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### Magna Carta and the Right to Trial by Jury

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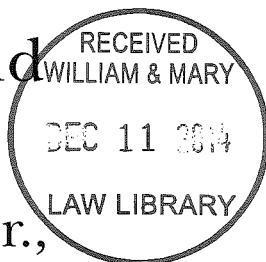
# MAGNA MUSE & MENTOR CARTA

Randy J. Holland

Foreword by

John G. Roberts, Jr.,

Chief Justice of the United States



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King John of England (r.1199–1216). 1215 Exemplar of Magna Carta. Great Charter of Liberties. Manuscript on parchment, June 1215. Courtesy of Lincoln Cathedral, England (front cover)

The signing of Magna Carta illustrated in Cassell's History of England, Volume 1. London: Cassell, 1903. General Collections, Library of Congress (back cover)

England's Lord Chief Justice Edward Coke bars King James I from the "King's Court" making the court, by law, independent of the executive branch of government. Bronze doors of Supreme Court, Washington, D.C. Collection of the Supreme Court of the United States (inside front flap)

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# RIGHT TO A JURY TRIAL

Coustumes. De. Normandie.



**D**ur ce que me in  
tencion est a edarier  
en ceste oeuvre au  
mieux que nous



# MAGNA CARTA AND THE RIGHT TO TRIAL BY JURY

*Thomas J. McSweeney<sup>1</sup>*

Magna Carta is often invoked as the primal source of the right to trial by jury. The influential English legal commentator Sir William Blackstone trumpeted Magna Carta's guarantee of trial by jury.<sup>2</sup> American constitutional debates regularly cited Magna Carta in connection with the right to jury trial. And linkages between jury trial rights and Magna Carta continue today. The United States Supreme Court wrote as recently as 2005 that in England, "the right to a jury trial had been enshrined since the Magna Carta."<sup>3</sup> Lawyers invoke Magna Carta's heritage in their briefs and summations in jury trials. Magna Carta is often identified as the origin of the right to a jury trial in popular writing as well.<sup>4</sup> Digging deeper into the history of Magna Carta, however, reveals a more complicated reality. Magna Carta's "judgment of his peers" language, which many associate with the jury trial right, did not guarantee trial by jury. The links between Magna Carta and the jury trial guarantee were actually forged centuries *after* the issuance of the original document in 1215.

## The English Jury Before 1215

The history of the common law jury begins about fifty years before Magna Carta, during the reign of King Henry II (r. 1154–1189). Henry became king at the end of a long and destructive civil war, a time when one chronicler said that "Christ and his saints slept."<sup>5</sup> The memory of the civil war and the disorder it caused may have been in Henry's mind when he began the reforms of land law and criminal law that would ultimately come to be seen as the beginnings of the common law;<sup>6</sup> Henry proposed many of his reforms as a way to restore the

Medieval jury depicted in *Grand Coutumier de Normandie* [Customary Law of Normandy]. Illustrated manuscript on vellum, ca. 1450–1470. Law Library, Library of Congress

kingdom to its state before the civil war.<sup>7</sup> It is also possible that he was motivated to steal judicial business from the many local courts that existed throughout England.<sup>8</sup> Whatever the reason, Henry instituted new procedures for his royal courts, procedures which made the courts easier to use and more accessible, even to people at the low end of the social scale.<sup>9</sup>

On the civil side, Henry introduced new procedures called assizes. The first of these assizes was the assize *utrum*, which Henry probably authorized in 1164 as part of an ongoing fight he was having with his bishops. In that year, Henry issued a text called the Constitutions of Clarendon, which he claimed was a statement of the “customs, liberties, and dignities of his predecessors . . . which ought to be observed and kept in the kingdom” concerning the relationship between the crown and the Church.<sup>10</sup> Chapter nine of the constitutions dealt with the issue of land held by the Church. In the twelfth century, it was fairly common for landholders to donate land to the Church. Donations of land to Church bodies like parish churches or monasteries were thought to be good for one’s soul and created a relationship with the parish or monastery that continued after the donor’s death, as the priests and monks would remember the donor in their prayers. Certain types of land owned by the Church, known as land held as free alms, were exempt from the jurisdiction of the king’s courts.<sup>11</sup> According to the Church’s canon law, disputes concerning land held as free alms could not be heard in the king’s court, only in the courts of the Church, which were extensive in the twelfth century.<sup>12</sup>

Henry recognized the Church’s exclusive jurisdiction over land held in free alms. The question was, what happened when it wasn’t clear whether the land was held as free alms or lay fee? Did the royal court or the ecclesiastical court get to decide who had jurisdiction? In chapter nine of the Constitutions of Clarendon, Henry answered that it was the royal court that had the right to decide. Chapter nine commanded that “If a dispute shall arise between a clerk and a layman, or between a layman and a clerk, in respect of any holding which the clerk desires to treat as free alms, but the layman as lay fee, it shall be determined by the recognition of twelve lawful men through the deliberation, in the presence of the king’s chief justice, whether the holding pertains to free alms or to lay fee.”<sup>13</sup>

The assize *utrum* (Latin for “whether,” since the assize decides whether the land is held in lay fee or free alms) was the new procedure that Henry introduced to decide issues of lay fee or free alms. The assize was begun by royal writ, a traditional tool of royal administration, and included a key role for laymen. Writs were essentially short documents issued by the royal chancery in the king’s name that commanded one of the king’s officials or subjects to do something. They



had been used in England since Anglo-Saxon times. Instead of being an individualized command from the king, the assize *utrum* used a standard form. Any of the king's subjects could purchase a writ or command in this general form, and a clerk could fill in the specific information.<sup>14</sup> The writ took the following form:

The king to the sheriff, greeting. If A. shall have given you security etc., summon, by good summoners, twelve free and lawful men of the vill of N. that they be before our justices at the first assize when they shall have come into those parts, prepared to recognize on oath whether ten acres of land with appurtenances in N. is the lay fee of the said A. or free alms belonging to the church of N. which B., the cleric, holds; and in the meantime let them view that land and cause their names to be recorded in writing, and summon by good summoners the said B., cleric, that he be there at the time to hear that recognition, and have there the summoners and this writ. Witness, etc.<sup>15</sup>

Writs such as these emerged as mainstays of the royal courts. By introducing the jury—the twelve free and lawful men who were commanded to come hear the case—into the assize *utrum*, the jury too became a mainstay of English law. Historians debate the origin of Henry's idea to use juries. Was the jury simply a continuation of trial procedures that had been used in England's county courts since Anglo-Saxon times? Or was it an institution of royal power that was transported from Normandy with the Norman Conquest? There is evidence for both points of view and it is possible that Henry drew inspiration from multiple sources.<sup>16</sup>

Fact-finding by small groups of people sworn to tell the truth, often called inquests, was commonplace in early medieval Europe.<sup>17</sup> Kings often used these fact-finding bodies to their advantage. Medieval kings had limited resources with which to extend their power. Generally, they could not afford to send royal servants into the counties to perform detailed investigations. The inquest was a way to draft local people into the fact-finding process. If the king wanted to know what rights he had over the people of a particular place, who owned a particular manor, or who had committed crimes, he could simply gather a group of local people together who were likely to know something of the local history of the place and make them swear an oath that they would tell the truth. Most notably, in 1086 William the Conqueror used the inquest to produce the Domesday Book, a survey of much of the land in England.<sup>18</sup>

The assize *utrum* orders the sheriff to summon "twelve free and lawful men of the vill." They were to come from the local community, and would be expected to know

something about the dispute.<sup>19</sup> The twelve all had to be male; women only served on juries in very limited circumstances in the middle ages.<sup>20</sup> The twelve men all had to be free. A large proportion of England's population was unfree in this period. The unfree were subject to humiliating disabilities and were disqualified from service on inquests or juries and, in most cases, could not use the king's courts.<sup>21</sup>

The twelve men also had to be "lawful" (Lat. *legalis*). In this period, one meaning of the term "law," or *lex* in Latin, was "oath," and *legalis* essentially means "worthy of making an oath." Oath-worthiness was important in medieval England. Oaths were required in many social and legal contexts. A person who lost his status as a *legalis homo*, or law-worthy man, by breaking an oath or bringing a false claim in the king's courts, was subject to severe social and legal disabilities.<sup>22</sup> It was important that the twelve men be law-worthy, since the writ indicated that they were to be placed under oath.

These twelve men were known in documents of the time by several different names: the inquest (*inquisitio*), the recognition (*recognitio*; the writ says that they be "prepared to recognize"), the assize (*assisa*, after the statute-like documents, also called assizes, that first authorized their use), and, less often in the twelfth century than the thirteenth, the jury (*jurata*, from Latin *juramentum*, "oath").<sup>23</sup>

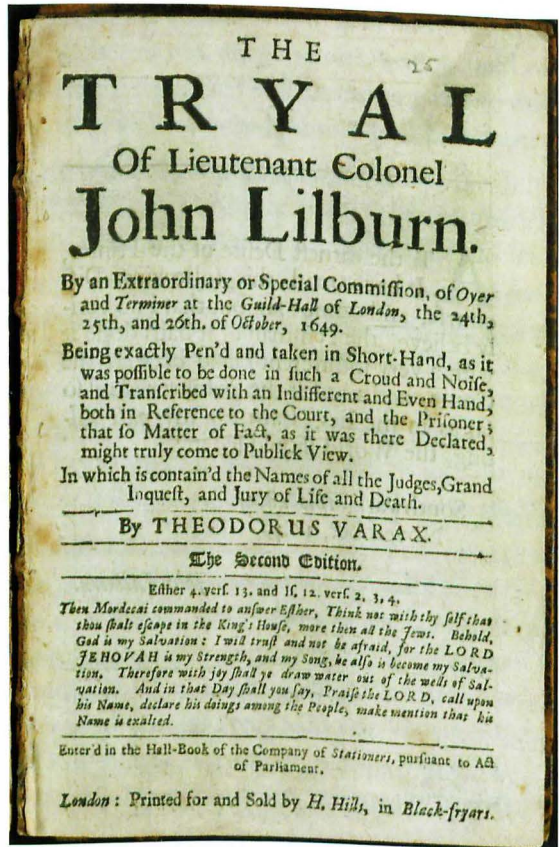
The basic elements of the assize *utrum*—the standard-form writ and the jury of twelve—were copied during Henry II's reign to create many new procedures for the king's courts, most of which decided questions relating to land. The assize of novel disseisin, which was probably authorized around 1166, called a jury of twelve to decide whether the person who was currently in possession of a piece of land had forcefully ejected the last holder.<sup>24</sup> The assize of mort d'ancestor, established in the Assize of Northampton in 1176, asked the jury whether the plaintiff was the nearest heir of the last person to die seised (essentially in possession) of a piece of land.<sup>25</sup> The grand assize was a procedure authorized in 1179 that allowed a person who otherwise would have to fight a judicial duel to determine his right to land to instead elect an assize of twelve men to decide the issue.<sup>26</sup> By the time Magna Carta was issued in 1215, juries had become the primary way of deciding land cases in the royal courts.

## Henry II And Criminal Juries

At the same time he was introducing sworn groups of twelve men to decide land cases, Henry experimented with juries to deal with the problem of crime.<sup>27</sup> In 1166, Henry met with his barons at his hunting lodge at Clarendon and issued a text known as the Assize of Clarendon (not to be confused with the Constitutions of Clarendon). Through this document, Henry drafted local people into the royal administration to root out criminals. The assize ordered that "inquiry shall be



John Lilburne (1614?–1657). *The Tryal of Lieutenant Colonel John Lilburn. . . the 24th, 25th, and 26th of October, 1649.* London: H. Hills, 1710. Law Library, Library of Congress



made throughout the several counties and throughout the several hundreds . . . whether there be in their hundred or vill any man accused or notoriously suspect of being a robber or murderer or thief, or any who is a receiver of robbers or murderers or thieves, since the lord king has been king.”<sup>28</sup> This inquiry was to be made “through twelve of the more lawful men of the hundred and through four of the more lawful men of each vill.”<sup>29</sup> Local people from the hundreds (subdivisions of counties) and vill (subdivisions of hundreds) would be called together to inform the king who had committed robbery, murder, or theft in their locality so they could be tried by the king’s justices. The king’s justices would periodically visit the counties and ask jurors from the hundred and the vill to present them with a list of suspected criminals. Forgery, treason, and arson were later added to the list of crimes the jurors were to present.<sup>30</sup>

These new juries were generally called juries of presentment, the ancestor of the modern grand jury. Their role was to present for trial people who were

suspected of particular crimes. Although the juries of presentment did not decide the final issue of guilt or innocence, they played a role in determining who would go to trial. The trial itself would not be by jury. Instead, the accused were to “go to the ordeal of water.”<sup>31</sup>

Judicial ordeals were a common way of trying suspected criminals in the twelfth century. Surviving ordeal liturgies paint a picture of ceremonies where a great deal of religious pressure was placed on the accused to confess.<sup>32</sup> An accused man heard a mass at which he was reminded that God would judge him justly. Before he took communion, he was reminded that he should not take it if he had “done or consented to or know who did this thing.”<sup>33</sup> He took an oath, in the presence of a priest, that he had not committed the crime of which he was accused, and then was put to some kind of test. Monasteries often had ordeal pits that they blessed specially for the purpose of holding ordeals of cold water, but a stream could be used as well.<sup>34</sup> The priest entreated the accused

by the Father and the Son and the Holy Spirit, by the day of terrible judgment, by the four evangelists, by the twenty-four elders, who with unwearied voice do not cease to praise God, by the twelve apostles, by the victory of the martyrs, by the invocation of your holy baptism, that, if you are culpable concerning this thing, either in deed or otherwise, with a heart hardened by the suggestion of the devil, do not presumptuously come to this judgment; the water will not accept you, and in this sign of the cross of Christ your malice will appear, and the virtue of almighty God will be manifested.<sup>35</sup>

By that point, if the accused had not confessed, he would go into the water. If he sank, he was adjudged innocent, and was pulled out of the water. If he floated, he was held to be guilty. Early on, those found guilty by the ordeal were mutilated and banished from the realm. By the early thirteenth century, anyone convicted of a felony was hanged.<sup>36</sup>

Although the presenting jury did not, strictly speaking, decide the final question of guilt or innocence, it was more than simply a jury of accusation. The jury had many ways of preventing the accused from going to the ordeal. A jury of presentment could present a man as having been accused of a crime, but then tell the justice that he was “not suspected.” In those circumstances, the individual would not go to trial, but would instead be released if he was able to find pledges for his good behavior.<sup>37</sup> The Assize of Clarendon had called for twelve men from each hundred and four men from each vill to come to make presentments. The practice developed in such a way that the jury of the twelve hundred jurors was the first to make their presentments. If they decided that a man they had named was not suspected, he would go free. If they decided that he was suspected, the question would then be put to the four men (possibly five, since each vill also sent its reeve) of each of



the four villis closest to the scene of the crime. If, and only if, they also suspected him, he would proceed to the ordeal.<sup>38</sup> In this way, the jurors of the vill could effectively veto the presentment of the hundred jurors. Thus, by the early thirteenth century, a person accused by the jury of presentment would only go to the ordeal if both the jury of the hundred and the juries of the four neighboring villis, a total of thirty-two people, said they suspected the individual.<sup>39</sup> The jury of presentment could not convict a person on its own, but it could essentially acquit one.

Although presentment became an important institution of English criminal law in the decades after 1166, it was not the only, or even primary, way of bringing suspected felons into court in the late twelfth century. The appeal of felony was a method by which a private party could accuse another party of a felony. Guilt or innocence would ordinarily be settled by trial by battle between the accuser and the accused, but trial by ordeal was also available if one of the parties was unable to undertake trial by battle. The appeal of felony might end in a jury trial, however. A defendant who did not want to go to battle or ordeal could challenge the appeal by means of a writ *de odio et atia* (of hatred and spite). The writ called a jury together to decide a limited question: whether the defendant was “appealed out of hatred and spite or because he was guilty.”<sup>40</sup> If the jury decided that the private accuser had brought the appeal out of hatred and spite, the defendant was set free. If it decided he was guilty, he still went to the ordeal or trial by battle.<sup>41</sup> The jury in a case of hatred and spite, like a presenting jury, could acquit the defendant, but could not convict him. Writs *de odio et atia* were fairly common. They cost money to obtain, but defendants lost little else in seeking one. The worst-case scenario was that they would go to the same ordeals or battles that they would have gone to without the writ, and there was always the possibility that the jury would find in their favor.<sup>42</sup>

Although the ordeal was the primary means of deciding guilt or innocence, juries were also occasionally used in place of the ordeal to decide the final question. A party who did not want to undergo the ordeal could purchase the right to a special inquest from the king. The king would then send a writ ordering an inquest into the defendant’s case. These inquests were exceptions to the general rule and were generally only available to the wealthy, but they did establish a precedent for use of the jury as a mode of proof rather than an accusing body.<sup>43</sup>

Thus, the best historical evidence indicates that, by 1215, juries had become regular parts of the administration of justice, both civil and criminal, in England. They were used widely in land cases and were used to ferret out criminals. However, people in 1215 probably would not have thought, as later generations did, especially from the seventeenth century onwards, that the jury was a great



bulwark of liberty against the crown. Juries certainly allowed the preferences of the local community to enter into the exercise of justice. Presenting juries could prevent suspects from going to the ordeal. But juries served not so much as protection against royal power, but as extensions of it. The jury of presentment was a method the crown used to keep tabs on the country with its limited resources by compelling members of the local community to work for the king.

What is more, jury service was far from popular. Jury service was considered an onerous task, one where people were forced to do the king's work, and was widely resented. Jurors often failed to appear on the appointed day and were fined for their non-appearance. In some cases, parties simply gave up because they were unable to get enough jurors to fill the jury.<sup>44</sup> The wealthy purchased exemption from jury service from the king, which forced lower gentry and free peasants to take on a larger share of the jury work in the county. Today's complaints about jury duty have a long history.

In 1215, when Magna Carta was drafted, juries were more apt to be seen as the means by which the king co-opted locals into the royal administration than as instruments of popular participation. It is no surprise that, in the years immediately following Magna Carta's issuance, no one, including those who had been involved in drafting the charter, thought that it contained a guarantee of trial by jury.

## Magna Carta And The Jury

Chapter 39 of the 1215 version of Magna Carta is one of the most famous sections of the charter. It was included in all subsequent reissues of the charter, eventually becoming chapter 29 of the revised 1225 version, which was the version of Magna Carta that came to be regarded as England's first statute. It reads:

No free man shall be taken or imprisoned or disseised [deprived of his land] or outlawed, or exiled, or in any way ruined, nor will we go against or send against him, except by the lawful judgment of his peers, or by the law of the land.<sup>45</sup>

At first blush, the words "judgment of his peers" appear to guarantee trial by jury. By the eighteenth century, they were certainly read that way. However, there are several problems with this interpretation. In order to read chapter 39/29 of the charter as *guaranteeing* trial by jury, it would have to read "except by the lawful judgment of his peers *and* by the law of the land." Instead, the text of the charter provides "or by the law of the land." The text as we have it guarantees that a free man will be tried in one of two ways, but it offers them as alternatives. The king



John Lilburne reading from Coke's *Institute* at his trial. Frontispiece from John Lilburne (1614?–1657). *The Tryal of Lieutenant Colonel John Lilburn. . . the 24th, 25th, and 26th of October, 1649*. London: H. Hills, 1710. Law Library, Library of Congress



need not try the free man by judgment of his peers; he can opt to try him by the law of the land instead.

The “or” in chapter 39/29 has caused trouble for generations of lawyers and scholars who want to read Magna Carta as the origin of the jury right. They have gone to great lengths to get around it. F. W. Maitland, the father of English legal history, argued that the Latin word *vel* used in the passage could also mean “and.”<sup>46</sup> While he produced evidence that *vel* could, at times, mean “and,” that was a rare usage of the word. It is much more likely that the drafters meant judgment of peers and law of the land to be alternatives.

A guarantee of judgment of peers *or* the law of the land seems strange to us today. What would it mean to be tried by the lawful judgment of one’s peers, but not in accord with the law of the land? This is only a problem because we tend to read the phrase “law of the land” (*lex terrae*) to mean something like trial according to the proper procedures and established substantive law, the law that is observed in this land. We read it as meaning something like what we mean when we say “the law of the United States” or “the law of New York.” The similar phrase “law of the realm” is used elsewhere in the charter to mean something like the general law of England.<sup>47</sup> But “law of the land” also had a much more specific meaning in the early thirteenth century. It could refer to a person’s oath. We saw earlier that the jurors had to be law-worthy (*legalis*) because they had to swear an oath, which in Latin was often called a *lex*. In fact, some contemporary texts used the phrase *lex terrae*, or “law of the land,” to refer to an oath.<sup>48</sup> An oath was taken in many different types of procedures, including trial by battle and ordeal. But even if the word “*vel*” in chapter 29/39 means “and,” it is still unlikely that the chapter was meant to guarantee trial by jury, because the phrase “judgment of his peers” probably does not refer to the jury at all. Medieval courts usually operated according to a logic of communal judgment. The king’s court was the exception rather than the rule. England was a patchwork of different jurisdictions. Sheriffs presided over county courts, which were attended by the free landholders of the county. The hundred, a smaller division within the county, had its own court that met more frequently than the county court. Lords held courts to settle disputes between their tenants; honour courts for their more exalted tenants; and manor courts for the peasants who worked the land. Towns had their own courts, as well.<sup>49</sup>

We have a sense for how these courts operated from the literature of the time, both monastic chronicles and chivalric epics and romances. They describe these courts as institutions in which judgment was made by the community. Consider the following example, which shows the litigants’ peers taking a role in judging a case. The cartulary of the priory of St. Peter at Bath describes a case that was



heard in the bishop of Bath's court in 1121. While the bishop was sitting in his court, celebrating the feast of the apostles Peter and Paul, he received a writ from the king's son William ordering him to "justly seize Modbert of the land which Grenta of Stoke has held," land that was, at the time, being held by the priory of St. Peter.<sup>50</sup> The bishop said that he agreed "to do what I have been ordered by the son of my lord by this letter, if it is just. However, my friends and lords, who are solemnly gathered in this court on the occasion of the apostolic feast-day, I beg you to discuss which is the more just cause in this matter."<sup>51</sup> After the prior and Modbert produced witnesses and a charter, the bishop put it to "those amongst you whom we know to be neither advocates nor supporters of the parties" to "diligently study the case and decide by what final judgment it shall be solved."<sup>52</sup> The "older and more learned in the law" then left, consulted, and made a judgment.<sup>53</sup> This was a fairly common pattern in courts of the period. The parties to the case entered the bishop's court—not constituted specifically as a law court, but simply as the collected body of the bishop's vassals—and expected to be judged not by the bishop, but by his vassals, their peers. Evidence suggests that this type of trial by one's peers, by the people beneath the lord who made up the lord's court, was the standard form in most courts in England.<sup>54</sup> The barons were simply asking for that mode of trial to be extended to them in the king's court, that they not be judged by the king, but by their peers, their fellow barons.

Sifting through the historical evidence, it seems most likely that chapter 39/29 was only meant to require that the accused would be tried either by peers, on the one hand, or by ordeal or battle, on the other. It foreclosed the possibility that the accused could simply be declared guilty by an act of the king's will, without any trial at all, but it did not guarantee that the trial would be by jury. This responded to a specific grievance that the barons had against John.<sup>55</sup> John was accused of too often acting on his own to determine that someone merited punishment, rather than putting the matter to his court.<sup>56</sup> The drafters of Magna Carta wanted guarantees that they would only be deprived of their land or arrested by judgment rather than the whim of the King, but they do not seem to have been overly concerned with the judgment's exact form. Judgment could be had by peers, by ordeal, or by battle, any of the forms commonly used in England in the early thirteenth century. Magna Carta guaranteed a trial, but not a trial by jury.

## The Fourth Lateran Council And The Criminal Jury

Magna Carta was not the only momentous event of 1215. In November of the same year, five months after Magna Carta was issued, Pope Innocent III (r. 1198-1216) opened a general council of the Western Church, called the

Fourth Lateran Council.<sup>57</sup> The council's ambitious agenda included substantial reform of the Western Church, and the council had an important impact, for good and ill, on subsequent European history. It was the first council to require Jews and Muslims to wear distinctive, identifying clothing, for instance.<sup>58</sup> It also called for substantial reforms to the administration of canon law, including the introduction of additional rights for accused parties.<sup>59</sup> It was the council's program of separating the sacred from the secular—of requiring priests to separate themselves from the secular life and forbidding them to marry and participate in certain types of occupations that it saw as too worldly—which proved to have significant implications for trial by jury in England.

Canon 18 placed certain restrictions on clerics, including a mandate that clerics were not to “bestow any blessing or consecration on a purgation by ordeal of boiling water or of cold water or of the red-hot iron . . .”<sup>60</sup> Canon 18 did not forbid judicial ordeals altogether; it simply said that clerics could not offer a blessing in them. But the blessing was crucial to the ceremony, and without it, the ordeal could not function. If God was to participate in the ordeal, the ordeal pit must be blessed by a priest, and the accused was often given the Eucharist before the ordeal, which required the participation of a priest as well.<sup>61</sup> The priest's participation was a critically important part of the agreed-upon method of resolving disputes, and without it the courts were at a loss.

A pressing problem that now faced the English royal courts was what should be done with people who were suspected of serious crimes if they could not be tried by ordeal. This issue did not affect the royal courts immediately, however. Just months after Magna Carta was issued in June of 1215, civil war broke out between John and the barons. By October of 1216, however, John had died (of natural causes) and his son, Henry III, at nine years of age, was crowned king. The war came to an end in September of 1217 and the kingdom settled into an uneasy peace. The king's courts had not operated regularly since the war began, but in November of 1218 the regency government prepared to send out the first eyres—groups of justices sent to the counties as travelling courts—since 1209.<sup>62</sup> It was only then that the courts were faced with the question of what to do about the trial of felons.

The eyre was already underway on January 26, 1219, when Peter des Roches, the young king's guardian, and Hubert de Burgh, his justiciar, sent a letter telling the eyre justices how to proceed in cases of “robbery, murder, arson, and similar things.”<sup>63</sup> Des Roches and de Burgh wrote to the justices that “judgment by fire and water is forbidden by the Roman Church.”<sup>64</sup> They were not sure what should replace it, however. Their instructions to the justices were to put off trying these



suspects until they could come up with a solution. They ordered the justices to do different things with respect to different classes of criminals:

those who are accused of the aforesaid greater crimes, and who are suspected of those things of which they are accused and in regard to whom, although they might abjure the realm, there is still suspicion that afterwards they might do ill, shall be held in our prison and safely guarded, so that they do not incur peril of life or limb by reason of our prison. Those who are accused of medium crimes touching which the judgment of fire and water would be suitable if it were not forbidden, and touching whom if they abjure our realm there would be no suspicion of evildoing afterwards, shall abjure our kingdom. Those who are charged with lesser crimes and in regard to whom there is no suspicion, shall find safe and secure pledges to keep our allegiance and peace and thus shall be loosed in our land.<sup>65</sup>

The most problematic of these categories, from the justices' perspective, were those "accused of the aforesaid greater crimes," who were to be kept in prison. Prison was not generally used as a punishment in twelfth- and thirteenth-century England, and the prisons were not designed for long-term incarceration. The justices didn't have any way to try these people, and keeping them locked up indefinitely did not seem practical. Casting about for alternatives, the justices made greater use of inquests *de odio et atia*, even in cases where the defendant had not asked for one.<sup>66</sup> The justices began to adapt these inquests to suit their current needs. Recall that an inquest *de odio et atia* traditionally could acquit, but not convict. The justices of 1218 sentenced some people based on a guilty verdict from a jury brought by writ of *de odio et atia*. They did not sentence them to hang, however, but instead to pay a fine.<sup>67</sup> The justices seemed to be wary of using the jury to sentence an accused felon to death, but they were willing to mete out a lesser punishment to felons on the basis of a jury verdict. These unasked-for juries presumably alleviated some of the strain on the prisons.

Two suspects were hanged on the weight of a jury verdict in 1218, but the verdict was declared to be illegal by the justices of the central courts at Westminster. Their heirs complained and the court agreed that the two men were "hanged wickedly and unjustly because . . . they could not be condemned through the verdict of the jurors."<sup>68</sup> The justices and the king's council re-asserted that the jury could only be used to ask intermediate questions, like whether an appeal was brought out of hatred and spite, not to determine guilt. This example offers more evidence that Magna Carta's "judgment of his peers" did not yet resemble the common law jury.



In the winter of 1220, the justices at Westminster went a step further towards using juries to convict. Some appeals were brought by people known as approvers, felons who had turned state's evidence. Felons who were caught might save their necks by confessing and agreeing to bring appeals of felony against others, generally the felons' accomplices.<sup>69</sup> The approver would then have to fight judicial duels against them. He would be kept at public expense while he brought the appeals, and if he survived the number of appeals and duels he had agreed upon with the king's officials—the *Bracton* treatise gives the sample number as five, so it is unlikely that he would—he would be granted his "life and members," but not much more.<sup>70</sup> The approver would be forced to abjure the realm for the rest of his life and would be mutilated—probably losing his nose or an ear—as a very tangible mark of his crime, to warn people who might come across him that he was a convicted felon.<sup>71</sup>

The party accused by an approver could respond that he need not answer "a confessed thief, one who ought to have no right to speak against a law-abiding man . . ." <sup>72</sup> He would bring a writ *de fidelitate* to prove that he was "a law-abiding man and within the assise of the lord king etc. and in frankpledge or has a lord who avows him."<sup>73</sup> He would make his proof to a jury. Just as in the procedure for the writ *de odio et atia*, the jury could acquit, but not convict. If the jury decided that the accused was a law-abiding man and need not answer, then he would be released. If it decided he was not a law-abiding man, he would still go to the duel to try to prove his innocence that way.

At the bench at Westminster in 1220, the justices were confronted with some problematic cases. In one of them, a woman who had confessed to theft, named Alice, had made a deal with the court to act as an approver. Technically she could not be an approver, because a woman was barred from fighting a judicial duel, but the court allowed her to make her accusations anyway.<sup>74</sup> All of those she accused would, therefore, be sent to the ordeal, since it was used as an alternative to judicial combat in appeals where that form of proof was unavailable. But the ordeal had been forbidden by the Lateran Council. The justices might have left the people appealed by Alice in prison while the king's council decided what to do with them; what they did instead was give them the option of a speedier trial. The court asked the defendants if they would empower the jury to decide both innocence and guilt. The roll of the court tells us that "they placed themselves upon the verdict *for good and ill (de bono et malo)*."<sup>75</sup> They probably shouldn't have. The entry tells us that all the jurors said that they were thieves, and laconically ends with the word *suspendantur* ("they were hanged").<sup>76</sup> This was not the most auspicious beginning for the criminal jury trial, at least not if we believe that the criminal jury's role is to defend the rights of the accused.

By 1220, the justices had clearly decided it was permissible to give accused persons, in cases brought both by appeal and by presentment, the option of putting themselves on the jury “for good and ill.” In cases of presentment, the justices would simply allow the jury of presentment, the jury that had originally presented the accused as suspected of a felony, to sit as a trial jury. The procedure followed was very similar to that that had previously been followed for ordeals. Recall that the twelve hundred jurors and the jurors of the four nearest vills—which each sent four men and their reeve to the court—had to agree that the person was suspected in order to send the individual to the ordeal. When the courts started using juries to convict, they similarly required that the hundred and the four vills, a total of thirty-two people, agree that the suspect was guilty in order to convict.<sup>77</sup> The trial by jury for good or ill was initially optional; the suspected felon could choose to accept the jury or to go back to prison. But when an accused felon announced that “he does not wish to place himself upon the country” in 1221, the justices responded by forcing a jury upon him. They added twenty-four knights to the twelve hundred jurors, making a trial jury of thirty-six, which gave a verdict against him.<sup>78</sup>

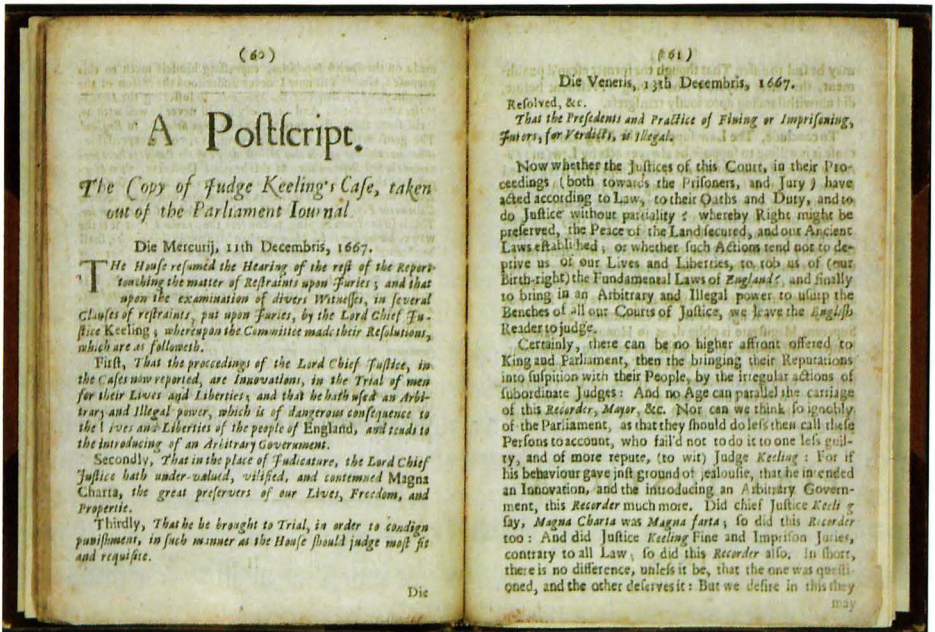
Trial by jury had therefore been established as the ordinary way to try felons in the royal courts by 1221. There are two points that are important to notice about these early trial juries. First, trial by jury was not designed to protect the accused from the king and his judicial machinery by giving him trial by his neighbors. If anything, it represented a decrease in the procedural safeguards the accused received. By simply adopting the jury of presentment as the trial jury, the royal courts had taken a step out of the process. Under the pre-1215 system, if the juries of the hundred and the four nearest vills said they suspected the accused, he still had a chance to save his neck if he succeeded at the ordeal. The trial jury took the ordeal out of the process and left the accused at the mercy of his neighbors. Second, the justices of the royal courts were reluctant to use jurors to try accused felons. The large size of the early trial juries probably reflected a discomfort among the justices with leaving the final question of guilt or innocence in the hands of the defendant’s neighbors instead of in the hands of God. There was thus no sense that the accused had a right to be tried by a jury of his peers. If anything, contemporaries thought that trial by jury was a troubling development.

## Connecting Magna Carta With The Jury

Over time, people in England came to think of trial by jury as a protection against royal tyranny and, over time, they began to associate it with Magna Carta. In some ways, this was a natural connection to make. As early as the fourteenth century, the jury of presentment was coming to be thought of as part of



the procedural guarantees of chapter 29 of Magna Carta. In a statute of 1351, parliament expanded upon the guarantee of chapter 29 by adding that “from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deed be done, or by process made by writ original at the common law.”<sup>79</sup> The authors of this statute read the jury of presentment into Magna Carta’s guarantees, but they did not read it into the “judgment of his peers” language. Rather, they connected it to the charter’s “law of the land” language.<sup>80</sup> The phrase, “law of the land,” for which the original drafters had probably intended a narrow meaning, namely, trial by ordeal or battle, had by then taken on a broader meaning. In the statute of 1351, it meant the procedural forms followed in the king’s courts. A statute of 1354 confirmed this reading of chapter 29. The statute amended the guarantee of chapter 29 to “no man, of whatever estate or condition he may be, shall be put out of his land or tenement, nor be taken or imprisoned, or disinherited, without being brought to answer by due process of law (*due process de lei*).”<sup>81</sup> This provision expanded the coverage of chapter 29 from any “free man” to any “man, of whatever estate or condition he may be,” and, more importantly for our purposes, it specified that the term “law of the land” was a right to be tried by the proper procedure, which, as the earlier statute had specified, included the jury of presentment. This



William Penn (1644–1718). *Peoples Antient and Just Liberties Asserted in the Tryal of William Penn and William Mead*. London, 1670. Law Library, Library of Congress



statute is the first known use of the phrase “due process of law,” so important to the American constitutional tradition.

Magna Carta was important to the political battles of the thirteenth and, to a lesser extent, fourteenth centuries, but after that it receded from the political scene. It arose from its dormancy in the political battles of the seventeenth century, heralded by Chief Justice Sir Edward Coke, who fought a protracted battle against King James I over the proper relationship between the king and the law. In his *Institutes of the Lawes of England*, Coke read the words “or by the law of the land” in chapter 29 to be a guarantee that a person would not be taken or imprisoned except by “presentment of good and lawfull men.”<sup>82</sup> Coke, like the authors of the fourteenth-century statutes, thus found the grand jury guaranteed in Magna Carta. Coke’s arguments about the connection between Magna Carta and the jury were extended by William Penn, the Quaker leader and founder of Pennsylvania, who, during his trial for illegal assembly, selectively misread Coke’s gloss on chapter 29’s words “by lawful judgement” to guarantee trial by jury in criminal cases, as well. Coke thought that the provision applied only to the trial of peers by the House of Lords, but where Coke had “Lords,” Penn substituted “jury.”<sup>83</sup> Coke’s “the Lords must heare no evidence, but in the presence, and hearing of the prisoner” becomes “The jury ought to hear no evidence, but in the hearing and presence of the prisoner” in Penn’s writings.<sup>84</sup> Penn exported this view of Magna Carta to America. When Penn drew up the *Fundamental Laws of West New Jersey* in 1676, he included the following provision:

That no Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due tryal, and Judgment passed by twelve good and lawful men of his neighborhood first had.<sup>85</sup>

The language clearly draws upon chapter 29 of Magna Carta, but in place of the phrase “lawful judgment of his peers or by the law of the land,” we have “due trial, and Judgment passed by twelve good and lawful men of his neighborhood,” language that clearly contemplates a trial jury.<sup>86</sup> Other colonial acts would do the same.<sup>87</sup> It thus became a truism in America that Magna Carta guaranteed a right to trial by jury in criminal cases.

The grand jury and the criminal trial jury are enshrined in the United States Constitution. The fifth amendment’s guarantee that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury” echoes language Coke used in the *Institutes* to gloss chapter 29.<sup>88</sup> It applies only to federal courts. The sixth amendment, which has been incorporated against the states, as well, guarantees trial by jury in criminal

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The history of trial by jury in criminal cases has been frequently told.<sup>15</sup> It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.<sup>16</sup> Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:

"Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer and terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion." <sup>17</sup>

<sup>15</sup> *E. g.*, W. Forsyth, *History of Trial by Jury* (1852); J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898); W. S. Holdsworth, *History of English Law* (3d ed. 1922).

<sup>16</sup> *E. g.*, 4 W. Blackstone, *Commentaries on the Laws of England* 349 (Cooley ed. 1899).

<sup>17</sup> *Id.*, at 349-350.

Historians  
no longer  
accept this  
pedigree. See,  
e.g., 1 F.

Pollock &

F. M. Maitland,

*The History of*

*English Law Before the Time of Edward I*  
at 173 & n. 3 (2d ed. 1909).



cases. By the time the constitution was written, both of these guarantees were widely understood as having their origins in Magna Carta. More curious is the seventh amendment, which guarantees trial by jury in all civil cases “at common law, where the value at issue shall exceed twenty dollars.” Civil juries had never been guaranteed in the English courts. In fact, the procedures associated with some of the common-law writs did not include a jury. The writ of debt is the primary example, but there were doubts as late as the late fourteenth century as to whether a jury was the proper procedure for a writ of trespass, as well.<sup>89</sup> Nevertheless, some members of the constitutional convention connected the civil jury to Magna Carta.<sup>90</sup> Others noticed that it was very difficult to base the right to a civil jury in the common-law tradition, and almost impossible to find its origin in Magna Carta.<sup>91</sup>

## Conclusion

Magna Carta was not originally intended to guarantee trial by jury. It could not have been; juries were an unusual trial method at the time the charter was written. Far from thinking that trial by one’s neighbors was an important safeguard against royal tyranny, contemporaries worried that a guilty verdict by a jury of the neighborhood might not be sufficient to send a man to the noose. That does not take anything away from Magna Carta’s importance to the Anglo-American legal tradition, however. Magna Carta is significant today primarily because of the ways people have creatively reinterpreted and even misinterpreted the text over the centuries. Later generations, who saw the jury as a “valuable safeguard to liberty” and the “palladium of free government,” read the jury into chapter 39/29 of Magna Carta, and from there the legend of Magna Carta and the jury entered our American constitutional tradition.<sup>92</sup>