Mansfield later gave voice to this same sentiment in only a slightly different fashion: “A Statute very seldom can take in all cases,” he wrote, “therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of Parliament.”<sup>59</sup>

As on the Continent, English judges did not employ this principle as an “open sesame” to rewrite the texts of Parliamentary statutes.<sup>60</sup> In fact, often they applied the words in a literal fashion, even over substantial objections, and when they did go farther afield, the umbrella under which they normally acted was what Sir John Baker has called “the presumption of righteous intentions.”<sup>61</sup> They presumed that ambiguous or incomplete phrasing in a statute had been meant by the law makers to achieve a just result. This reading of Parliament’s intent was normally enough to prevent miscarriages of justice that would have been compelled by a literal interpretation of statutes.

Cases described in T. F. T. Plucknett’s exploration of the treatment of statutes during the fourteenth century provide several examples of the power this principle of statutory interpretation held.<sup>62</sup> The statute *De donis*, for example, prohibited alienation of lands conveyed in fee tail by the initial donee in tail, but it did not prohibit alienation by the issue of the initial donee.<sup>63</sup> In other words, the restriction on alienation of lands held by fee tail would bind takers in tail for only one generation. Objection to this literal interpretation of *De donis* was raised in a case early in the reign of Edward II. In

58. *Eyston v. Studd* (1574) 75 Eng. Rep. 688, 694–95; 2 Plowden 459, 464–65; *see also* *Rex v. Prin.* (1663) 83 Eng. Rep. 1131–32; 1 Keble 594–95.

59. *Omychund v. Barker* (1744) 26 Eng. Rep. 15, 23; 1 Atk. 21, 33.

60. *E.g.*, *Rex v. Inhabitants of Haughton* (1718) 93 Eng. Rep. 399, 400; 1 Str. 83, 85.

61. Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. U. J. INT’L HUM. RTS. 3, 20 (2004).

62. THEODORE F. T. PLUCKNETT, *STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* 51–52 (1922); *see also* 2 STEFAN VOGENAUER, *DIE AUSLEGUNG VON GESETZEN IN ENGLAND UND AUF DEM KONTINENT* 673–81 (2001).

63. *The Statute of Westminster the Second (De Donis Conditionalibus)* 1285, 13 Edw. 1, st. 2, c. 1.

consequence, the judge held the prohibition endured because “the statute meant to bind the issue in fee tail as well as the feoffees until the tail had reached the fourth degree; and it was only through negligence that [the drafter] omitted to insert express words to that effect.”<sup>64</sup> The judge was thus able to give effect to what he believed the true intent of the statute had been—a method which Plucknett described as a “drastic piece of underpinning,” also taking note that the result was “suspected [to be] of Roman origin.”<sup>65</sup> This method was also found among the Novels of the Emperor Justinian in the *Corpus iuris civilis*.<sup>66</sup>

In any event, the results of applying this principle of statutory interpretation lasted beyond the Middle Ages. Exclusion from the law’s reach of conduct made unlawful or ineffective under literal readings of the Statute of Frauds<sup>67</sup> or the Statute of Limitations<sup>68</sup> later provided examples of equivalent exercises of judicial discretion. They looked beyond the words used by the legislature. The Statute of Frauds declares many acts and agreements unenforceable unless they are reduced to written form. However, English judges have not hesitated to enforce oral agreements when failure to do so would itself amount to permitting a fraud. Allowing one person to take unfair advantage of a neighbor was not what Parliament had meant to permit. The “spirit” of the Statute has always been to prevent fraud. Its literal interpretation, however, sometimes could actually encourage fraud, and common law judges acted to prevent this. They acted in accordance with what one commentator described as “their supreme duty as courts of equity and conscience.”<sup>69</sup>

Assuming this position also allowed English judges to avoid some of the consequences of their notoriously harsh criminal laws. The extension of “benefit of clergy” to cover laymen as well as men in holy orders is probably the most familiar example.<sup>70</sup> As was true on

64. YB 5 Edw. 2, Pasch, pl. 2 (1312), reprinted in 31 SELDEN SOCIETY YEAR BOOK SERIES 176–77 (1915).

65. PLUCKNETT, *supra* note 62, at 52.

66. NOV. 159, pr (555) (Fred H. Blume trans., 2d ed. 2009), [http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/novels/141-168/novel%20159\\_replacement.pdf](http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/novels/141-168/novel%20159_replacement.pdf) [<https://perma.cc/3LT3-TB57>].

67. An Act for Prevention of Frauds and Perjuries 1677, 29 Car. II, c. 3.

68. An Act for Lymytacion of Accions, and for Avoyding of Suite in Lawe 1624, 21 Jac. I, c. 16.

69. CAUSTEN BROWNE, A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS § 437 (5th ed. 1895).

70. See R.N. SWANSON, CHURCH AND SOCIETY IN LATE MEDIEVAL ENGLAND 149–53 (1989). The relevant statute was An Ordinance for the Clergy 1352, 25 Edw. 3, st. 6, c. 3.

the Continent, however, invoking of the “mind” of the statute was not a code word for a “get out of jail free” card. The approach did not routinely excuse criminal defendants from compliance with the penalties provided for in the statutes.<sup>71</sup> In fact, it could work the opposite way by convicting men whose conduct appeared to be outside the express language of a statute.

This side of statutory interpretation is well illustrated in a case from Coke’s Reports.<sup>72</sup> The residents of a hundred in Essex were fined for their failure to pursue a fleeing robber.<sup>73</sup> They denied any liability, however, citing the common law rule that liability to the Crown attached only for robberies committed during daylight hours—the reasoning being that during the night most men were properly “at rest” and could not practically be expected to pursue fleeing felons.<sup>74</sup> The robber in this case had in fact acted and escaped under cover of night. Coke’s account of the case, however, invoked the Statute of Winchester (1285)<sup>75</sup> in rejecting this plea by the hundred’s residents.<sup>76</sup> That statute began by reciting the dangers of an increasing number of robberies, murders, burnings and thefts.<sup>77</sup> It went on to require that “great Towns, being walled” keep their gates closed at night and imposed liability on the towns if a felon made his escape because of a lapse in that requirement.<sup>78</sup> The words of the statute obviously did not contemplate a rural hundred, but the residents of this hamlet were fined nonetheless. Coke justified this result, however, saying that the common law’s extension to cover nighttime escapes regardless of the size of the town was proper. He added that “[t]he Act hath changed the reason of the law, and therefore the law itself is changed; for *ratio legis est anima*.”<sup>79</sup> Coke’s sentiments on statutory interpretation thus mirrored those of his European counterparts. He recognized that statutes could have a mind apart from their words.

71. Cf. CARLETON KEMP ALLEN, LAW IN THE MAKING 475 (5th ed. 1951) (noting how judges carry out both the will of the legislature and their own judicial logic in determining liability).

72. *Milborn’s Case* (1577) 77 Eng. Rep. 420; 7 Co. Rep. 6b.

73. A hundred was an ancient subdivision of a county or shire.

74. *Milborn’s Case*, 77 Eng. Rep. at 421; 7 Co. Rep. at 6b.

75. The Statute of Winchester 1285, 13 Edw. 1, st. 1, c. 1–6.

76. *Milborn’s Case*, 77 Eng. Rep. at 421; 7 Co. Rep. at 7a.

77. 13 Edw. 1, st. 1, c. 1.

78. *Id.* c. 4.

79. *Milborn’s Case*, 77 Eng. Rep. at 421; 7 Co. Rep. at 7a.



### III. STATUTORY INTERPRETATION AND LATER COMMENTARY ON MAGNA CARTA

The reason for examining the clauses of Magna Carta in light of the contemporary methods of statutory interpretation is to show that some of what now seem like anachronistic readings that were made of its provisions in later centuries actually fit within contemporary ideas about how statutes should be interpreted. Commentators could look beyond the words of the Charter to its “mind.” Once discovered, that “mind” gave judges considerable latitude in decisions. An appropriate way of developing this theme is to return to the pivotal figure of Sir Edward Coke. He has often been cast as one of those most clearly responsible for the creation of the myth of Magna Carta. His *Institutes* were influential, and they dealt with the Charter at length.<sup>80</sup>

What does such an examination show? It shows three things—the first of which is that this text contains less “myth making” than some of Coke’s modern critics have suggested. In interpreting “judgment by peers” in clause 39 (c. 29 in the later statutory version), for example, he did not equate the term “judgment of peers” with a common law jury. Rather, he recognized the limitation in its applicability to only the nobility. Coke took some pains to describe what was implied by the words “lawful judgment” (*per legale iudicium*), but he made clear that this particular clause dealt with the nobility alone.<sup>81</sup> He therefore distinguished the import of this clause from ordinary procedures in the common law. Where a jury gave a verdict, he noted, the noble peers simply returned “their verdict upon their honour and ligeance to the King[.]”<sup>82</sup> The clause’s reference was not to a common law jury. Similarly, although Coke mentioned the existence of Parliament several times in his coverage of the Charter, he did so in the context of Parliament’s then current role in English government.<sup>83</sup> That was his primary task—explaining the applicable law found in the Charter. He did not claim to be presenting a historical account of its enactment. Even so, in its treatment in Coke’s

80. The second part of the *Institutes* was published only in 1642; its description of Magna Carta is given an expansive reading in CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE* 515–18 (1956). A more measured interpretation is found in ANTHONY ARLIDGE & IGOR JUDGE, *MAGNA CARTA UNCOVERED* 121–28 (2014).

81. COKE, *supra* note 1, at \*48–49.

82. *Id.*

83. *E.g., id.* \*35 (describing dukes, marquesses, and viscounts as “lords of parliament” and stating that “there were no Dukes, Marquesses, or viscounts within England at the making of the Statute”).

*Institutes*, no actual assertion of the Charter's enactment by Parliament can be found.

The second "surprise" that emerges from reading Coke's discussion is how often he acknowledged the possibility, indeed the reality, of change in English law. He did say that the Charter was "declaratory of the ancient Law and Liberty of England,"<sup>84</sup> but he also noted places where time had brought amendments to existing law and practice.<sup>85</sup> He even recognized the possibility of change in the law by desuetude.<sup>86</sup> In interpreting Magna Carta, Coke was far from the prisoner of the anachronistic belief that English law had remained the same from the Laws of Aethelred onwards. He liked to express the nature of the change that had occurred by using aphorisms. "[O]ut of the old fields must come the new corne" was one favorite.<sup>87</sup> The image of creating new procedures "as out of a root" was another.<sup>88</sup> These were two ways he used to describe changes that had occurred in English law, changes that Coke apparently admired. Coke's two images also had the merit of accuracy. They described ways in which a legal system does change, and Coke's account of Magna Carta recognized some of the possibilities they had made possible.

Third, Coke's treatment of Magna Carta utilized the commonly accepted method of statutory interpretation described in the body of this Article. It was a cautious use, and only an occasional one. But it is there. That is, Coke (and later Blackstone) understood that the words of a statute like Magna Carta could contain a principle capable of producing results greater than those that were readily apparent from its text. His treatment of guarantees of rights to "free men" provides a good example. According to Coke, this clause extended to women and even to villeins.<sup>89</sup> Why? It did so because in practice, the word "men" was commonly understood in law to refer to women as well as to men. And as for villeins, English law, as it had been developed, included them in the category of free men. This happened because

84. *Id.* \*3.

85. *E.g., id.* \*18–19 (describing "[n]on seisiemus terram aliquam[.]" limiting the King's existing power to levy execution to collect debts owed to him); *id.* \*42, (describing "[b]revi inquisitionis," as the enlargement of the possibility of relief from imprisonment by bail). This point is well made in Anthony Musson, *Myth, Mistake, Invention? Excavating the Foundations of the English Legal Tradition*, in 6 *LAW AND HISTORY: CURRENT LEGAL ISSUES* 63 (2003) (Andrew Lewis & Michael Lobban eds., 2004).

86. COKE, *supra* note 1, at \*31 (describing "[c]onstabularius," which is the disappearance of "infangenthief and outfangenthief").

87. *Id.* \*22.

88. *Id.* \*46.

89. *Id.*

villeins were regarded as free against everyone but their lords. In other words, they could be regarded as “free men” in most parts of the law, with only one exception. The way was thereby opened to their inclusion among those protected by the Great Charter’s text,<sup>90</sup> and, as it turned out, this actually happened.<sup>91</sup>

At another place in this commentary, in dealing with the clause that forbade the erection of fish weirs in the Thames and Medway rivers,<sup>92</sup> Coke similarly interpreted the prohibition to cover more than obstacles to navigation. According to Coke, it included all purprestures.<sup>93</sup> Purpresture was then a general term, meaning an encroachment on the public’s right to land, such as by erecting an obstruction on a highway to prevent its use by others. In other words, Coke understood the term “fish weirs” to embrace encroachments on land as well as on navigable waters. The principle underlying the prohibition of the obstructions to navigation generally thus extended further than the words themselves. It was meant to protect freedom of movement. Like most English lawyers, Coke did not use the phrase “mind of the statute” to describe what he looked for in interpreting this clause in the Great Charter. The term “equity” or “spirit” of a statute was the more normal term in England.<sup>94</sup> But it came to the same thing.

#### CONCLUSION

In their commentaries on Magna Carta, Coke and Blackstone were performing a common legal task—interpreting an authoritative precedent to address a current issue. In doing so, they were encouraged to give expansive readings to Magna Carta by applying a commonly accepted method of statutory interpretation of their time. This method looked beyond specific words used in the statute. It looked to the goals and purposes of the enactment, which were in accord with principles of right and justice. These goals were thought

90. For background on this topic, see SELECTED READINGS AND COMMENTARIES ON MAGNA CARTA, *supra* note 25, at lxix–lxxiv.

91. Paul Vinogradoff, *Clause 39*, in MAGNA CARTA COMMEMORATION ESSAYS 78–95 (Henry E. Malden ed., 1917); *see also* CHARLES M. GRAY, COPYHOLD, EQUITY AND THE COMMON LAW (1963).

92. MAGNA CARTA ch. 33 (1215), *reprinted and translated in* CARPENTER, *supra* note 20, at 50–51.

93. *See* COKE, *supra* note 1, at \*38.

94. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES \*61; *see also* John V. Orth, *Blackstone’s Rules on the Construction of Statutes*, in BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY 79, 79–80 (2009) (describing William Blackstone’s ten “rules to be observed with regard to the construction of statutes”).

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to lie within the specific words found in the texts of the statutes, and they mattered as much or more than the words themselves. It was this method of statutory interpretation that allowed judges and jurists in earlier centuries to extend the reach of statutes to matters beyond the limited view of the men who drafted them. Now, this may look like “myth-making.” Then, it did not.

