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The Great Charter Turned 800: Remembering Its 700th Birthday

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THE GREAT CHARTER TURNED 800: REMEMBERING ITS 700TH BIRTHDAY

Karl Shoemaker*

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

—Chapter 39, *Magna Carta*¹

I. MAGNA CARTA AND THE REVISIONISTS

If there is any specific provision that the non-specialist can readily call to mind regarding Magna Carta, it is probably some distillation of the Great Charter's thirty-ninth chapter. The thirty-ninth chapter (which now appears as the twenty-ninth chapter after Henry III's 1225 reissue of the Charter) is commonly held to be the provision that specifically guarantees due process in our common law tradition.² "[T]he palladium of [British] liberties" is one venerable phrase celebrating what chapter thirty-nine wrested from King John at Runnymede.³ It is also one of the most enduring features of Magna Carta, insofar as it is one of four specific provisions of Magna Carta that remain enshrined in English Law today.⁴ Thus, it is entirely fitting that the William & Mary Law School and its *Bill of Rights Journal* sponsor a scholarly colloquium on this, the 801st anniversary of Magna Carta, in order to reflect upon Magna Carta's significance in our legal and constitutional traditions.

On this anniversary, however, I would like to draw our attention to the previous centenary of Magna Carta, and the scholarship that commemorated it. Like our current anniversary, the 700th anniversary of Magna Carta was the occasion for significant scholarly reflection on the Charter and its place in our legal and political traditions. We may be surprised, though, to discover how many ancient pieties were attacked

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¹ WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 375 (2d ed. 1914). The chapter divisions in the text are the work of modern editors. No chapter divisions appear in the original text or its contemporary copies.

² See Charles McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 27–28 (1914) (discussing historical interpretations of chapter 39 of Magna Carta).

³ *Id.* at 27.

⁴ Those are in clauses 1, 13, 39 and 40. *MAGNA CARTA* (1215) cls. 1, 13, 39, 40; see CLAIRE BREAY, *MAGNA CARTA: MANUSCRIPTS AND MYTHS* 48 (2002) (discussing three of the four provisions).

in that endeavor a century ago. Rather than celebrating “the palladium of [British] liberties,” late nineteenth- and early twentieth-century scholarship laid siege to the triumphant narrative that had coalesced around Magna Carta for several centuries.⁵ The barons who brought King John to the table and extracted concessions from him were recast as self-interested feudal lords seeking to regain special privileges, not high-minded constitutional reformers. The mass of “freemen” to whom rights were granted in Magna Carta, and whom Creasy had read to encompass “every human being who breathes English air,”⁶ were reduced to include only freeholders, and perhaps only those who held land directly from the king. The “law of the land” promised in chapter thirty-nine was not, as generations of common lawyers had been taught to assume, the jury trial. Instead, these iconoclasts pointed out that if the original language of chapter thirty-nine secured anything for those without noble condition, it could only have been a right to the ancient trial by hot iron or water.⁷ Writing in the *Columbia Law Review* in 1914, Charles McIlwain surveyed these transformations in Magna Carta scholarship with some bemusement:

The famous thirty-ninth chapter . . . is now regarded by some eminent historians not as a document of popular liberty, but rather as one of feudal reaction. They consider it a concession to the demands of the barons for a return to the feudal anarchy of Stephen’s time and a repeal of the great administrative measures by which Henry II and his predecessors were molding a national judicial system, and thus preparing the way for a common law.⁸

It is hard to overestimate just how dramatic this revisionism was within the field of English constitutional history at the turn of the twentieth century. The great talisman of common law rights had been disenchanting, its heroic framers rendered petty and venal, and the Charter’s most well known protection, the jury trial, was reduced to an anachronism, erroneously, if happily, read into Magna Carta by later jurists. Rather than laying the foundation for a national guarantee of due process, the Charter had been rendered a mere instrument by which the barons sought a freer hand in their own individual lordships. It was a revisionist history, indeed, in which bad King John was made into a kind of John the Baptist preparing the way for a common law.

⁵ See McIlwain, *supra* note 2, at 27–28 (discussing scholarly interpretations of chapter 39 by McKechnie, Petit-Dutaillis, and others).

⁶ SIR EDWARD CREASY, *THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION* 151 (16th ed. London, Richard Bentley & Son 1892).

⁷ See Karl Blaine Shoemaker, *Criminal Procedure in Medieval European Law: A Comparison Between English and Roman-Canonical Developments After the IV Lateran Council*, 85 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE. KANONISTISCHE ABTEILUNG* 179 (1999).

⁸ McIlwain, *supra* note 2, at 27.

How did Magna Carta come to be the target of such revisionism one hundred years ago? In many respects, the scholarly reassessment was unavoidable. Driven by a rapid professionalization of the methods of English legal history, in which scholars like Frederick Maitland made insightful use of the plentiful records of everyday court practice in Medieval England, scholars in the late nineteenth century secured clearer insights into how, and how far, royal law penetrated the farthest reaches of the English realm in the centuries after the Norman Conquest.⁹ Maitland, moreover, had shown decisively that one of the most iconic features of medieval English law, the jury trial, was not, as some scholars held, a buffer by which local communities and individuals took shelter from the overreaches of royal law.¹⁰ Rather, the jury was itself an imposition of royal law, a mechanism by which reluctant neighbors were forced to tell tales upon one another in front of royal officials.¹¹ The jury did not even first sprout on native soil (it had Frankish antecedents). In this account, the jury did not arise as a buffer against royal law; it began as an extension of royal power. Further, in this new telling of medieval legal centralization, the barons more often appeared as impediments to the centralizing impulses of the Angevin kings than as defenders of a nascent national common law.¹²

But the revisionism was also in part a conscious reaction against the “cult of Magna Carta” that had taken root in the seventeenth century.¹³ The high priest of this cult was Sir Edward Coke, who, as McKechnie trenchantly put it, “following his vicious method of assuming the existence, in Magna Carta, of a warrant for every legal principle of his own day, misled generations of commentators.”¹⁴ From the seventeenth until the nineteenth century, Magna Carta was read with considerable consistency as the cornerstone of a national, constitutional project. According to this older view, the barons who extracted the Charter from John “did not confine it to themselves alone, but delivered it as a common blessing to the whole people.”¹⁵ In this light, the Charter was understood to “guarantee full protection for property and person” to every person on English soil.¹⁶ Said another way, the Charter guaranteed an “equal distribution of civil rights to all classes of freemen.”¹⁷ According to Bishop

⁹ See generally 1 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2d ed. 1903).

¹⁰ See *id.* at 140 (examining the connection between the jury and royal power).

¹¹ See *id.*

¹² See generally *id.*

¹³ The phrase is John Gillingham's. See John Gillingham, *The Anonymous of Béthune, King John and Magna Carta*, in *MAGNA CARTA AND THE ENGLAND OF KING JOHN* 27 (Janet S. Loengard ed., 2010).

¹⁴ MCKECHNIE, *supra* note 1, at 385.

¹⁵ *Id.* at 113 (quoting Lord Chatham, Oration to the House of Lords (Jan. 9, 1770)).

¹⁶ CREASY, *supra* note 6, at 151.

¹⁷ 2 HENRY HALLAM, *VIEW OF THE STATE OF EUROPE DURING THE MIDDLE AGES* 447 (7th ed. London, John Murray 1837).

Stubbs, in *Magna Carta* “[c]ause by clause the rights of the commons are provided for as well as the rights of the nobles This proves, if any proof were wanted, that the demands of the barons were no selfish exaction of privilege for themselves”¹⁸ They were, rather, “claim[s] for the nation at large.”¹⁹

These were the soaring visions of *Magna Carta* that historians set about systematically dismantling in the late nineteenth and early twentieth centuries. Nor were they particularly gentle about it. In his landmark 1905 study, McKechnie characterized chapter thirty-nine of *Magna Carta* as “reactionary . . . tending to restore feudal privileges and feudal usage, inimical alike to the Crown and to the growth of popular liberties.”²⁰ The French historian Charles Petit-Dutaillis had even earlier attacked the motives of the barons, arguing in 1894, “The barons had no suspicion that they would one day be called the founders of English liberty.”²¹ Rather, “they were guided by a crowd of small and very practical motives in extorting this form of security from John Lackland.”²² Elsewhere Petit-Dutaillis called the barons “childish and anarchical” and complained that they had “not the idea of law at all.”²³ Maitland, too, was in the revisionist camp: “Even in the most famous words of the Charter we may detect a feudal claim which will only cease to be dangerous when in course of time men have distorted their meaning.”²⁴ “In after days it was possible for men to worship the words [except through the judgment of his peers and by the law of the land] . . . because it was possible to misunderstand them.”²⁵ Against the inherited tradition of reverence for *Magna Carta* was placed a new kind of legal realism, stressing the banal and petty interests of petulant aristocrats.

McIlwain called these views, which stood the meaning of *Magna Carta*’s most famous provisions on their head, “radical and revolutionary.”²⁶ And he had a point. The new scholarship swept aside several centuries of learned tradition that had celebrated *Magna Carta* as a progressive step toward individual liberty and had hailed it as the cornerstone of right to a jury trial. “[A] promise of law and liberty and good government to every one” was the expression McKechnie wryly used before explaining that the guarantee of peer judgment and law of the land as it was first enshrined in the 1215 Charter should not really be regarded as a touchstone of law, liberty, and

¹⁸ 1 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT* 570–71 (1903).

¹⁹ J. R. GREEN, *A SHORT HISTORY OF THE ENGLISH PEOPLE* 124 (London, MacMillan and Co. 1875).

²⁰ MCKECHNIE, *supra* note 1, at 387.

²¹ CHARLES PETIT-DUTAILLIS, *ÉTUDE SUR LA VIE ET LE RÈGNE DE LOUIS VIII* (1187–1226) 57 (Paris, Librairie Émile Bouillon ed., 1894).

²² *Id.* at 58.

²³ CHARLES PETIT-DUTAILLIS, *STUDIES AND NOTES SUPPLEMENTARY TO STUBBS’ CONSTITUTIONAL HISTORY* 143 (W. E. Rhodes trans., 2d ed. 1911).

²⁴ POLLOCK & MAITLAND, *supra* note 9, at 173.

²⁵ *Id.* at 173 n.3.

²⁶ McIlwain, *supra* note 2, at 28.

good government for anyone save perhaps the barons.²⁷ But what did McKechnie mean by this? In order to show how the due process guarantees of chapter thirty-nine could be read as an impediment to a national law and good order, it is necessary to look closer at what precisely chapter thirty-nine secured in 1215.

II. CHAPTER THIRTY-NINE AND THE ORDEAL

Chapter thirty-nine of Magna Carta expressly forbade King John from imprisoning, exiling, or seizing the property of a “freeman” without first securing “the lawful judgment of [the man’s] peers or [and] by the law of the land” (*nisi per legale iudicium parium suorum vel per legem terre*).²⁸ That is, judgment must precede execution.²⁹ The phrase “by the judgment of [his] peers” captured a customary expectation, widely observed on the Continent as well, that no man should be judged by anyone of inferior station.³⁰ This did not originally have anything to do with a guarantee of a right to a criminal jury trial.³¹ Maitland showed decisively that the criminal petty jury did not exist in 1215.³² McKechnie argued convincingly that the phrase held the following meaning for John’s barons. First, the peers of a tenant were other crown tenants, and the court in which they would render judgment on a peer was the *Curia Regis*.³³ Similarly, the peers of a tenant of a *mesne* lord were other tenants of the same lord, and the court in which they would render judgment on a peer was the relevant baron’s court.³⁴ There were wider applications as well. Jews being sued by Christians were entitled to the judgment of their peers, other Jews.³⁵ Marcher lords might even claim a right to be tried by other marcher lords.³⁶ The phrase indicated, in other words, a demand to return to older practices; practices that John was widely viewed as having flaunted by appointing his own favorites to judge in disputes with his barons or by disregarding legal process altogether.

²⁷ MCKECHNIE, *supra* note 1, at 376.

²⁸ *Id.* at 375. There is some dispute concerning whether the clause should be read as “lawful judgment of peers *or* the law of the land” or “lawful judgment of peers *and* the law of the land.” *See id.* at 381–82 (providing a detailed discussion of the dispute).

²⁹ *See id.* at 377 (explaining the necessity of that clause).

³⁰ *See id.* at 377–78 (discussing English and Continental European procedure for selecting peers).

³¹ *See id.* at 377–78; POLLOCK & MAITLAND, *supra* note 9, at 173.

³² *See* POLLOCK & MAITLAND, *supra* note 9, at 173; *see also* MCKECHNIE, *supra* note 1, at 393.

³³ MCKECHNIE, *supra* note 1, at 378.

³⁴ *Id.*

³⁵ *See, e.g.*, 1 ROTULI CHARTARUM IN TURRI LONDINENSI ASSERVATI 93 (Thoma Duffus Hardy ed., 1837). *See generally* Paul Brand, *Jews and the Law in England, 1275–90*, 115 *ENG. HIST. REV.* 1138 (2000).

³⁶ POLLOCK & MAITLAND, *supra* note 9, at 410 & n.1 (discussing the Earl of Gloucester’s claim to the judgment of his peers, the lord of Marchers).

If the phrase “by judgment of [his] peers” designated the forum and composition of the court, “*per legem terrae*” (by the law of the land) indicated the procedure by which judgment would be found.³⁷ But again, this did not mean trial by a jury. While there is considerable ambiguity concerning what the “*lex terrae*” of chapter thirty-nine meant in 1215,³⁸ it can be convincingly argued to mean the trial by ordeal. In the legal text, *Glanvill*, for example, “*lex*” clearly meant tests such as battle or ordeal.³⁹ In the Assize of Clarendon, the ordeal is explicitly equated with “*lex*.”⁴⁰ In chapter twelve of the assize, red-handed thieves “shall have no law,” while mere suspects “shall go to the ordeal of water.”⁴¹ For the barons, the “*lex*” in this sense probably meant the *duellum*,⁴² trial by battle. The ordeal was more typically reserved for the unfree. Granted, “*lex terrae*” might also be used in less formal senses not associated with the ordeal, but in chapter thirty-nine, the usage seems to have meant the duel or the ordeal.

Neither the barons nor King John had any way to know that a few months later, in Rome, Pope Innocent III would promulgate legislation at the Fourth Lateran Council that effectively ended the use of the ordeal in Christian Europe.⁴³ Why does it matter that the process of law guaranteed by chapter thirty-nine included the ordeal? It matters in the first instance because it lends perhaps some force to the argument that the barons’ demands were antithetical to a national common law. Although it is highly doubtful that the barons regarded the duel or ordeal in precisely this way, they both were unruly forms “of trial that did not permit the consistent application of formal substantive rules to similar cases.”⁴⁴ Neither could they “be easily or effectively controlled from centralized royal or ecclesiastical courts.”⁴⁵ The judgments produced in the ordeal and duel were inscrutable and unreviewable. If the barons are not recorded expressing this view, such a view was captured in the critiques of the ordeal offered by twelfth- and thirteenth-century jurists and theologians.⁴⁶ It is possible that Stephen Langton, Master and future Archbishop of Canterbury, and key mediator

³⁷ See *supra* note 28 and accompanying text.

³⁸ See *id.*

³⁹ See, e.g., THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND, COMMONLY CALLED GLANVILL 36, 58 (G. D. G. Hall ed. & trans., 1965).

⁴⁰ See WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 144 (H. W. C. Davis ed. & trans., rev. 9th ed. 1921).

⁴¹ See *id.*

⁴² MCKECHNIE, *supra* note 1, at 393.

⁴³ 4 Lat. c. 38. CONSTITUTIONES CONCILII QUARTI LATERANENSIS UNA CUM COMMENTARIIS GLOSSATORUM 1–172 (Antonio García y García ed., MIC, Series A: Corpus Glossatorum 2; Vatican City, 1981) [hereinafter García y García].

⁴⁴ See Karl Shoemaker, “I Have Asked for Nothing Except the Ius Commune:” *Legal Change in Thirteenth-Century France*, in JEWS AND CHRISTIANS IN THIRTEENTH-CENTURY FRANCE 67 (Elishiva Baumgarten & Judah Galinsky eds., 2015) (exploring these issues in the medieval French context).

⁴⁵ *Id.*

⁴⁶ See, e.g., *id.* at 68–69 (discussing the criticism the ordeal received from theologians at the University of Paris).

between the king and barons in the years leading up to 1215, held this view. Langton's teacher at the University of Paris, Peter the Chanter, had been one of the leading critics of the ordeal.⁴⁷

Peter the Chanter was by no means alone. Though its use had become increasingly marginalized, not least by university elites who tended to condemn it, the ordeal remained an important feature of legal practice in England and the Continent at the dawn of the thirteenth century.⁴⁸ The Assizes of Clarendon and Northampton had assumed reliance on the ordeal for trying accused criminals, though they took precautions against repeat offenders who might pass the ordeal.⁴⁹ The ordeal remained, in particular, one of the primary modes of proof in criminal accusation against serfs.

A great number of ordeal formulas survive.⁵⁰ Typically, these formulas describe three classes of ordeal, though there were several variations, including a Eucharistic ordeal reserved for clerics.⁵¹ One popular form of ordeal required the accused to carry a red-hot piece of iron a predetermined number of paces.⁵² Another involved binding the accused and lowering him into a pool of sanctified water.⁵³ After completion of the ordeal of hot iron or water, a priest would examine the wounds.⁵⁴ If the wound

⁴⁷ John W. Baldwin, *The Intellectual Preparation for the Canon of 1215 against Ordeals*, 56 *SPECULUM* 613, 626–32 (1961) (providing careful exposition of Peter the Chanter's opposition to the ordeals).

⁴⁸ There is a rich literature on the ordeal. See generally ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* (1986); Baldwin, *supra* note 47; Peter Brown, *Society and the Supernatural: A Medieval Change*, 104 *DAEDALUS* 133 (1975) (looking at the ordeal among the superstitions of the time); Rebecca V. Coleman, *Reason and Unreason in Early Medieval Law*, 4 *J. INTERDISC. HIST.* 571 (1974) (looking at the ordeal within medieval socio-politics); Richard M. Fraher, *IV Lateran's Revolution in Criminal Procedure: The Birth of Inquisitio, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics*, in *STUDIA IN HONOREM EMINENTISSIMI CARDINALIS ALPHONSI M. STICKLER* 97–111 (Rosario Iosepho Card. Castillo Lara ed., 1992); Paul R. Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 90–126 (Morris S. Arnold et al. eds., 1981) (examining the link between ordeals and proof); Finbarr McAuley, *Canon Law and the End of the Ordeal*, 26 *OXFORD J. LEGAL STUD.* 473 (2006); Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 *SYRACUSE L. REV.* 109 (2000). My own somewhat polemical contribution to the debates is *Criminal Procedure in Medieval European Law: A Comparison Between English and Roman-Canonical Developments After the IV Lateran Council*. Shoemaker, *supra* note 7, at 174–202.

⁴⁹ Naomi D. Hurnard, *The Jury of Presentment and the Assize of Clarendon*, 56 *ENG. HIST. REV.* 374, 374–410 (1941).

⁵⁰ See MGH, *Legum*, section V, at 601 fols.; an English translation of a few selected formulas can be found in *SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES* 314–18 (Ernest F. Henderson ed. & trans., 1910) [hereinafter Henderson].

⁵¹ See BARTLETT, *supra* note 48, at 82.

⁵² Henderson, *supra* note 50, at 315.

⁵³ See *id.* at 316–17.

⁵⁴ *Id.* at 315–16.

festered, it was evidence of guilt.⁵⁵ If it healed cleanly, or showed no injury at all, it proved innocence.⁵⁶ Likewise, a body that sank when lowered into a pool of sanctified water was innocent, the water having freely received it.⁵⁷ A body that “swam” on the water’s surface was guilty, having been refused by the sanctified water.⁵⁸ Some of the older Frankish formulas likened this form of ordeal to baptism: “[I]f, however, thou art innocent, may the water which received thee in baptism receive thee now.”⁵⁹ The procedure for the ordeal of hot iron sometimes invoked Shadrach, Meshach, and Abednego directly, both tying the ordeal to Old Testament precedents and equating passing the ordeal unscathed with divine protection.⁶⁰ What linked the various forms of ordeal together was a belief that elements of the natural world could reveal God’s judgment through the flesh of the accused—unworthiness betrayed by festering corruption visible on the flesh.

As the analogy to baptism suggests, the ordeal formulas were peppered with liturgical and penitential significance. For example, when the hot iron ordeal was performed, the accused was to pray and fast for three days before undergoing the trial.⁶¹ On the appointed day, the priest, dressed in his vestments, consecrated the iron implement at the altar.⁶² Inside the church, young altar boys sang a hymn.⁶³ Outside, a fire was stoked.⁶⁴ While the iron heated, a mass was performed.⁶⁵ Afterward, the proband took up the iron and walked the prescribed distance, normally three paces, though the distance could be extended up to nine paces in some serious cases.⁶⁶ Afterward, the iron was set down and the wounded hand was bandaged so that the proband could pray and fast for three more days.⁶⁷ Some scholars have seen in this long duration of the process an intentional creation of time for social negotiation between feuding parties, presuming that the ordeal’s eventual outcome might be finessed to reflect a concord reached behind the scenes.⁶⁸ Finally, the priest examined the wounds in order to make a determination of guilt or innocence.⁶⁹ While the ordeal formulas tend to

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 317.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See HENRY C. LEA, SUPERSTITION AND FORCE 231 (Philadelphia, Henry C. Lea rev. 2d ed. 1870).

⁶¹ Henderson, *supra* note 50, at 314.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 314–15.

⁶⁶ See *id.* at 315.

⁶⁷ See *id.*

⁶⁸ HUNT JANIN, MEDIEVAL JUSTICE: CASES AND LAWS IN FRANCE, ENGLAND AND GERMANY, 500–1500, at 16–17 (2004).

⁶⁹ Henderson, *supra* note 50, at 315.

speak decisively in terms of guilt or innocence, medieval chroniclers sometimes saw in the ordeal room for God's merciful intervention on behalf of the guilty. At least in some cases, then, the ordeal was understood to render a spiritual accounting rather than a legal one.⁷⁰ Thus, the ordeal might be inscrutable as a factual determination, but it remained intelligible within the teachings of medieval theology.⁷¹

Despite legislation embracing it, the ordeal was not without skeptics. A number of high-ranking churchmen had begun expressing serious doubts about its use, at least in specific cases.⁷² Agobard, a Spaniard by birth who became the Archbishop of Lyon, thought the ordeal was impious and wrote two treatises attacking it in the ninth century.⁷³ The ordeal, he urged, was neither sanctioned by scripture nor particularly good policy.⁷⁴ Indeed, social groups who could secure exemptions from the ordeal generally tried to do so. High status groups—nobles, knights, and clerics—were often exempted from the water and fire ordeals, and as a consequence, being liable to ordeal process was often a mark of servile status. In France and England, Jews received, probably at their own request, explicit exemptions from the ordeal.⁷⁵ By the eleventh and twelfth centuries, some cities claimed an exemption against the ordeal for their citizens, apparently sharing the view held by medieval writers that the ordeal was a rural practice best suited for peasants.⁷⁶ Following this hint, some modern scholars have seen the ordeal as an ingenious device for deciding hard cases in small, integrated communities that lacked strong judicial institutions.⁷⁷ In this view, the ordeal might provide a platform upon which responsibility for difficult decisions could be transferred from local agents, against whom resentment of an adverse judgment might fester, and placed firmly in the hands of divine justice, which was perhaps more difficult to gainsay than local authority.⁷⁸

⁷⁰ See generally GALBERT OF BRUGES, *THE MURDER OF CHARLES THE GOOD* 288–89 (James Bruce Ross trans., Columbia University Press 1967) (discussing the results of the ordeal through the lens of God's control).

⁷¹ See Olson, *supra* note 48, at 110; Shoemaker, *supra* note 7, at 179–80, 197–201.

⁷² Pope Nicholas I, for example, forbade the judicial ordeal in the adultery accusations that Lothair II brought against his wife, Queen Teutberga. Baldwin, *supra* note 47, at 614 n.9 (citing Jaffé-Lowenfeld, *Regesta Pontificum Romanorum* no. 2872 (Leipzig 1885)). Pope Stephen V prohibited ordeals of iron or water in an accusation of infanticide. *Id.* (citing Jaffé-Lowenfeld, *supra*, no. 3443). Though, as John Baldwin points out, Stephen apparently confused the ordeal with torture designed to elicit a confession. *Id.*

⁷³ *Liber Adversus Legem Gundobadi et Impia Certamina Quae per eam Geruntur*; and *Liber Contra Judicium Dei* in his *Opera*, T. I. 107 sqq., 300 sqq. (Paris, Baluzius ed., 1666), and in *PL* 104:113–26 and 250–58; see also BARTLETT, *supra* note 48, at 72.

⁷⁴ See BARTLETT, *supra* note 48, at 72.

⁷⁵ See A. Esmein, *Les Ordailes*, in *ÉCOLE PRATIQUE DES HAUTES ÉTUDES* 1–7 (Paris 1886).

⁷⁶ *Id.*

⁷⁷ See, e.g., Fraher, *supra* note 48, at 98 (citing Brown, *supra* note 48, at 137).

⁷⁸ See Brown, *supra* note 48, at 135–36 (stating that the ordeals were the final decision of God and not human agency).

It is undoubtedly correct that medieval ordeal practices contained an element of penitential discipline and provided local communities with cover in hard cases. Even so, Richard Fraher has shown that the ordeal presented other challenges to ecclesiastical discipline.⁷⁹ For example, a motivated parishioner might offer to prove serious charges, for example simony or concubinage, against priests or bishops by submitting to an ordeal. Perhaps unsurprisingly, such attempts at proving by one's own body another's guilt appear to have had high success rates. The use of ordeals in certain cases posed a significant challenge to the papacy because it put clerics, and especially prelates, at the mercy of lay accusers and interfered with papal attempts to extend and centralize clerical discipline in the early thirteenth century.⁸⁰ From the papacy's perspective, it was better for ecclesiastical superiors to discipline clerics than to have such matters addressed by unpredictable and unreviewable ordeal processes.

Alongside the administrative and institutional challenges the ordeal posed, a sentiment had arisen among many theologians at the University of Paris that the ordeal was illegitimate as a theological matter.⁸¹ Coupled with the increasing doubts about the ordeal expressed by early thirteenth-century canon lawyers, and the fact that many communities sought to avoid using it where they could,⁸² it was possible for Innocent III to move decisively against the ordeal at the Fourth Lateran Council held in the fall of 1215, a few months after Magna Carta.⁸³ In canon 18 of the council, priestly participation in ordeals was prohibited, effectively removing whatever ecclesiastical sanction the ordeal had enjoyed.⁸⁴ Whether Innocent III's prohibition was enough on its own to end the practice is still a matter of debate, but it is clear enough that ordeal practice in Europe withered quickly after 1215.

The ramifications of the abandonment of the ordeal for legal process on the Continent were striking. The same Lateran council that effectively ended the ordeal in 1215 had provided directions for replacing it.⁸⁵ For example, in canon 8 the papacy tried to find a delicate balance between insulating clerics against false accusations of wrongdoing (which might be brought from spite or jealousy, and which the ordeal practice facilitated) and simultaneously increasing the Church's capacity for clerical discipline through legal processes.⁸⁶ The solution was a hierarchical arrangement in which ecclesiastics of superior rank could discipline clerics of a lower rank, yet were themselves insulated from accusations made by inferiors or by

⁷⁹ See Fraher, *supra* note 48, at 99–100.

⁸⁰ See *id.* at 107.

⁸¹ See Baldwin, *supra* note 47, at 626–30.

⁸² See generally Hyams, *supra* note 48, at 103–06 (discussing the decline of ordeals in communities).

⁸³ Stephan Kuttner & Antonio García y García, *A New Eye Witness Account of the Fourth Lateran Council*, 20 *TRADITIO* 115, 115–78 (1964).

⁸⁴ See, e.g., Baldwin, *supra* note 47, at 615.

⁸⁵ See *FOURTH LATERAN COUNCIL CONST.* Canon VIII (1215).

⁸⁶ See *id.*

laypersons.⁸⁷ Canon 38 placed important checks on some judges in these cases by requiring them to employ “a public official” or “two suitable men” to record the judicial process.⁸⁸ The aim was for accountability. The prescribed process required that a judge would oversee all the acts of the inquiry, namely, “citations, adjournments, objections and exceptions, petitions and replies, interrogations, confessions, depositions of witnesses, productions of documents, interlocutions, appeals, renunciations, final decisions and other things” which take place.⁸⁹ The scaffolding for modern European civil and criminal procedure was erected. All the steps in the inquiry were to “be written down in convenient order, the time, places, and persons to be designated.”⁹⁰ The stated purpose of this canon was to provide a record in cases where someone claimed they were subject to a “dishonest or imprudent” judge.⁹¹ But it did much more than this. It mandated the conditions under which all ecclesiastical litigation would be recorded and, therefore, amenable to review by superior judges within the ecclesiastical hierarchy, culminating with the Pope who was the *judex ordinarius* of everyone. Judges failing to comply with the requirement that their proceedings be recorded were liable to punishment.⁹² Taken together, these two canons represented the canon law’s solution to the end of the divine ordeal. Judicial inquiries were to follow a prescribed order—including allegations, responses, interlocutory appeals, depositions, etc.—and put into a written dossier that could be transmitted through a judicial hierarchy over which the pope presided. The obligations of pastoral care were taking on an increasingly juridical character.

Matters were developing rather differently in England. There, the response to the Church’s abandonment of the ordeal did not involve the erection of an inquisitorial judicial model. On this matter, chapter thirty-nine of Magna Carta demonstrated its inherent flexibility. The reference to ordeal in John’s 1215 Charter was altered slightly in the 1217 reissue. To the simple phrase “*lex terrae*” (“law of the land”) was added “*nec ad juramentum*” (“nor to sworn oath”).⁹³ McKechnie shrewdly saw this evidence that by 1217, the sworn testimony of the jury, its verdict, was replacing the now “discredited ordeal.”⁹⁴ Even so, it was only in 1219 that the Crown issued specific instructions to royal justices to use jury verdicts in place of the ordeal. As I have argued elsewhere, the common law trial jury stepped more or less into the space left open by the ordeal and retained some of its central features: no discernable separation of law and fact and no offering of a rationale for the judgment reached.⁹⁵

⁸⁷ *Id.*

⁸⁸ FOURTH LATERAN COUNCIL CONST. Canon XXXVIII (1215).

⁸⁹ *Id.* (translating García y García, *supra* note 43).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ MCKECHNIE, *supra* note 1, at 375.

⁹⁴ *Id.*

⁹⁵ Shoemaker, *supra* note 7, at 174–202.

One possible interpretation of all of this is that chapter thirty-nine was an attempt by the barons to secure the ordeal and to fend off the centralization of royal courts. This seems to be one of the pieces of evidence that McKechnie and others used to accuse the barons of wanting to return to feudal anarchy.⁹⁶ But this is probably not the best explanation for the procedural protections of chapter thirty-nine. The rapidness with which the procedural rights secured by the chapter came to be identified with the jury trial in later reissues of Magna Carta suggests that neither the barons nor anyone else was deeply invested in maintaining the ordeal practice.⁹⁷ So while chapter thirty-nine of Magna Carta did not originally secure a right to jury trial, it was sufficiently flexible in its scope that it could absorb the dramatic change in legal procedure accomplished by the Church shortly after the first issuing of Magna Carta. It is the case, however, that the jury practices developed after 1215 retained important ordeal-like features.

III. STEPHEN LANGTON

Indeed, chapter thirty-nine is probably better read as a fulfillment of a promise John had made in 1213, when he submitted to the barons' demand that he be absolved from his excommunication. Stephen Langton's role in these events is crucial. Langton's role has been treated at length in the scholarship, but a few points should be highlighted here. Langton had been elevated to the rank of cardinal by Pope Innocent III, who may have been his student at Paris.⁹⁸ In 1205, when King John and the monks at Canterbury could not agree on a new archbishop of Canterbury, Innocent III imposed his own choice, Langton.⁹⁹ King John objected, refusing Langton.¹⁰⁰ In response, Innocent III placed the entire kingdom under interdict.¹⁰¹ The legal ramifications of the interdict were significant. Among other things, valid marriages could not occur. And this certainly led to the pressures the barons were bringing to bear on King John. In 1209, Innocent III increased the pressure on John by excommunicating him.¹⁰² Still, John would not allow Langton to be installed as Archbishop. By 1213, Innocent III was actively recruiting the French King, Philip Augustus, to force John's hand.¹⁰³ Meanwhile, the barons were refusing to follow John in war across the channel into France, chafing under his increasingly predatory exactions and from the inconveniences of the interdict.¹⁰⁴ The barons told John they

⁹⁶ MCKECHNIE, *supra* note 1, at 378.

⁹⁷ See generally Hyams, *supra* note 48, at 113–17, 123–24 (discussing the decline of ordeals in favor of jury judgments).

⁹⁸ John W. Baldwin, *Master Stephen Langton, Future Archbishop of Canterbury: The Paris Schools and Magna Carta*, 123 *ENG. HIST. REV.* 811, 823 (2008).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 824.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See McIlwain, *supra* note 2, at 96.

would not follow him until he had his excommunication absolved.¹⁰⁵ This is the context into which Langton arrived when he returned to England in July of 1213. At Winchester, Langton absolved John of his excommunication. According to Roger of Wendover, Langton exacted sworn promises from John during the absolution, including a promise: to restore the good laws of his ancestors, especially the Laws of Edward the Confessor, that he would remove abuses, and that he would judge all his men according to the just judgment of his court and restore to each his right.¹⁰⁶

Only a short time later, however, after John ordered his barons to follow him to France, the northern barons refused, and John marched upon them with a mercenary army.¹⁰⁷ Archbishop Langton, who had absolved John, rushed to overtake John and finally caught up to him in Northampton.¹⁰⁸ There, he threatened to excommunicate John again and did not leave until he had secured from John a promise of a court day for the recalcitrant barons.¹⁰⁹ As John Baldwin showed in 2008, Langton had written extensively on the necessity that judgment precede execution.¹¹⁰ Baldwin's research showed that concerns with due process contained in chapter thirty-nine had been a preoccupation of Langton's when he was a master at the University of Paris.¹¹¹ At Paris, Langton was squarely in the anti-monarchical camp, and he spent considerable energy articulating arguments about the conditions under which royal authority must be obeyed, and when it can be disregarded.¹¹² Baldwin's key insight was that Langton had articulated an argument that royal commands were only binding if they followed a lawful judgment.¹¹³ So, after his disastrous campaign in 1214, when the northern barons were in open defiance and John sent mercenaries upon them, Langton could claim that John was violating his oath of the previous year. He was "going upon" and "sending upon" the barons without first obtaining a judgment against them.¹¹⁴ In this light, chapter thirty-nine of Magna Carta shows unmistakable signs of Langton's influence.

CONCLUSION

The harshest revisionists of the past century probably overstated the case against the barons. The barons may not have been as nationally and constitutionally high-minded as Coke and others had made them out to be, but the protections they sought in chapter thirty-nine of Magna Carta do not necessarily have to be understood as

¹⁰⁵ *Id.*

¹⁰⁶ ROGER OF WENDOVER, *CHRONICA SIVE FLORES HISTORiarUM* 2:81 (Rolls Series 1842).

¹⁰⁷ McIlwain, *supra* note 2, at 99.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See generally* Baldwin, *supra* note 98, at 827–29.

¹¹¹ *Id.* at 829.

¹¹² *See id.*

¹¹³ *Id.* at 817–18.

¹¹⁴ *See id.* at 830.

a return to the atomistic privileges of feudal lordships. Indeed, as Langton's influence on the Charter shows, the insistence that the king not act without first securing a lawful judgment could be easily traced to Langton's theological concerns about unjust kingship. The chapter secured nothing more than a guarantee that a judicial hearing must be had before the Crown could use coercive force. The methods of proof available at that judgment would be those that prevailed at the time—battle, ordeal, and compurgation. But chapter thirty-nine was pliable enough to very soon be understood as protecting the trial by criminal jury. This may be an anachronism, but it is one for which we can be grateful.