BRENDAN BROWN LECTURE

MAGNA CARTA AND THE LAW OF NATURE

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INTRODUCTION[1]

My subject is an appropriate one for a lecture series established by Brendan F. Brown. From first to last, he was "an advocate and defender of the natural law and its school of jurisprudence."[2] He sparked an interest in the subject among his students, he wrote books and articles to demonstrate its value,[3] and he compiled an historical survey of the subject that remains useful today.[4] Coming to his scholarly maturity in the years immediately following the Second World War, Professor Brown was optimistic about the future of this subject. The leaders of Nazi Germany were being put on trial for the commission of crimes against humanity, crimes that were widely believed to be condemned by natural law. With apparent confidence, he was able to predict a revival in the recognition of natural law within modern law and jurisprudence.[5] Not coincidentally with the

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1. These remarks were delivered at the 2016 Brendan Brown Lecture at Loyola University College of Law, New Orleans, on April 14, 2016.

2. A.E. Papale, *A Tribute to Dr. Brendan F. Brown*, 21 LOY. L. REV. 803, 804 (1975).

3. *See, e.g.*, BRENDAN FRANCIS BROWN, AROUND THE WORLD IN SEVENTY DAYS: ON THE BEAM OF THE NATURAL LAW, A PROGRAM FOR PEACE (1976); Brendan F. Brown, *Natural Law: Dynamic Basis of Law and Morals in the Twentieth Century*, 31 TUL. L. REV. 491 (1957) (citing ST. THOMAS AQUINAS, SUMMA THEOLOGIAE I–II 91.2, 93.3, 94.2, 97.3).

4. *See* BRENDAN F. BROWN, *Preface* to THE NATURAL LAW READER, at v (Brendan F. Brown ed., 1960) ("[T]he modern resurgence of natural law thinking has been so great as to propel it to a commanding position in the contemporary development of the legal order. Natural law jurisprudence, which is based on a moral attitude toward law, is slowly but surely winning its final battle with the force concept of law contained in positivism which makes the essence of law depend on the will of the political sovereign.").

5. *See, e.g.*, Brendan F. Brown, *Natural Law and the Anglo-Iranian Oil Case*, *in*

subject of this Lecture, he found support for his vision of natural law's future in the continued importance ascribed to England's Magna Carta of 1215.[6]

Things have not worked out as Professor Brown envisioned. Natural law, which requires that all true law serve the cause of morality and the just purposes of human society, does not occupy a central place in current jurisprudence, and the Magna Carta itself is not recognized as having served as an effective guarantee of natural human rights. In fact, within today's academy, most of the Charter's exalted reputation is said to rest on mistake and myth.[7] In a recent number of *The Green Bag*, for example, federal judge, prolific writer, and inveterate iconoclast, Richard Posner, scolds writers and speakers who have anything good to say about Magna Carta. He takes them to task for praising the Charter "without even understanding it—they think it guaranteed the ancient liberties of the English, whereas in fact it guaranteed just the rights of barons, and in any event was soon annulled, later restored, and eventually demoted to the purely symbolic."[8]

In this confident statement, Judge Posner echoed a view widely shared among today's scholars. He would, therefore, have ample company in regarding the approach to Magna Carta presented in this Lecture with suspicion, perhaps even contempt. The Lecture explores possible connections between the Charter and the currents of legal thought that prevailed when it was

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NATURAL LAW AND WORLD LAW: ESSAYS TO COMMEMORATE THE SIXTIETH BIRTHDAY OF KOTARO TANAKA 1 (1954).

6. Charles S. Rhyne, *The Magna Carta Memorial Ceremonies: Runnymede*, 43 A.B.A.J. 904 (1957), *reprinted in* THE NATURAL LAW READER, *supra* note 4, at 123.

7. *See, e.g.*, ANTHONY ARLIDGE & IGOR JUDGE, MAGNA CARTA UNCOVERED 1 (2014) ("Many myths have grown up around the Charter. It did not immediately give us trial by jury . . . . It did not offer sweeping statements about personal freedoms or human rights or fair trials and, in fact, for the most part did not establish general rights, but rather created or recognised privileges."); ROBERT M. PALLITTO, IN THE SHADOW OF THE GREAT CHARTER: COMMON LAW CONSTITUTIONALISM AND THE MAGNA CARTA 16–20, 16 n.44 (2015) (citing Edward Jenks, *The Myth of Magna Carta*, 4 INDEP. REV. 260 (1905)) (discussing the Charter's history under the heading "The Magna Carta as Myth," and writing that "Edward Jenks argued that the Magna Carta had not been intended to establish liberties on behalf of the general citizenry but rather for the nobility alone"); 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) ("My claim is that the articles in Magna Carta that are now cited to stand for the principle that the punishment must fit the crime do no such thing because, at bottom, those articles do not concern criminal activity.").

8. Richard Posner, *What is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable, Part I*, 19 GREEN BAG 2D 187, 188 (2016).

written. It deals, not with twentieth-century methods of social science research, but with the law of nature. It asks whether the enactment of England's Magna Carta was connected with principles of justice found within the law of nature as it was understood in 1215 and as it continued to be understood in Western law for many centuries. In other words, it asks whether Professor Brown's conclusions about the Great Charter and natural law were warranted by the relevant evidence.

I believe they were indeed warranted by an objective reading of the evidence, but I concede at the outset that my Lecture will offer only an exploration of the subject, not a proof of the veracity of Professor Brown's approach. Certainty on this topic is more than anyone can claim. We know too little about either the identity and intentions of the drafters of the document, or the circumstances under which it was written, to prove anything about their motivation conclusively. The available evidence simply does not admit of proof. The best we can do is to draw reasonable inferences from the evidence that does exist, and most of that is found within the clauses of the Charter itself.

Although this approach swims against the tide of recent scholarship, there are sound reasons for exploring this subject. The dangers of anachronism have always been present in seeking to do justice to ways of thought that have passed out of common use—and particularly so in interpreting a document that has played the vital role in the law and politics of later centuries that Magna Carta has. As Professor Charles Donahue put it, "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."[9] Sometimes they did. Sometimes they did not. We need to be alert to this danger; it has happened more than once in interpreting the clauses of the Great Charter. A sensible way to avert this possibility is to start with a perspective we know was current in the learned world at the time when Magna Carta was written, rather than to start with our own.

THREE PRELIMINARY MATTERS

Three general points about European legal history in the years during which Magna Carta was formulated provide useful, even necessary, background to the subject of this Lecture.

9. 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).

Stating them provides a starting point for understanding its character and its aims.

First, the formulation of Magna Carta in England was not an isolated event. It was not unique. The results of the meeting at Runnymede coincided with many similar statements of law on the Continent. In form and content, they ran roughly parallel to the English document, though none was exactly identical to it. Among the most nearly contemporary were the *Liber Augustalis*, containing the Constitutions of Melfi issued in 1231 by the Emperor Frederick II for the kingdom of Sicily,[10] and the *Golden Bull of Zagreb*, issued by King Béla in 1242 to the towns and cities of Slavonia and Hungary.[11] There were also many others. Among the best known of them are Philippe de Beaumanoir's *Customs of the Beauvaisis* in France, the *Siete Partidas* in Castile, the *Sachsenspiegel* in Germany, the *Usatges of Barcelona* from Catalonia, and the laws of King Magnus Ladulås in Sweden.[12]

None of these laws replicated the contents of Magna Carta, but most of them contained parallels with it. For instance, the first of those just mentioned, the *Liber Augustalis*, contained titles for protection of the church's interests, guarantees of trial by peers, promises of learned and upright judges, provisions to guarantee honest weights and measures, and more along the same lines—all roughly, though never exactly, similar to the provisions of Magna Carta. The second of them, the *Golden Bull of Zagreb* granted self-government to the cities, freedom of movement for most citizens, a right of testamentary disposition, and contained titles regulating criminal law and procedure.[13] Again, the parallels with Magna Carta are evident though not

10. *See generally* THE LIBER AUGUSTALIS, OR CONSTITUTIONS OF MELFI PROMULGATED BY THE EMPEROR FREDERICK II FOR THE KINGDOM OF SICILY IN 1231 (James M. Powell trans., Syracuse Univ. Press 1971).

11. *See* BOŽIDAR LATKOVIĆ, LA BULA ÁUREA DE 1242: GRADEC—ORIGEN MEDIEVAL DE ZAGREB 117–22 (2005), hrcak.srce.hr/file/59430; *see also* DAMIR KARBIĆ & MARIJA KARBIĆ, LAWS AND CUSTOMS OF MEDIEVAL CROATIA AND SLAVONIA: A GUIDE TO THE EXTANT SOURCES 80–82 (Martyn Rady ed., 2013) http://www.academia.edu/2926178/The_Laws_and_Customs_of_Medieval_Croatia_and_Slavonia_A_Guide_to_the_Extant_Sources (discussing the "*Golden Bull of Zagreb of 1242*").

12. For current scholarly assessments of medieval European compilations of law that contain parallels with Magna Carta, see generally MAGNA CARTA: A CENTRAL EUROPEAN PERSPECTIVE OF OUR COMMON HERITAGE OF FREEDOM (Zbigniew Rau et al. eds., 2016); ARMIN WOLF, GESETZGEBUNG IN EUROPA 1100–1500: ZUR ENTSTEHUNG DER TERRITORIALSTAATEN (1996).

13. KARBIĆ & KARBIĆ, *supra* note 11.

exact. In all of these fundamental laws, rules found in the Roman and canon laws played a part, and along with these twin sources of medieval law and learning went the law of nature. These coincidences in time and content between these laws and Magna Carta have been noticed by many historians.[14] It makes sense to begin with the assumption that England's Charter shared some of the characteristics that were present elsewhere at the time.

Second, in 1215 the law of nature was known and accepted as a source of law in England, as it was on the Continent.[15] The basic texts of both the Roman and canon laws begin with clear statements of the importance of natural law. The first two titles of Justinian's *Institutes*, for example, start by asserting that it was "shared by all living creatures," and that many of the precepts of the municipal law had been "collected from the precepts of nature."[16] Gratian's *Decretum* from circa 1140, the first book of the classical canon law of the church, states the same principle, adding specific examples of areas where the canon law had followed or even borrowed directly from the law of nature.[17] These texts were not unknown in England. They were taught in English schools in the century leading up to Magna Carta.[18] That

14. *See, e.g.*, J.C. HOLT, MAGNA CARTA 50–53 (3d ed. 2015) ("England was no exception in twelfth- and thirteenth-century Europe, and Magna Carta was far from unique, either in content or in form."); Rafael Altamira, *Magna Carta and Spanish Mediaeval Jurisprudence*, *in* MAGNA CARTA COMMEMORATION ESSAYS 227, 227 (Henry Elliot Malden ed., 1917).

15. For scholarship supporting this assertion, see R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 82–93 (2015).

16. J. INST. 1.1.4, 1.2.

17. *See D.1 c.7*, *in* 1 CORPUS IURIS CANONICI EDITIO LIPSIENSIS SECUNDA POST AEMILII LUDOUCI RIGHTERI CURAS AD LIBRORUM MANU SCRIPTORUM ET EDITIONIS ROMANAE FIDEM RECOGNOUIT ET ADNOTATIONE CRITICA 2, 2 (Emil Friedberg ed., Akademischen Druck- und Verlagsanstalt Graz photo. reprint 1959) (Leipzig, B. Tauchnitz 1879) [hereinafter 1 CORPUS IURIS CANONICI]; *see also* Brian Tierney, *Vitoria and Suarez on* ius gentium*, Natural Law, and Custom*, *in* THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 101, 104 (Amanda Perreau-Saussine & James B. Murphy eds., 2007) (citing *D.1 c.7*, *in* 1 CORPUS IURIS CANONICI, *supra*).

18. *See, e.g.*, John Hudson, *Magna Carta, the* ius commune*, and English Common Law*, *in* MAGNA CARTA AND THE ENGLAND OF KING JOHN 99, 99 (Janet S. Loengard ed., 2010) (citing Eleanor Rathbone, *Roman Law in the Anglo-Norman Realm*, 11 STUDIA GRATIANA 253, 253–71 (1967)), http://www.arts.cornell.edu/prh3/MDVL%202130/Texts/Hudson%20(2010).pdf; Ralph V. Turner, *Roman Law in England Before the Time of Bracton*, 15 J. BRIT. STUD. 1 (1975) ("[The twelfth-century] was a time of growth for the great legal systems in the West: English common law, revived Roman law, and canon law. Students of medieval England have rarely concerned themselves with the question of the connection between these legal systems. For six centuries, from Bracton until the rise of modern legal history . . . the study of English

the law of nature had a place within English jurisprudence itself is also amply demonstrated by the treatise on the laws and customs of England, known as *Bracton*.[19] Its text stated and discussed the law of nature in much the same terms that are found in Justinian's Digest.[20] English legal historians sometimes say that these were Romanesque frills, meant only to enhance the prestige of the treatise, but actually the same might almost be said of the Digest itself. Almost all the rest of the Digest was devoted to the latter, the positive law, just as was true of the text of *Bracton*. In neither case, should the later preponderance of positive law cause us to dismiss the jurisprudential principle stated at the start.

Third, the clergy and the law of the church had an influence on Magna Carta's contents. In 1215, the church was the special custodian of European legal traditions in England, and it makes sense to suppose that natural law would have been on the minds of any clerics who had a hand in the document's formulation. We know little for certain about the actual process by which the Charter was composed—but to suppose a connection between clerical initiative and this document is not pure conjecture. Clauses 1 and 38, which purported to guarantee the liberties of the English church, were self-evidently due to clerical influence.[21] Other clauses in the document also tracked the contents of the European *ius commune*.[22] We know also that a part in this

law was insular, ignoring the continental legal systems. When a seventeenth-century civilian wrote that 'our common law, as we call it, is nothing else than a mixture of the Roman and the feudal,' he aroused the anger of Coke and the common lawyers. Recently scholars have taken such a view more seriously, and a number of studies have sought Roman or canonistic influences on English law.").

19. *See generally* HERMANN KANTAROWICZ, BRACTONIAN PROBLEMS: BEING THE NINTH LECTURE ON THE DAVID MURRAY FOUNDATION IN THE UNIVERSITY OF GLASGOW 22–23 (1941) (discussing the nature and extent of Bracton's use of Roman law categories).

20. *Compare* DIG. 1.1.3 (Florentinus, Institutes 1), 1.1.4 (Ulpian, Institutes 1), 1.1.5 (Hermogenianus, Epitomes of Law 1), 1.1.6 (Ulpian, Institutes 1), *and* 1.1.7 (Papinianus, Definitions 2) (Charles Henry Monro trans., Cambridge Univ. Press 1904), https://ia800206.us.archive.org/8/items/digestofjustinia01monruoft/digestofjustinia01monruoft.pdf, *with* 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 23–24 (George Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1997).

21. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN WITH AN HISTORICAL INTRODUCTION 191 (Burt Franklin ed., 2d ed. photo. reprint 1960) (1914) (writing that, although Clause 1 "has no counterpart in the Articles of the Barons . . . . Stephen Langton and his bishops were careful to have that defect remedied").

22. The *ius commune* was the amalgam of Roman law and canon law that long dominated European legal education and governed much of legal practice in

process was played by Stephen Langton, Archbishop of Canterbury.[23] Some of the preliminary Articles of the Barons were referred to him and other bishops for clarification or amendment.[24] Among the twenty-seven barons named in the Charter's prologue were eleven clerics. At the time, more than half of the men who served as judges in the royal courts were in holy orders.[25] Copies of the Charter were deposited in each English diocese, probably in the cathedral churches.[26] Clerical influence in legal matters was a fact of life in 1215. It led to

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European courts. *See* MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE, 1000–1800, at 58 (Lydia G. Cochrane trans., 1995). For the argument that tenets of the *ius commune* played a role in the formulation of the Great Charter's chapters, see Johann Andreas Dieckmann, *The Normative Basis of Subrogation and Comparative Law: Select Explanations in the Common Law, Civil Law and in Mixed Legal Systems of the Guarantor's Right to Derivative Recourse*, 27 TUL. EUR. & CIV. L.F. 49, 58–68 (2012); R.H. Helmholz, *Magna Carta and the* ius commune, 66 U. CHI. L. REV. 297, 303–11 (1999); Kenneth Pennington, *The "Ius Commune," Suretyship, and Magna Carta*, 11 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 255 (2000). *But see* Hudson, *supra* note 18.

23. *See* DANIEL BAUMANN, STEPHEN LANGTON: ERZBISCHOF VON CANTERBURY IM ENGLAND DER MAGNA CARTA (1207–1228), at 159–89 (Andrew Colin Gow ed., 2009); John Baldwin, *Master Stephen Langton, Future Archbishop of Canterbury: The Paris Schools and Magna Carta*, 123 ENG. HIST. REV. 811, 833–35 (2008); Kenneth Pennington, *Reform in 1215:* Magna Carta *and the Fourth Lateran Council*, 32 BULL. MEDIEVAL CANON L. 97, 97 (2015) (citations omitted) ("*Magna Carta* was a major event in King John's reign. Because the archbishop of Canterbury, Stephen Langton, played such a significant role in the affair that took place on Runnymede, scholars have wondered about the connections canon law and its jurisprudence embedded in the *Ius commune* might have had in the minds of those who drafted the document."); Nicholas Vincent, *Stephen Langton, Archbishop of Canterbury*, *in* ÉTIENNE LANGTON: PRÉDICATEUR, BIBLISTE, THÉOLOGIEN 51, 93–97 (Louis-Jacques Bataillon et al. eds., 2010).

24. *See* Vincent, *supra* note 23, at 93 (writing that "the so-called Articles of the Barons," which are closely associated with the negotiations of Magna Carta, show that Langton was "assigned a prominent role as arbiter" of the negotiations); *see also* HOLT, *supra* note 14, at 387, 389–91 (containing clauses 25, 37, 45, and 46 respectively).

25. 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 132–35 (The Lawbook Exch., Ltd. photo. reprint 1996) (Cambridge Univ. Press, 2d ed. 1898); RALPH V. TURNER, THE ENGLISH JUDICIARY IN THE AGE OF GLANVILL AND BRACTON, C. 1176–1239, at 88–98 (1985).

26. *See* DAVID CARPENTER, MAGNA CARTA: WITH A NEW COMMENTARY 375–76 (2015) ("[W]e know [how the copies were disseminated] from documentary evidence . . . . [T]he chancery thought it wise to draw up a distribution list . . . . [which] states that the bishop of Lincoln received two Charters, the bishop of Worcester one Charter and Master Elyas of Dereham four Charters . . . . The annals of Dunstable, moreover, state specifically that the Charters were 'deposited through each bishopric in safe places.' The safe places almost certainly were the cathedral churches, where the Charters would be accessible to anyone who wanted to inspect them.").

clauses protecting the clergy,[27] and it easily might have led to incorporation within its clauses of principles drawn from the law of nature.[28] This Lecture's exploration, tentative though it must be, is grounded both in the Charter's texts and in contemporary political reality.

NATURAL LAW AND MUNICIPAL LAW

The principle question, then, is determining the extent to which the law of nature could have played any part within Magna Carta's clauses. What, if anything, do its tenets add to our understanding of the Charter's text and purpose? For this purpose, examination of individual clauses must hold the key. However, a first look is discouraging. If one looks at the clauses themselves, as many scholars have done, no obvious sign of natural law's importance, or even of its existence, appears. The Charter, it is said, shows "no comprehensive or unifying design." For a "theory of the state we search it in vain." Instead Magna Carta looks "very much like answers given by many persons to the questions, 'What is being done wrong' [and] 'What practices should be halted?'"[29] In other words, it seems to have been a quite miscellaneous collection of grievances, some of them grand, some of them petty.

More fully examined, it was more than that, but to understand the point one must start with the contemporary understanding of the nature of law itself. According to jurisprudence of the day, all law could be divided into four categories: (1) the law of nature, (2) the *ius gentium* or what we call 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 Jews and Christians.[30] Subdivisions had to be hived off within each of these categories to

27. 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, 53 (Robin Griffith-Jones & Mark Hill eds., 2015).

28. For a further example of this proposition, see F.S. Siebert, *The Ecclesiastical Bar and Scholastic Philosophy*, 32 VA. L. REV. 753, 766 (1946). *See also* BRIAN TIERNEY, LIBERTY & LAW: THE IDEA OF PERMISSIVE NATURAL LAW, 1100–1800, at 149–51 (2014).

29. Samuel E. Thorne, *What Magna Carta Was*, *in* THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA 3, 3–4 (Samuel E. Thorne et al. eds., 1965). All the quotations preceding footnote twenty-nine are taken from this source.

30. *See, e.g.*, HENRICUS A SEGUSIO CARDINALIS HOSTIENSIS, SUMMA AUREA, Proem, Nos. 6, 11 (Venice 1574) https://books.google.com/books?id=AQtCAAAAcAAJ&printsec=frontcover#v=onepage&q&f=false.

make them fit together, but those four were the basic divisions. The four were different in scope and content, but they were not independent. That is the relevant point for understanding how Magna Carta could have been related to natural law in its time. The law of nations and the municipal law were regarded as putting into more detailed form general prescriptions found within the law of nature.

The four were, however, different among themselves. The *ius gentium* was shared by all civilized peoples, whereas each individual land or kingdom was free to adopt individual rules or statutes suitable for its own situation. That was the positive law. Everywhere, it was assumed, this had happened in fact. Italian law was different from Spanish law, but both of them were regarded as having somehow grown out of the law of nature. It was not the kind of growth characteristic of the life of a flower or a plant. It was instead the growth characteristic of a large idea taking different but related forms under a variety of circumstances. Where this had happened, as it was assumed it had, both the *ius gentium* and the *ius municipale* would turn out to be consistent with the law of nature. If discordance between them existed, then either a good reason for it had to exist or else something had gone wrong and the situation should be corrected.

A textbook example involved the law of parent and child. The law of nature demonstrated that parents had an obligation to care for their young—even common animals obeyed this law. Without it, the newly born would quickly perish. The *ius gentium* put that principle into the form of an obligation enforceable in law, one that was respected by all civilized nations. The function of the *ius civile* was to provide statutory remedies and specific penalties to be imposed on neglectful parents, so that the obligation could be understood and enforced in local practice. In other words, in contemporary understanding, one moved from the general to the specific. Real differences between these related sources of law existed. The natural law could not be changed, for example, whereas the law of nations and the municipal law could. It was also true that distinctions and qualifications were necessary to make this scheme fit together in the world. The essential point, however, is that all four were regarded as necessary parts of a regime of law. They were designed to work in harmony to achieve law's main goal, the goal of rendering due justice to all people.

This jurisprudential scheme matters for the interpretation of

Magna Carta. It would not have seemed complicated to lawyers at the time. From a jurisprudential point of view, most of Magna Carta, as in other statements of law adopted in other European nations around the same time, was a statement of positive (or municipal) law that was itself an outgrowth of both the law of nature and the law of nations. That the Charter stated established English customs was appropriate too, for the customs themselves were regarded as part of the positive law that was supposed to be congruent with the law of nature. It is (and was) of course possible to ignore that congruence, focusing only on the detailed provisions of the Charter. That would have been the habit of most lawyers then, as it is now. But if pressed or questioned, contemporary lawyers would have accepted the existence of these jurisprudential assumptions and would have seen them at work in the clauses of Magna Carta.

They would have held, moreover, that the Great Charter also incorporated divine law, for the liberty of the English church found in the Charter's first clause was no part of natural law—the English church did not exist in the Garden of Eden. God had spoken to the point, however. Pope Innocent III (d. 1216) found biblical evidence to show that the clergy, and especially the Roman pontiffs, had been granted plentitude of power on earth.[31] Freedom in exercising that power, particularly freedom from secular control, was a necessary component of a divine command. Clause 1 in Magna Carta put that principle into a more definite form. It would not, therefore, have been regarded simply as a reiteration of one clause in King Henry I's coronation charter,[32] but as a recognition that the municipal law of England embodied a fundamental principle of the law which God himself had made known to all Christian rulers. In other words, under the prevailing assumptions of the time, Magna Carta's first clause provided an example of how legal principle became enforceable law, *ius cogens* in effect. It was not a perfect statement, for it left open exactly what the English church's freedom meant in particular circumstances, but it surely applied to episcopal elections and, as Sir James Holt concluded, its imprint "infected

31. *See X 1.7.3*, *in* 2 CORPUS IURIS CANONICI EDITIO LIPSIENSIS SECUNDA POST AEMILII LUDOUCI RIGHTERI CURAS AD LIBRORUM MANU SCRIPTORUM ET EDITIONIS ROMANAE FIDEM RECOGNOUIT ET ADNOTATIONE CRITICA 98, 99 (Emil Friedberg ed. Akademischen Druck- und Verlagsanstalt Graz photo. reprint 1959) (Leipzig, B. Tauchnitz 1879) [hereinafter 2 CORPUS IURIS CANONICI], http://www.columbia.edu/cu/lweb/digital/collections/cul/texts/ldpd_6029936_002/ldpd_6029936_002.pdf.

32. *See* Hudson, *supra* note 18, at 102.

the whole of the Charter."[33] That is exactly the function which the classical jurisprudential system was thought to serve in the world, although contemporaries would have used a different word than "infect" to describe it. They did not consider natural law and divine law to be a virus. But they did assume that it should stand behind and influence the content of the positive law.

EXAMPLES OF NATURAL LAW IN MAGNA CARTA'S CLAUSES

These assumptions could be seen as underlying quite a few clauses of Magna Carta. Not all, of course. Clause 50's exclusion from office of members of the family of Gerard d'Athée is hard to relate to discernible natural-law principles. However, many more of the Great Charter's clauses at least suggest a connection with jurisprudential principles found within natural law. This Lecture presents six examples to make the point. The six demonstrate the existence of lessons contemporary lawyers could have drawn from the exercise. In 1215, they might have seen possible links between the Charter's clauses and the principles stated in the law of nature and nations.

CLAUSE 33

A useful start is to take the clause students habitually find the hardest to connect with what they know about human rights. This is Clause 33: "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 English 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 one considers its possible relation to the law of nature. Under natural law, the seas and other navigable waters were *res nullius*.[34] No one owned them. In the absence of special circumstances, therefore, their use was open to all.[35] To erect a fishweir, which is an obstruction placed in the river to trap fish as they swam in it, was to interfere with a natural right held by

33. HOLT, *supra* note 14, at 245.

34. HUGO GROTIUS, MARE LIBERUM 22 (James Brown Scott ed. Ralph van Deman Magoffin trans., 1916), https://www.oll.libertyfund.org/sources/1808-facsimile-pdf-grotius-the-freedom-of-the-seas-latin-and-english-version-magoffin-trans/download.

35. DIG., *supra* note 20, at 1.8.2.1; *see generally* PITMAN B. POTTER, THE FREEDOM OF THE SEAS IN HISTORY, LAW, AND POLITICS 36–56 (1924) https://www.babel.hathitrust.org/cgi/pt?id=mdp.39015049016556;view=1up;seq=25;size=75.

all men. Clause 33 was designed to prevent this.

In time, the establishment of the freedom of the seas would become the great theme of the *Mare liberum* by Hugo Grotius (d. 1645), the great jurist known as the marvel of Holland in the seventeenth century.[36] Here was the same principle stated in the early thirteenth-century in a different context. Placing an obstacle like a fish weir in a navigable river abridged a natural right, the right to make use of an asset held in common by all people. This was a local grievance, no doubt, but within it lay a greater principle: establishment of a freedom of navigation.[37]

CLAUSE 41

A second and similar example is the protection offered to foreign merchants by Magna Carta's Clause 41. They were to have "safe and secure exit from England," freedom from "all evil tolls," and protection even if they were "of a land at war with us" as long as English merchants were granted reciprocal rights in the land of the warring nation. Ordinarily merchants were considered to constitute a class foreign to arms in European jurisprudence.[38] They were exempted from onerous taxation and they were not to be treated as enemy combatants during wartime. Three of the Church's Lateran Councils, those held in 1123, 1139, and 1179, had enacted legislation to secure the enforcement of these mercantile privileges.[39] The natural-law principles that

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36. GROTIUS, *supra* note 34, at 22–44; *see* Heinhard Steiger, *Die Freiheit der Meere und das Naturrecht: Zur Naturrechtlichen Argumentation in Einem Polistischen Konflikt der Frühen Neuzeit*, *in* NATURRECHT UND STAAT IN DER NEUZEIT: DIETHELM KLIPPEL ZUM 70. GEBURTSTAG, at 11 (Jens Eisfeld et al. eds., 2013); POTTER, *supra* note 35, at 57–80.

37. For a similar modern citation of Clause 33, see Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 262, 284 (1997) (quoting MICHAEL EVANS & R. IAN JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 53 (1984)) ("The Magna Carta provided that the Crown would remove 'all fish-weirs . . . from the Thames and the Medway and throughout all England, except on the sea . . . . Not surprisingly, American law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose."). *See also id.* (citing Arnold v. Mundy, 6 N.J.L. 1 (N.J. 1821)).

38. *See 4.63.3 (Imperatores Honorius, Theodosius)*, *in* 4 CODEX JUSTIANUS (Paul Krueger & Theodor Mommsen eds., Weidmannsche Buchhandlung 1877) http://www.archive.org/stream/codexiustinianu00kruegoog#page/n8/mode/2up.

39. *See* First Lateran Council, 18 March 1123, c.14, *in* 1 DECREES OF THE ECUMENICAL COUNCILS 193 (Norman P. Tanner S.J. ed., Georgetown Univ. Press 1990) [hereinafter DECREES]; Second Lateran Council, 2 April 1139, c.11, *in* DECREES, *supra*, at 199; Third Lateran Council, 5 March 1179, c.24, *in* DECREES, *supra*, at 223 ("Let those . . . be under excommunication who dare to rob Romans or other Christians who sail for trade or other honourable purposes. Let those also who

underlay them—and also those that were secured by Clause 41—was that merchants should not be harmed except where they had committed an offense or taken some part in a war.

Hugo Grotius himself later wrote that merchants should suffer no loss simply from having been caught on the wrong side of a line drawn for combatants.[40] What Clause 41 did, therefore, was to apply to foreign merchants a natural-law principle, making it a part of England's positive law. It requires a stretch of the imagination to envision this clause as part of a selfish baronial agenda, but much less of a stretch to see it as an application of the law of nature and nations.

CLAUSE 40

A third example comes from what may, at first sight, seem to be the clearest example of the place of natural law in the Charter. Clause 40 contained the king's promise not to "sell, deny, or delay right and justice" to his subjects. Objectively, it was certainly that—a promise based upon, and stating one of, natural law's basic tenets. However, if seen as a legislative enactment to be approached from a modern perspective, Clause 40 created some real problems, as William McKechnie and others have long recognized.[41] The king did sell justice. Royal writs were not available without payment. Many fees were also due to royal officials—some of which were included in what went into the pockets of the king's justices. In addition, in the circumstances of the early thirteenth-century legal system that existed in England, an open-ended promise to do justice "to anyone" was likely to cause more harm than good. It would have caused disruption of long established jurisdictional boundaries. Could the barons have been blind to these consequences? That seems unlikely.

Seen, however, from the perspective of natural law, Clause 40 looks much more reasonable. It fits with a fundamental assumption of jurists who accepted and described some tenets of

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in the vilest avarice presume to rob shipwrecked Christians, whom by the rule of faith they are bound to help, know that they are excommunicated unless they return the stolen property.").

40. 3 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 737 (Cambridge Univ. Press 1925) ("The canon adds merchants; and this provision is to be taken as applicable not only to those who make a temporary sojourn in hostile territory, but also to permanent subjects; for their life also is foreign to arms. Under this head are included at the same time artisans and other workmen, whose pursuits love peace, not war.").

41. *See* MCKECHNIE, *supra* note 21, at 395–98.

the law of nature—later it is found in Blackstone's *Commentaries*, for example.[42] It was also contained in many medieval treatises.[43] The supposition was that when society was first organized, all men had surrendered the right they possessed by the law of nature to defend themselves against wrongdoers. They had granted it to the men who would rule—typically the kings. In return for that surrender, the rulers had taken upon themselves the duty to act against those same wrongdoers—in effect to do justice for individuals who could no longer do so by themselves. It was, of course, a very general sort of agreement and exchange. The details were understood as having been left to the positive law. Here we see the promise in Clause 40—exceptional among those I have mentioned because it was put into a more general form than most of Magna Carta's clauses. Just how the principle would be implemented was left to future development, and this happened in fact. That assumption must have been understood to have given rise to Clause 40 and to have been so understood at the time.

CLAUSE 48

A fourth and rather different example of the place occupied by natural law in Magna Carta's provisions is found in Clause 48. It provided that the king would abolish "[a]ll evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officers, river banks and their wardens," after having been ascertained by a sworn inquest of twelve knights from each county in the land. Surprisingly, this provision was quickly put into motion; on June 19th the King issued writs to have the knights chosen in each shire.[44] But the obvious question was: What were the "evil customs?" The clause did not say. It did not define them; nor did it give any examples—proof that modern American administrative law holds no monopoly on open-

42. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *47 ("This may lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of the state, wherever that sovereignty be lodged, of making and enforcing laws.").

43. *See, e.g.*, *C. 11 q. 3 c.66*, *in* 1 CORPUS IURIS CANONICI, *supra* note 17, at 661–62.

44. MCKECHNIE, *supra* note 21, at 439 ("John lost no time in instituting machinery for effecting this part of the reforms. On the very day on which terms of peace were concluded at Runnymede, namely, on 19th June, 1215, he began the issue of writs to sheriffs, warreners, and river bailiffs. Within a few days every one of these had been certified of the settlement arrived at, and had received commands to have twelve knights chosen in the first county court to make sworn inquest into evil customs.").

ended mandates requiring governmental agencies to do something. McKechnie treated this as a dangerous experiment, sensibly not repeated in subsequent re-issues of the Charter.[45] However, its inclusion in the original document becomes more comprehensible if we remember that one of the principal functions natural law was meant to serve in medieval jurisprudence was to distinguish legitimate customs from those that were "odious" in character.[46] The law of nature did not serve to "strike down" the latter in the fashion of the present use of the U.S. Constitution, but it did suggest likely candidates for abolition. Thus, for example, a custom barring appeals from a lower to a higher court was considered an "odious custom," one that should be amended or abolished because it could frustrate the natural law's guarantee of a fair trial. As Julius Clarus (d. 1575), an Italian proceduralist, expressed the argument in the sixteenth century, "An appeal is a form of self-defense granted by the law of nature, one that should not be taken away by law or statute."[47] If disallowing the possibility of appeal had become entrenched in legal practice, it was sensible to think the practice should be changed. This would correct an abuse that was out of step with natural law. A procedure like the one envisioned in Magna Carta's Clause 48 provided one way this change could be made.

CLAUSES 20, 21, AND 22

A fifth example occurs in Clauses 20, 21, and 22, which, taken together, granted that thenceforth all free men, all earls and barons, and all clerics would be amerced (that is penalized by having to pay fines to the King) only in accordance with the gravity of the offences they had committed. Clause 20 extended at least a part of this protection to merchants and villeins, adding the protection that in all cases amercements should only be fixed according to the testimony of reliable local men. Was this provision in any way connected with natural law? Yes, it was. It was an application of the natural law principle of proportionality in punishment. Jean-Jacques Burlamaqui (d. 1748) would later

45. MCKECHNIE, *supra* note 21, at 440 (concluding that "[t]he dangerous experiment of leaving the definition [of 'evil customs'] to local juries in each district was not repeated").

46. *See* NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 78–83 (1990).

47. R.H. Helmholz, *Judicial Review and the Law of Nature*, 39 OHIO N. U. L. REV. 417, 426 n.75 (quoting JULIUS CLARUS, PRACTICA CRIMINALIS, Quaest. 94, no. 3 (Venice 1595)).

put it this way: "All crimes are not equal, and 'tis but justice that there should be a due proportion between the crime and the punishment."[48] This principle had also long been incorporated within the medieval canon law, giving at least a degree of specificity to an otherwise quite general principle.[49] These three clauses moved in that same direction.

It is true that determining a proportionate penalty for crimes and other offences was not a mechanical process, as even today's much maligned Federal Sentencing Guidelines recognize.[50] Natural law itself left room for mitigation and variation in outcome. This was bound to be so, and it was commonly said that all penalties were arbitrary in the sense that they were left to the sound discretion of judges. However, there were limits. Arbitrary or vindictive sentences violated the important principle of proportionality in punishment. Abuse of discretion in fixing amercements for misconduct is what these three clauses of Magna Carta sought to curb, and contemporary lawyers could easily have seen a connection between them and the principle of proportionality found within the natural law.

CLAUSE 38

A sixth example is contained in Clause 38. It stated in part: "No bailiff shall put anyone to his law by his simple statement, without credible witnesses brought for that purpose." Obviously, this was one of the Charter's several guarantees of procedural due process, but its wording has nonetheless produced a considerable number of apparently contradictory interpretations. McKechnie listed and discussed many of them.[51] From the

48. JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 424–25 (Petter Korkman ed., Thomas Nugent trans., Liberty Fund, Inc. 2006) (Geneva 1763) https://www.oll.libertyfund.org/sources/1542-If-printer-pdf-burlamaqui-the-principles-of-natural-and-politic-law/download; *see* 1 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW: BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS, READ IN ST. JOHN'S COLLEGE, CAMBRIDGE 215–17 (Baltimore, William & Joseph Neal 2d American ed. 1832) (Cambridge 1754), https://www.archive.org/download/institutesnatur00ruthgoog/institutesnatur00ruthgoog.pdf (insisting upon the necessity in sentence of "prudence to weigh all its circumstances, and more equity to proportion the punishment to it").

49. *See, e.g.*, *Glossa Ordinaria, X 3.1.13, in* 2 CORPUS IURIS CANONICI, *supra* note 31 ("[P]uniantur secundum canonicas sanctiones prout plus vel minus peccaverit.").

50. *See* 28 U.S.C. § 991(b)(1)(B) (2006) (expressing the goal of the Federal Sentencing Guidelines as "avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors . . . .").

51. *See* MCKECHNIE, *supra* note 21, at 369–75.

perspective of the lawyer of the early thirteenth century, however, there would have been no mystery. To be put to your law meant to be tried, normally by being required to take a formal oath that you were innocent of wrongdoing (as in "wager of law," commonly used in actions of debt), then usually followed by ordeal, compurgation, or inquest. Initiation of this trial process (if one may borrow a modern phrase) required more than simply an official's action; it required witnesses. Note the plural—"witnesses." At least two witnesses were required under the law of proof in the *ius commune*. That guarantee of fairness to litigants and defendants was here extended to the initiation of a trial. It was based on a principle given by God himself in the Bible (e.g., Deut. 19:15) and endorsed by generations of canonists and civilians. Here, Magna Carta put into more specific terms the abstract requirement of procedural fairness found in the law of nature and endorsed by fundamental texts of the Christian religion. The clause's words did not lay out a detailed plan of criminal procedure, but it did add something of importance. It served as a shield—partial but not inconsequential—against unjust action on the part of the King's agents.

SUMMARY AND CONCLUSION

In concluding, I turn to the question of what consequences emerge from following this path of understanding Magna Carta. This question matters today. It matters in arriving at a fair assessment of the Charter's meaning and historical importance. What I have provided above are examples, no more. *Mutatis mutandis*, the same process of analysis will prove possible and even (so I think) enlightening in understanding what the provisions of Magna Carta meant in their own time. Of course, it will not allow us to see into the minds of the drafters. It may be that they were not thinking about natural law at all. We do not know. However, it is possible to understand what the clauses meant under legal conventions that were generally accepted in the thirteenth century. From that perspective, the detailed clauses dealt with matters found in the municipal law of England in ways that brought them into harmony with the law of nature. They may not have been simply expedient ways of filling baronial pocketbooks and enshrining feudal rights. Raising this possibility has been the goal of this Lecture.

This approach has a collateral benefit. Besides helping us to understand what Magna Carta was in its own time, it helps to explain and to justify some of the later uses made of it. This has

been the subject of primary importance to historians, and of course they have noticed how frequently the Charter was later used as a source of civil rights. Historians have sometimes disparaged these uses, treating them as products of antiquarian invention, but in fact many of them followed from an accepted way of interpreting legal texts. Lawyers then saw within some texts a "mind" containing basic principles, one not necessarily confined to their specific terms. It became a legitimate means of expanding the reach of specific enactments, legitimate because the "mind" itself extended further than the words themselves. Each of the specific examples just mentioned did that. They expressed a principle within a specific context, but their "mind" could extend further. What English lawyers called by a slightly different name—the equity of a statute—might extend to cover related problems that were not specifically articulated in the clauses of Magna Carta.

Some of the uses to which the Great Charter was later put become less surprising and more interesting when seen as examples of this method of statutory interpretation. It was not wholly unlike the creative ways the text of the Bible itself was read in scholastic thought. We need to recover this assumption of jurisprudence if we are more fully to understand and appreciate the later uses made of the Charter's provisions. It was what Sir Edward Coke meant in an only slightly different context in dealing with the Petition of Right. Words in a statute might be understood as containing "*magnum in parvo*."[52] They might contain a meaning that extended beyond the specific instance in which they were invoked. It must be a matter of conjecture, of course, but I think Professor Brown would have understood them that way.

52. 1 SIR EDWARD COKE, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, WEIGHTY MATTERS IN LAW, REMARKABLE PROCEEDINGS IN FIVE PARLIAMENTS: BEGINNING THE SIXTEENTH YEAR OF KING JAMES, ANNO 1618, AND ENDING THE FIFTH YEAR OF KING CHARLS, ANNO 1629, at 562 (John Rushworth ed., 1659–1701) https://www.acrchive.org/details/historicalcollec03rush ("This is *magnum in parvo*, this is propounded to be a conclusion of our Petition: It is a matter of great weight; and, to speak plainly, it will overthrow all our Petition; it trenches to all parts of it: It flies at Loans, and at the Oath, and at Imprisonment, and Billeting of Soldiers . . . .").