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Magna Carta, Civil Law, and Canon Law

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MAGNA CARTA
AND THE
RULE OF LAW

Foreword by Former Justice
Sandra Day O’Connor

Daniel Barstow Magraw, Andrea Martinez,
and Roy E. Brownell II
Chapter 11
Magna Carta, Civil Law, and Canon Law

Thomas J. McSweeney*

I. Introduction

In the spring of 1215, as King John (r. 1199–1216) and the barons were negotiating the terms of Magna Carta, bishops, abbots, royal ambassadors, and an army of advisers, servants, and clerks were preparing for a general council of the Western Church to be held at the Cathedral of St. John Lateran, in Rome, the following November. Pope Innocent III (r. 1198–1216) had called them together to make canons for the reform of the Church. On the agenda were the suppression of heresy, the provision of ministers who could preach in the language of their people, and the enforcement of clerical celibacy. The council was the first to require annual confession by all believers and the first to require Jews and Muslims to wear distinctive clothing. It was also responsible for certain reforms in the administration of Church law. It afforded due process before a sentence of excommunication could be pronounced and established a right of appeal, with the possibility of damages for an unjust sentence. It required every ecclesiastical judge to employ a notary to keep a record of his court. It decreed that no defendant was to be called before a court more than two days’ journey from his diocese. The council had an important impact, for good and ill, on Western Europe for centuries afterward. Some of its ripples are still felt today. And yet the Fourth Lateran Council is the forgotten event of 1215. It is overshadowed by the events that took place at Runnymede.

*The author would like to thank Nate Oman, Dick Helmholz, Joel Anderson, and Jason Taliadoros for their very helpful comments on an earlier draft of this chapter.

2. Id.
4. Id. at 654–55, 672 (canons 21 and 68).
5. Id. at 663–64 (canon 47).
6. Id. at 660–61 (canon 38).
7. Id. at 660 (canon 37).
The canons of the Fourth Lateran Council became part of the law of the Western Church, a body of law known as canon law. Canon law had been developing for centuries by 1215, but in the 70 or 80 years before Magna Carta, the study of canon law had taken a new turn. Europe's first universities were just starting to come together in the 12th century. The center of learning at Bologna in Italy actually coalesced around the teaching of canon law and its close cousin, Roman law. Romanists and canonists studied each other's laws, borrowed doctrines from each other, and shared a common, dialectical method of scholarship. The two were often referred to by contemporaries as utrumque ius ("both laws") or the ius commune ("the common law") and were treated by scholars in the universities, by the beginning of the 13th century, as forming a unified system. They were the two universal laws of Latin Christendom, one being the law of the secular power and the other being the law of the Church. The modern civil law—by twists and turns that took it through the age of nation-states and codification—is the descendant of this medieval ius commune.

The degree to which Roman and canon law have influenced the Anglo-American common law is a question that common law lawyers have been debating for a long time and, because Magna Carta is an important text of the common law tradition, scholars have naturally turned their attention to the possibility of Roman and canon law influence on Magna Carta. None of the authors who have written about Magna Carta's civilian pedigree have spent much time on the question of the mechanisms by which ius commune would have made its way into Magna Carta, however. When historians and legal scholars talk about influence from one system to another, they tend to assume that it occurs through some process of organic osmosis. Scholars have assumed that the people who were drafting Magna Carta saw ius commune and common law as parallel and coequal systems of law and would therefore have thought it natural to borrow doctrines from one to insert into the other. This is one possible model of ius commune influence and examples of this kind of influence do exist in 12th- and 13th-century English texts. The Bracton treatise is examined below as one example. But the ius commune influence found in Magna Carta is of a different kind, and a different model for understanding it is required.


This chapter looks more closely at those people in England who had been trained in *ius commune* and who had an interest in seeing it in Magna Carta. The central argument of this chapter is that where *ius commune* influence appears in Magna Carta, it is not there because someone in England thought the rules of Roman and canon law should be adopted into or adapted to the needs of the nascent common law. The *ius commune* influence in the text has very little to do with common law. Rather, this chapter considers another way people deployed *ius commune* in England in the 12th and 13th centuries—as a political language that they knew would appeal to the pope—and suggests that *ius commune*’s appeal to an audience in Rome was the main impetus for its inclusion in Magna Carta. Roman and canon law were used offensively and defensively in this period by the major players in England’s greatest political battles, such as the Becket dispute of the 1160s and 1170s. The two laws were useful because the pope was often an important figure in these political battles. He was one of the audiences that the various disputing parties were trying to please, and he understood the language of the *ius commune*. Previous scholars have done an admirable job of placing Magna Carta in the context of broader intellectual developments in law in the Middle Ages. To get a better view of how *ius commune* influenced Magna Carta, however, Magna Carta must be placed in the broader context of European politics, in which the fight between John and the barons was a sideshow to a larger story that involved reform of the Western Church. All politics are local, but in the case of Magna Carta, they were also international.

II. Magna Carta, the *Ius Commune*, and the Historians

R. C. van Caenegem, a Belgian historian of English and Continental European law, was the first scholar to seriously turn his attention to the possibility of *ius commune* influence on Magna Carta. Van Caenegem, whose work has been aimed at placing English common law in the context of the legal developments that were happening everywhere in Europe in the 12th and 13th centuries, suggested that there was some similarity between provisions of Magna Carta and rules of Roman and canon law. Richard Helmholz followed up on Van Caenegem’s suggestion in a highly detailed article, in which he examined Magna Carta chapter by chapter in order to make

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13. *Id.*
the maximum case for *ius commune* influence on Magna Carta. Helmholtz argued for the possibility of *ius commune* influence on 34 out of the charter’s 63 chapters (chapters 1, 4, 5, 7–12, 14, 20–22, 26–28, 30, 31, 33, 35, 36, 38–42, 45, 52–54, 55, 57, 61, and 63), a substantial portion of the text. The chapters vary considerably, however, in both the degree and the probability of *ius commune* influence. A few (chapters 1, 22, 52, 53, 57, and 63) clearly show the influence of canon law rules. Others merely bear some minimal resemblance to Roman and canon law rules. Helmholtz stops short of claiming that all of the chapters he outlines are the result of the influence of the *ius commune* on Magna Carta. Rather, his piece is a building block for further research, making the strongest possible case for *ius commune* influence everywhere he sees a reasonable possibility.

Helmholtz’s article sparked a lively debate about *ius commune* influence on Magna Carta. Kenneth Pennington built upon Helmholtz’s analysis of chapter 9 of the text, which dealt with the question of whether a creditor could seek redress against his debtor’s sureties if the debtor himself was available and solvent. Pennington bolstered Helmholtz’s argument that the rule stated in Magna Carta closely tracked the *ius commune* rule with evidence from canon law texts that would have been available in England in 1215. Helmholtz’s article has also attracted a critical response, however, in the form of John Hudson’s article, “Magna Carta, the *Ius Commune*, and English Common Law.” Hudson argues that most of the rules in Magna Carta that Helmholtz points to as evincing *ius commune* influence have other possible sources, in many cases more likely ones. For instance, Hudson disputes Helmholtz’s suggestion that chapter 20 of Magna Carta, which essentially says that a fine should be proportional to the gravity of the offense, is a borrowing from the *ius commune*. Helmholtz demonstrated that proportionality, as a general principle, appears throughout the *ius commune*. Hudson shows us, however, that the specific rule that a fine should be proportional to the gravity of the offense appears in many English texts, dating back at least to the early 12th century, a time before scholars had thought to combine Roman and canon law into a *ius commune* and before

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15. Id.
18. Id. at 265–67.
20. Id.
21. Id. at 104–05.
the first teacher of Roman law had arrived in England. The major problem for Helmholz’s maximalist case is that the drafters of Magna Carta did not unambiguously borrow any terminology from the *ius commune*, except in chapters 1, 22, 52, 53, 57, and 63, all chapters that deal with issues that implicated canon law, a special case that will be dealt with later in this chapter. The case for *ius commune* influence on the other 28 chapters Helmholz points to thus must be a circumstantial one, based on similarities in the ways rules in Magna Carta and the *ius commune* operate. As Helmholz admitted, “there is no smoking gun.”

III. Borrowing Style

Helmholz thought it was possible that “some of the drafters of the Charter . . . desired actively to advance the fortunes of the *ius commune* in England and saw this as an opportunity to promote that goal.” This is certainly a possibility. One early 13th-century text demonstrates the deep commitment to the *ius commune* as a system that Helmholz suggests. The treatise, now known as *Bracton*, was written by a succession of royal justices and their clerks. These authors were invested in making the practices of the English king’s courts more like those of the *ius commune*. *Bracton* was an attempt to describe the practices of the English king’s courts—the procedures that had grown up around the English writs—using the forms and terminology of the two laws.

In previous work, I have argued that *Bracton* evinces the same kind of approach to the *ius commune* that has been described by scholars such as Pennington and Manlio Bellomo in contemporary legal texts from continental Europe. Bellomo, in particular, has argued that even though Roman law was not applied directly as positive law in any court in Europe, it had a heavy influence on the secular legal systems throughout Europe, because there was a normative element to the notion that Roman law was a universal law. If it is a universal law, then the laws of kingdoms and cities should in some way reflect that universal law. Bellomo describes the *ius commune*’s role in medieval Europe in almost Platonic terms: *ius commune* is the ideal form of law, which should be reflected in the law as it is practiced in local

26. *Id.* at 367.
There certainly do seem to have been people who believed that, if their local law was to be worthy of the name, it should, in some way, reflect the universal glory of the *ius commune*. The justices who were involved in the writing and revision of *Bracton*—Martin of Pattishall, William of Raleigh, and Henry of Bratton—were committed to the notion that the law of the English king’s courts should conform to the *ius commune* to the extent possible. Romanisms appear in the trial records of all three justices, something that was extremely uncommon for the time. In the *Bracton* treatise, which was begun about a decade after the events at Runnymede, these justices were striving to explain the English writ system in terms of the Roman law of property, going to great lengths to make the two compatible even when they had to torture their texts to do so.

A person like Pattishall, Raleigh, or Bratton, committed to the idea that English court practices should in some way reflect the *ius commune*, would have several ways of showing that commitment in a text. Texts can draw their authority, at least partly, from being written in a particular style. The *Bracton* treatise, for instance, is written in a *ius commune* format. It is designed as a *summa*, a type of text that Roman and canon law scholars were writing at the beginning of the 13th century. A drafter of Magna Carta who was thinking like Pattishall or Raleigh might be expected to model the text of Magna Carta on texts that were common in the two laws. Imperial constitutions—the legislative acts issued by the Roman emperors—would have been a reasonable model. This was the model followed 16 years after Magna Carta by Frederick II, the Holy Roman Emperor (r. 1220–1250), when he issued the *Constitutions of Melfi* as a set of laws for his kingdom of Sicily. Although admittedly “not issued on the scale of the Roman codes,” but instead designed to “deal with problems specific to a kingdom in urgent need of reconstruction” (much like the provisions of Magna Carta, one might add), the *Constitutions* nevertheless draw on the genres used by Roman emperors to express the imperial will.
does not, however, follow the patterns of ius commune documents. It is written in the format of a charter of liberties, for which there are ample English antecedents, from the charters that established towns, to rural charters of liberties, to Henry I's (r. 1100–1135) coronation charter. The drafters of Magna Carta would have been familiar with all of these texts, as they drew on them for the substantive provisions of their charter.\footnote{William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 289 (2d ed. 1914) (discussion of borough charters); J.C. Holt, Magna Carta 67–68 (2d ed. 1992) (1207 charter of Peter de Brus to the freeholders of Langbargh); 1 The Chartulary of Guisborough 92–94 (W. Brown ed., 1889) (Latin text of Peter de Brus's charter); Holt, supra, at 36–38, 222–25 (discussion of Henry I's charter as a rallying point for the barons).} The charter genre is not a style that anyone would associate specifically with ius commune. If, among the drafters of Magna Carta there were any of the ius commune's true believers, they did not leave their mark in this way.

We might also expect the drafters of Magna Carta to use ius commune terminology in the text, even if only by accident; students of Roman and canon law often memorized large parts of their texts so they could recall them in an instant.\footnote{Mary Carruthers, The Book of Memory: A Study of Memory in Medieval Culture 127 (2d ed. 2008).} Van Caenegem, in stating the problem of finding ius commune influence in Magna Carta, put his finger on the primary issue, however, when he said that “it is no doubt significant that Magna Carta, unlike other old English legal texts, contains no Roman terminology.”\footnote{Van Caenegem, supra note 12, at 181.} To state the problem a bit more accurately, Magna Carta contains no terminology that unambiguously comes from Roman law\footnote{Helmholz suggests that the use of the word “delictum” in chapters 20 and 21 of the charter indicates the drafter was trained in the ius commune, as delict is a field of law in Roman and canon law roughly equivalent to the common law's tort. Helmholz, supra note 14, at 368. Hudson points out that “delictum” is also the general term for a wrong used in much of the Latin Vulgate version of the Bible. Hudson, supra note 19, at 108. Virtually anyone who could read and write Latin in the 13th century would have been familiar with at least parts of the Vulgate, so the use of the word “delictum” does not reveal much more about the person who drafted the charter than we already know, only that he was trained to write in Latin.} and further contains only six chapters (chapters 1, 22, 52, 53, 57, and 63) that draw on canon law terminology, which will be examined in more detail shortly.

Chapter 9 of Magna Carta is a case in point. This chapter—which states that as long as a debtor is capable of paying his debt, his creditors may not seek satisfaction from his pledges (what would today be called sureties)—is one of the best candidates for ius commune influence.\footnote{1215 Magna Carta ch. 9, in Holt, supra note 36, at 453.} The rule Magna Carta states was the current rule in Romanist and canonist circles in 1215.\footnote{Helmholz, supra note 14, at 318–19.}
Helmholz pointed out that it was not the rule followed in England before 1215 and it was not even followed in English courts after its inclusion in the 1215, 1216, 1217, and 1225 versions of Magna Carta, making a strong circumstantial case that it ran counter to notions of how debt should be handled in the English royal courts. One way to interpret this evidence is that the rule came from some outside source, such as the *ius commune*. And yet, the text from Justinian's *Novellae* that Helmholz cites as the principal *ius commune* text on the subject contains none of the same language as chapter 9. The text of the Roman novel reads as follows:

If anyone shall have loaned money and accepted a *fideiussor*, a *mandator*, or a *sponsor* [three different types of surety], he should not first proceed against the *mandator* or *fideiussor*, or *sponsor*, and he should not molest the intercessors of the debtor as a negligent person, but he should come first to him who took the money and contracted the debt. 

Magna Carta reads:

Neither we nor our bailiffs will seize any land or rent in payment of a debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties [*plegii*] of the debtor be distrained so long as the debtor himself is capable of paying the debt; and if the principal debtor defaults in the payment of the debt, having nothing wherewith to pay it, the sureties shall be answerable for the debt; and, if they wish, they may have the lands and revenues of the debtor until they receive satisfaction for the debt they paid on his behalf, unless the principal debtor shows that he has discharged his obligation to the sureties. 

The only significant word the two texts seem to share is *debitor*, the Latin word for debtor. Nothing else could have been borrowed from the Roman law text. Its format is markedly different. Where the novel is written in the form of a restriction on the creditor, Magna Carta's ninth chapter is written in the form of a promise to the surety. The novel focuses on what a creditor may and may not do to his debtor. The creditor is the subject and the verbs

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42. *Id.* This chapter does appear in the later reissues of Magna Carta. *1225 Magna Carta* ch. 8, in HolT, *supra* note 36, at 504.

43. “Si quis igitur crediderit et fideiussorem aut mandatorem aut sponsorem acceperit, is non primum mox adversus mandatorem aut fideiussorem aut sponsorem accedat, neque neglegens debitoris intercessoribus molestus sit, sed veniat primum ad eum, qui aurum accept debitumque contraxit.” *Nov.4.1.1.* (535) (translation by author).

are all in the active voice. Chapter 9 of Magna Carta begins in the active voice, but it states what the king and his bailiffs may not do, with no reference to the creditor. It then shifts into the passive voice, placing its focus on the sureties and what may not be done to them. The creditor never becomes a character in Magna Carta as he does in the Justinianic text.

Pennington cites two papal decretals—texts of canon law—circulating in England in the early 13th century that he argues could have supplied the rule. These are difficult to compare to any of the other texts because they are commands to two papal judges—the bishop of Ely and the archbishop of Canterbury—ordering them to proceed in a particular way. These decretals speak in specifics, not in the language of general rules seen in the novel and in Magna Carta. Pennington also cites a treatise that discusses the decretals, however: it is the Summa of Bernardus Papiensis, a canon law text that was almost certainly circulating in England in 1215. Like the novel, Bernardus’ text focuses on the creditor:

It should be noted that at one time a creditor could ask either the principal debtor or the surety for payment. Today, if the debtor is present and solvent, the surety [fideius sor] cannot be summoned. The debtor is obligated to the surety to free him from his obligation. Or if the surety pays the debt, the debtor is obligated to reimburse the surety for the principal and interest, as in Lucius’ decretals.

In this text, the author borrows some of his structure and patterns of thought from Justinian’s novel, which, as a scholar of canon law, Bernardus had undoubtedly read since the two laws were so closely related. The text begins by stating what the creditor may and may not do, just like the novel does. Bernardus’s explanation does bear one similarity to the text of Magna Carta. In its second sentence it focuses on what may not be done to the surety, in the passive voice. It then shifts to the debtor’s obligations, however, which do not appear in Magna Carta. Again, the potential source text bears little resemblance to the text of Magna Carta itself.

It is difficult to believe that, in a world where students of Roman and canon law memorized large portions of their legal texts, a proponent of the ius commune would have adopted ius commune rules without, at least accidentally, using some of the language and structure of the ius commune texts. How would a person trained in ius commune adopt a specific rule

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46. Pennington, supra note 17, at 267.
47. Id.
48. Carruthers, supra note 37, at 127.
from the *ius commune* without thinking about it in the terms in which the *ius commune* presented it? One does not adopt specific rules from a legal system simply because ideas from that system are in the air at the time. There must be some concrete mechanism for the borrowing. If that mechanism involved borrowing from *ius commune* texts, it is likely that the language of those texts would have left some mark upon Magna Carta.

It is of course possible that the drafters had reason to hide the rules' origins. Twenty-one years later, at the council of Merton, the barons would reject the canon law rule for legitimation of a child whose parents married after his birth, saying that they "did not wish the laws of England to change."49 Later in the century, the justice Roger of Thurkilby would reject canon law influence on the common law, saying, "[B]ehold now the civil court is befouled by the example of the ecclesiastical court and a stream is poisoned by a font of sulphur."50 It is unlikely that the drafters felt the need to hide *ius commune* origins, however, for the simple reason that, in six chapters of the charter (chapters 1, 22, 52, 53, 57, and 63), they used *ius commune* language explicitly. If there were parties with some animus against *ius commune* at the time, one would expect *ius commune* influence to be hidden in all parts of the charter, not hidden in some parts and explicit in others.

It is useful to compare treatment of the surety in the novel and Magna Carta to the treatment of the same problem in Bracton, because Bracton treats this issue in a much more Romanesque way. In a passage where he reconciles what appears to be a contradiction in outcomes between two cases that had been heard in the royal courts, one of the Bracton authors explains:

> [T]he contradiction is resolved thus, that in the first case, where the prohibition did not lie, the chief and principal debtor was summoned, and in the second the sureties [*fideiussores*] were summoned and impleaded, though the principal debtor was solvent, and where after the prohibition it was adjudged in the secular court that the parson should betake himself to the principal debtor who was solvent, and that the sureties [*fideiussores*] be quit.51

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49. 1 Frederick William Maitland, Bracton's Note Book 115 (1887) (translation by author).
The difference between this treatment of the issue of the surety and Magna Carta’s is striking. The authors of the Bracton text, royal justices themselves, were discussing cases that they had heard in the king’s courts. But instead of using the language they would have actually been using in the courts to describe what had occurred there, they used the language of Roman and canon law. The plegii who appeared in Magna Carta and who would have appeared in the plea roll record of the case become Roman fideiussores in the Bracton text. This text—like Justinian’s novel and the papal decretals, but unlike chapter 9 of Magna Carta—focuses on what the creditor can and cannot do. The Bracton authors even adopt styles of textual exposition from texts of Roman and canon law. Placing two authoritative texts beside each other and working out the apparent contradictions between them was a common way to teach in the Roman and canon law faculties of the universities. In other parts of the text, they cite and quote Roman and canon law directly. The justices who wrote Bracton wanted the world to know that they were making use of the ius commune. This is simply not the case in chapter 9 of Magna Carta. Bracton therefore represents the road not taken in Magna Carta. It demonstrates what Magna Carta could have looked like had it been written by the ius commune’s true believers.

IV. Canon Law and the Politics of Church Reform

All six of the chapters that contain express and unequivocal ius commune terminology (chapters 1, 22, 52, 53, 57, and 63) involve canon law. These six chapters have little to do with canon law influencing the common law, however. Canon law made its way into these six chapters because the struggle between the king and the barons in 1215 had become entangled with a battle that had been going on in England and the rest of Europe for the previous century and a half on the proper relationship between the Church and the crown: the Gregorian reform movement. The papacy and almost every kingdom in Europe had become involved in it in some way. It was this international dimension to John’s fight with the barons that probably led to the inclusion of canon law. As mentioned above, while John and the barons were negotiating Magna Carta, Pope Innocent was preparing a major council of the Church. The canon law in Magna Carta may have been intended to appeal to a pope who was concerned with Church reform.

The first and last chapters of the Charter (chapters 1 and 63), which grant freedom to the Church in perpetuity, are clearly tied to the reform movement. Chapter 1 specifies that this freedom includes the right to free elections, an important topic for Church reformers. In theory, bishops were elected by their cathedral chapters, which were composed of the senior clergy of the cathedral church. Abbots, likewise, were elected by the monks of their houses. In reality, bishops and the most important abbots were often picked by the king, who placed pressure on the electors to accept his candidates. Ecclesiastical elections were a live political issue in 1215. In 1207, the archbishop of Canterbury, Hubert Walter, died. John wanted a reliable supporter in that position, particularly since the archbishop of Canterbury was the most powerful ecclesiastic in England, and the king campaigned to put John de Gray into the post. De Gray was clearly John’s man: he had been part of John’s household before John was king, had become a chancery clerk under Hubert Walter after John ascended to the throne, and had secured the chancellorship for his nephew on Walter’s death. John even pawned the crown jewels to him at one point in exchange for some ready cash. The archbishopric would be both de Gray’s reward for a job well done and the king’s assurance that the archbishop of Canterbury would not oppose him.

John ran into problems, however. First, the bishops of the province of Canterbury claimed the right to participate in the election of its archbishop. Then the monks at Canterbury, worried that if they did not move quickly to assert their right to elect the archbishop they would lose the right to the bishops or the king, elected their own sub-prior archbishop. In the face of John’s wrath at their presumption they agreed to vote again and this time elected de Gray. Many of the monks were unhappy with this result, however, and a group of them appealed the irregular election to Pope Innocent III, who ordered a new election, recommending his old university friend, Stephen Langton, to the electors. The Canterbury chapter obligingly elected Langton in 1207, but he was unacceptable to John. Langton was an English theologian at the University of Paris, which was Latin Christendom’s foremost theological center; but Paris was also the capital of John’s principal rival, Philip Augustus, the king of France (r. 1180–1223). John saw Langton as too cozy with the French court and refused to allow him to take

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55. 1215 Magna Carta ch. 1, in Holt, supra note 36, at 448–51.
58. Id.
60. Id.
61. Id.
62. Id. at 161–62.
up his post. The result was a six-year battle with the papacy. Innocent placed an interdict on England, suspending most sacraments for England’s inhabitants, and excommunicated John. This battle ended only in 1213, when John surrendered England to the pope as a papal fief and became his vassal.

The battle between John, on the one hand, and Langton and Innocent on the other, was really part of a much wider struggle that had been going on for over a century. The Gregorian Reform movement, begun in the 11th century, sought to take the Church out from under the thumb of secular rulers. More generally, the Church reformers sought to separate sacred power from secular power. Reformers thought, for instance, that bishops should not be servants of kings. In Germany, the reform movement spawned a battle between the pope and the Holy Roman Emperor over the practice of laymen investing bishops with the symbols of their office. The reformers believed that bishops should not, even symbolically, be beholden to secular rulers for their offices. The reform movement was felt as far away as Iceland where, in the 12th and 13th centuries, reforming bishops attempted, with mixed success, to prevent secular chieftains from becoming priests, on the theory that no one person should wield both secular and sacred power.

In the late 12th century, the reform movement manifested itself in a spectacular seven-year battle between John’s father, Henry II (r. 1154–1189), and his archbishop of Canterbury, Thomas Becket. When Henry produced a text called the Constitutions of Clarendon, laying out what Henry claimed were the customs of England concerning the relationship between the Church and the Crown, Becket refused to assent to them. Henry claimed that the Constitutions merely represented the ancient customs of the English Church, but many, including Becket, claimed that they violated the Church’s liberties as detailed in canon law. William FitzStephen, one of Becket’s legal advisers, wrote during the debate that “Never is the Lord found to have said ‘I am the custom’; Rather, he said ‘I am the truth,” and, for William FitzStephen, that truth was expressed by the Church through the medium of canon law.

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63. *Id.* at 162–63.
64. *Id.* at 164, 208–09.
65. *Id.* at 164–69.
66. *Id.* at 208–09.
70. SMALLEY, supra note 11, at 128; 3 MATERIALS FOR THE HISTORY OF ARCHBISHOP THOMAS BECKET 47–48 (J.C. Robertson & J.B. Sheppard eds., 1877) (translation by author).
Canon law came into conflict with Henry’s customs in several ways. For example, where contemporary canon law stated that a cleric accused of a crime could be tried only in an ecclesiastical court, the Constitutions insisted that clerical felons were to be tried in the courts of the king. 71 This violated the principle of ecclesiastical liberty espoused by the reformers. After a struggle that included Becket’s trial, lengthy exile, and reconciliation with Henry, Becket was murdered in his own cathedral by four knights who thought they were doing Henry’s bidding. 72 Although Henry ultimately won on many of the points of law contained in the Constitutions, the Becket affair in many ways was a defining moment for England’s Angevin dynasty, a black spot they were never able to wash out completely.

The events of 45 years earlier still loomed large in 1215. Becket was, by then, a saint of international stature; his feast was celebrated as far away as Poland and Hungary. 73 He was a martyr for the liberties of the Church and John’s father Henry was painted as an enemy of reform, the villain in a saint’s life. Langton was compared to Becket—another archbishop of Canterbury driven into exile—and some propagandists for Church liberties fit the battles between John and Langton into a continuing story of Angevin resistance to the reform movement. 74

Canon law was an important medium for the reformers. It served as a sort of language of reform. With issues of Church liberty, freedom of elections, and the separation of priestly and secular power still in the air, canon law certainly could have had some influence in the drafting of chapters of Magna Carta that had to do with these issues. It is important to note, however, that a contemporary might not have looked at a provision on Church liberty and immediately identified it with canon law. Certainly canon law had something to say about the liberty of the Church, but Church liberty was also an issue discussed by theologians, like Langton. 75 The average Englishman might, by 1215, have merely thought of Church liberty as a political issue, one of the great debates of the day, rather than associating it specifically with the discourse of canon law, which was only one of many contexts in which it was discussed. Chapters 1 and 63, then, might not owe as much to canon law as they do to the Becket and Langton disputes.

Other sections of Magna Carta that concern Church liberties, like chapter 22, on the amercement of clerics, hearken more directly to canon law. In

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71. Stubbs, supra note 69, at 138.
73. Smalley, supra note 11, at 191–92.
74. Langton himself used the imagery of Becket to paint his fight with John as a continuation of Henry’s battles with the Church. Nicholas Vincent, Magna Carta: A Very Short Introduction 51 (2012).
the months leading up to the issuance of Magna Carta in June of 1215, the barons were concerned with amercements. One can think of amercements as something akin to modern fines; if a person committed a wrong against the king—which could include anything from breaching the king's peace, to bringing a false claim in court, to cutting down trees in the king's forest—that person was said to be in the king's mercy (in misericordia).\(^{76}\) The king would accept some kind of payment to let the person out of his mercy. For certain wrongs, such as failure to prosecute one's case, the payment was standardized and substantial, but not overwhelming. Half a mark, equivalent to one-third of a pound, was fairly standard.\(^{77}\) But John was famous for arbitrarily amercing his barons.\(^{78}\) This, along with John's other arbitrary financial exactions, would have been a major issue for the barons in 1215. Sometime in the period between 1213 and June of 1215, a group of barons issued a list of preliminary demands that are now called the Unknown Charter.\(^{79}\) The Unknown Charter included a copy of King Henry I's coronation charter, which the barons wanted John to confirm as a statement of the good, old law as it was observed in the time of John's great-grandfather.\(^{80}\) One chapter of Henry I's coronation charter that appears in the Unknown Charter reads:

If any baron or man of mine should have committed a wrong he will not give gage in mercy of the whole of his money as used to be done in the time of my father and brother, but according to the manner of the wrong.”\(^{81}\)

Henry I's charter essentially provides that the amercement should fit the crime. A baron should not be amerced for the whole of his fortune for a trivial offense. A more precise statement of this principle appears in the Articles of the Barons, a text produced in the days leading up to Magna Carta as a product of negotiations between the king and the barons, which was probably sealed by John on June 10 as a sign of his good faith: “[The

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\(^{76}\) 3 Curia Regis Rolls of the Reigns of Richard and John Preserved in the Public Record Office: 5–7 John 4 (A.E. Stamp ed., 1926) (example from 1203 of a litigant amerced half a mark for a disseisin).

\(^{77}\) Holt, supra note 36, at 333, n.109.

\(^{78}\) Warren, supra note 56, at 182.

\(^{79}\) Ralph V. Turner, Magna Carta Through the Ages 61–62 (2003); Holt, supra note 36, at 420–23.

\(^{80}\) Holt, supra note 36, at 240, 421. The unknown charter seems to have been written by someone with little background in the writing style of the English Chancery; it does not look like John's men were involved in writing it. It uses the third person and first person singular, while Chancery documents used the first person plural, what we would call the “royal we.” Id. at 419. It was probably drafted entirely within the baronial camp.

\(^{81}\) Id. at 426 (translation by author).
King concedes] that a free man is amerced for a small wrong according to the manner of the wrong, and for a great wrong according to the magnitude of the wrong.” 82 The articles add that a man cannot be amerced to the extent that it would destroy his livelihood and that the amercement is to be set by the upright men of the neighborhood. 83 All of these provisions can be found in earlier charters of liberties, granted to towns and rural communities. 84 They were fairly common liberties to purchase from one’s lord in the period leading up to 1215.

Chapter 10 of the articles adds something else, however, that was not included in Henry I’s coronation charter and was not commonly found in charters of the period. It adds that “a cleric is amerced from his lay fee according to the manner of the others aforesaid, and not according to his ecclesiastical benefice.” 85 This provision, modified slightly, became chapter 22 of Magna Carta. This meant that if a cleric was brought into a secular court for some reason and was amerced, the amercement could not be levied on the lands owned by the cleric’s church, only on those owned by the cleric as an individual. The cleric’s office, called his benefice, would have lands attached to it, which produced revenue for the support of the parish and its cleric. Canon law made it clear, however, that the lands belonged to the benefice, not to the cleric. Gratian’s Decretum, the standard textbook of canon law used in the universities and cathedral schools in 1215, summed up this position in the phrase, “the cleric does not make the fruits of the benefice his own.” 86 The rector merely had use of the rectory’s lands while he was rector, and the permissible uses were limited. Gratian developed this principle further, arguing specifically that a secular judge could not levy a judgment on a cleric’s benefice because “the delicts of the parson cannot be converted into an injury to the church.” 87

This was a countercultural position to take in 1215, when titles and secular offices were treated as personal property that could be purchased or even inherited by one’s heirs. 88 Gratian’s position was related to the reform movement. The reformers wanted to make the point that an ecclesiastical office was not like a secular lordship. Clerics should not be able to create secular dynasties and treat the Church’s wealth as family wealth. Rather, they should use the Church’s wealth for the cure of souls. The Church was

82. Id. at 431-32; TURNER, supra note 79, at 62. ARTICLES OF THE BARONS CH. 9, IN HOLT, supra note 36, at 434 (translation by author).
83. ARTICLES OF THE BARONS, IN HOLT, supra note 36, at 434.
84. Hudson, supra note 19, at 106.
85. ARTICLES OF THE BARONS CH. 10, IN HOLT, supra note 36, at 434 (translation by author).
86. Helmholz, supra note 14, at 331; C.12 q.5 c.4.
87. Id. at 330; C.16 q.6 c.3.
fighting established notions of land and service by severing the individual from his office and, perhaps more importantly, severing the lands that belonged to the person from the lands that belonged to the office. Canon law thus spoke specifically to the problem of the amercement of clerics and it is almost certain that the drafters of Magna Carta were taking their lead from the law of the Church when they included chapter 22.

Chapters 1, 22, and 63 of Magna Carta were clearly influenced by the reform movement and are therefore strong candidates for canon law influence. But why are they there? The traditional explanation is that Stephen Langton put them there. There is some support for this theory in the chronology of the drafting. All three chapters entered Magna Carta late in the process. The promise of free elections outlined in chapter 1, in particular, appears to have been an eleventh-hour addition. Langton and the other bishops came to the party late. They would eventually side with the barons, but in the early stages of baronial dissent they appear to have seen themselves as mediators rather than partisans. As the spring wore on, Langton and the bishops were increasingly throwing in their lot with the barons, however. Langton can be placed at Windsor with the king on June 9, the day before the articles of the barons were likely sealed, and, according to one source, he was in conference with the king for the better part of the day. He certainly had a motive to ask for the inclusion of these chapters. It is evident from Langton’s theological writings that he had an interest in the reform movement. He was either an old school friend or teacher of the pope, who was a reformer of the most extreme variety. Innocent was not content to simply separate the sacred power from the secular; he wanted to place all secular rulers beneath the pope, who was both king and priest in Innocent’s view. In addition, Langton had several canonists in his episcopal household who could have handled the details, although issues of

90. The promise of free elections appears in neither the unknown charter nor the articles of the barons. 1215 Magna Carta, in HOLT, supra note 36, at 448-51. The author would like to thank John Hudson for pointing this out.
91. Id. at 231. Despite Langton’s troubles with John between 1207 and 1213, the king seems to have trusted him in 1215. According to a safe conduct John issued on April 23 to the rebels who wished to speak with him, Langton was to lead them to John. Id. at 232; 1 Rotuli Litterarum Patentium in Turri Londinensi Asservati 134 (T. Duffus Hardy ed., 1833).
92. On May 27, Langton and Saer de Quincy, who was one of the rebels, received letters of safe conduct from John’s chancery so that they could meet with John on the barons’ behalf. HOLT, supra note 36, at 242. Saer de Quincy was the other baron who received letters of safe conduct.
93. Id. at 243.
94. Holdsworth, supra note 75.
95. SAYERS, supra note 1, at 18-19.
96. Id. at 88.
clerical amercement and the freedom of Church elections would not have required much conferral with professional jurists; both were salient issues that any learned cleric would have known about. 97

Langton had a motive to include canon law, he had the expertise necessary to do it, and his appearance in the negotiations coincides with the inclusion of these three chapters. The evidence does line up well with the hypothesis that Langton was the driving force behind chapters 1, 22, and 63. Langton is not the only possible source for these chapters, however, and other possible sources have not been given their due by historians. Both the barons and King John may have had reasons for including them even in the absence of urging from the clergy. When the charter was issued, the barons and the king were both trying to placate the pope, who must have been a primary audience of the charter. While negotiations were taking place in the spring of 1215, both sides launched appeals to Innocent, as John’s overlord, to decide who had the right of it. 98 John, remember, had become a papal vassal. Moreover, even apart from his unique role with respect to England, Innocent had immense prestige and influence within Christendom.

The barons must have been aware that, in order to secure Innocent’s support for the charter, they should include elements that would appeal to him. They had already clothed their rebellion in the sanction of the Church; when he assumed command of the rebel army in the spring of 1215, Robert FitzWalter named himself “Marshal of the Army of God and the Holy Church” in an attempt to claim that the barons’ authority to overthrow John was connected with John’s alleged impiety. 99 Adding two sections on the freedom of the Church and one on clerical amercements would not only show that the barons were concerned with things that were dear to the pope, but would also paint John as an impious king who had oppressed the English Church along with the English baronage, and who now had to be prevented from amercing Church property and interfering in Church governance. It would additionally place the conflict between John and his barons in the larger context of the fight between the sacred and secular powers as it was understood by advocates of the reform movement.

After Langton’s drawn-out battle with John over his election to Canterbury, which had resulted in an interdict that had deprived the barons, and everyone else in England, of the sacraments for five years, it must have been clear to the barons that the freedom of episcopal elections was a matter of

98. Holt, supra note 36, at 231.
importance for the pope, and that fighting for free elections would solidify their claim to being "the army of God and the Holy Church." The issue of clerical amercements may not have been as obvious to them, and is more likely to have been suggested by a cleric who was aware that this was something in which the clergy and the reforming papacy had an interest. The barons, however, would have had plenty of learned clerics in their party. In the early 13th century, as barons began to manage their estates personally, rather than placing vassals on them or farming them out, they relied more and more heavily on professional administrators. They often turned to clerics educated in the schools, who could keep written records of their estate management. Several of the barons are known to have had such clerics in their retinues in the rebellions of 1212 and 1215. They would not have necessarily needed to turn to Langton or the bishops for guidance on these issues.

We should also not discount the possibility that chapters 1, 22, and 63 were added by someone in John's party. John had learned how to manipulate the papacy during his extended battle to keep Langton out of the see of Canterbury. John had despoiled the Church during his excommunication and had earned a reputation for impiety. His status as an excommunicate had emboldened his enemies; a Welsh revolt, a plot to murder him, and a planned French invasion, all between the years 1212 and 1213, were justified under the banner of removing an excommunicate king from the throne, even if piety did not provide the initial impetus for any of them. John understood the power of religious rhetoric. In 1213, he was able to reverse the religious rhetoric against him and transform himself from the Church's enemy to its special ward and son. John showed himself to be a savvy politician who knew how to ingratiate himself with the pope. John knew that Innocent, an advocate of the position that the pope should be at the apex of the secular hierarchy as well as the sacred one, would jump at the opportunity to make the English king a vassal. When he surrendered England to Innocent as a papal fief and allowed Langton to take up his see, he forestalled the French invasion; moving against a special son of the papacy was very different from ousting an excommunicate king. Facing a rebellious baronage and an increasingly hostile episcopate, John showed again in 1215 that he knew how to manipulate the pope and prevent his enemies from taking action against him in the name of the Church. In May

100. Id.
102. Holt, supra note 36, at 283.
103. Warren, supra note 56, at 167–68.
104. Id. at 202–05.
105. Sayers, supra note 1, at 88.
106. Id.
of 1215, John took up the crusader’s cross. Whether John ever intended to fulfill his crusader’s vow and go to the Holy Land is beside the point. In May of 1215, it placed the barons in an awkward position. It was a sin to attack a crusader and John’s promise to launch a crusade pleased Innocent a great deal.

The issue of ecclesiastical elections specifically was on John’s mind in the months leading up to the issuance of the charter. Even after the Langton affair was over, John and Innocent continued to squabble over ecclesiastical elections, leading John to issue a special charter in November of 1214, a mere seven months before Runnymede, guaranteeing free elections to cathedral churches and monasteries. It does not require a great stretch of the imagination to think that, in June, when John was faced with baronial demands and wanted the pope to declare their rising an illegal act of rebellion, he would confirm the same provisions he had conceded to the pope seven months before. There is actually one bit of canon law in Magna Carta that assuredly was added by John, as it served only his interests. In three chapters (52, 53, and 57) that deal with land that had been unjustly confiscated or afforested by Henry II and Richard I (r. 1189–1199), John promised to make amends, but with a “respite for the usual crusader’s term.” At canon law, crusaders were immune from suit for a certain period of time. John was using his crusade vow and the canon law related to it as an excuse to delay the implementation of parts of the charter.


108. Id. As a sign of how completely John’s tactic worked to reverse the papacy’s policies against him, by 1219, the pope and his legate were actually supporting John’s minor son, Henry III, in his disputes with individual religious houses over Church and crown rights. As a vassal and ward of the papacy, the pope reasoned, the King of England was under his special protection. D.A. CARPENTER, THE MINORITY OF HENRY III 143 (1990).


110. 1215 Magna Carta chs. 52, 53, 57, in HOLT, supra note 36, at 464–69; Helmholz, supra note 14, at 349.

111. Helmholz, supra note 14, at 349.

112. It is worth noting that John may have taken this rule from the practices of his own courts rather than canon law. It appears that the royal courts were, by the early 13th century, granting respite to crusaders; Bracton allows an essoin, or excuse, to anyone who has gone to the Holy Land and specifically mentions crusaders who have left as part of a general crusade. A crusader is given a year and a day to respond to any writ brought against him while he is away. It is more likely that John drew this rule from canon law, however. At canon law, it was immaterial whether the crusader was present in England or absent. The royal courts’ essoin was useful only to the crusader who had actually left for the Holy Land, “beyond the sea of the Greeks.” John had not left for his crusade yet and fully expected to receive his respite. 4 BRACTON, supra note 51, at 75, 324.
We know Langton could look to the example of Becket and his supporters to find precedent for use of *ius commune* against the king. Becket’s episcopal *familia* had used it well.\(^{113}\) What is less well known is that John had precedents of his own to draw upon. When John’s father, Henry II, had put Thomas Becket on trial at Northampton in 1164, he used a Roman-Canonical trial format.\(^{114}\) This was not the ordinary way to try a recalcitrant subject before the English king. Henry must have known that, in the midst of a debate where the reformist clergy were representing him as a defender of unjust custom against the righteous truth—represented by canon law—he could defuse some of the antiroyal propaganda by turning Becket’s own language against him.\(^{115}\) If Becket was convicted using the forms of the royal court, it would be another sign of the king’s injustice. If he was convicted using the forms of the *ius commune*, however, it would be much more difficult to make that argument. Certainly Henry’s judicial performance was intended to speak to reforming clergy generally, but the pope, who would ultimately mediate the dispute between Henry and Becket, was likely Henry’s primary audience, just as Innocent was an audience for the performances of John, Langton, and the barons. John, like his father, had canonists in his own camp and clearly knew how to draw on canon law to serve his own interests.\(^{116}\) In the end, John played his cards well. In September of 1215, Innocent not only suspended Stephen Langton from his office, but declared Magna Carta to be “illegal and unjust” and a “shameless presumption,” because it was wrung from John’s hands under duress.\(^{117}\) The fact that Innocent ultimately used canon law to justify John’s position should give us pause in assigning the canon law influence in the charter to Stephen Langton and the barons.

V. Influence from Legal Practice

*ius commune* was a political tool that could be used to reach international audiences,\(^{118}\) and it was clearly used in this way in Magna Carta. All of the major players had incentives to include it—and to include it explicitly, in language that would be understood by readers as *ius commune*—in certain instances. But what of the many examples Helmholz produces of chapters of Magna Carta that contain the substantive rule of the *ius commune*, but

\(^{113}\) Smalley, *supra* note 11, at 160–63.


\(^{115}\) *Id.* at 386.

\(^{116}\) Brundage, *supra* note 97, at 96.

\(^{117}\) Warren, *supra* note 56, at 245.

\(^{118}\) Bellomo, *supra* note 10, at 83–111.
adopt none of its language? While I agree with Hudson when he argues that most of these chapters have more plausible explanations that do not involve the *ius commune*, there is another possible route of *ius commune* influence that has been underdeveloped in the literature: legal practice.

Although Pennington and Helmholtz do not say so explicitly, they seem to assume that, if there was *ius commune* influence on Magna Carta, it came through texts. The evidence they use for similarities between Magna Carta and the *ius commune* is primarily evidence from the texts of Roman and canon law that were being studied in the universities. But canon law was also practiced in English ecclesiastical courts. Canon law was the law in England and, as late as the 19th century, was a law that the average Englishman would come into contact with at some point in his life: issues like marriage formation and probate of personal property were within the exclusive jurisdiction of the ecclesiastical courts.119 The Church even claimed jurisdiction over contracts sealed by solemn oath.120 It had its own lawyers, trained separately from the lawyers of the common law courts.121 Most of the ecclesiastical jurisdiction has been subsumed into the common law in England and its former colonies and its origin in canon law has largely been forgotten. Probate and marriage are now issues for the regular state courts, but in 13th-, 14th-, and 15th-century England, and even much later, there was no such thing as a common law of probate or marriage formation.122

As noted above, Pennington discusses two papal decretals that stated the rule on sureties as it was stated in Magna Carta. Decretals were letters that the pope issued as legal rulings in individual cases. When the parties or the judges in an ecclesiastical court were unsure about the relevant law in a case, they could request a decretal on the matter.123 These decretals were a source of law in the late 12th and early 13th centuries, a type of ecclesiastical case law. They were brought together in decretal collections, which generated their own glosses and commentaries.124 The two decretals that Pennington cites were both issued in English cases, and both concerned litigation over debts. Pennington draws the potential line of influence from the decretals to Magna Carta through the *Compilatio Prima*, a decretal collection that was circulating in England at the beginning of the 13th century. It is entirely

120. Id. at 359.
121. Id. at 221-26.
124. Id. at 40-45.
possible that a learned cleric or justice who had read the *Compilatio Prima* or Bernardus' *Summa* was then involved in the negotiations for Magna Carta and wanted to include the canonical rule but, to hide its canonist origin, clothed the rule in an entirely different vocabulary. It requires a much smaller leap of the imagination, however, to posit that the barons had heard about these cases in the ecclesiastical courts, liked their rule better than the one the king's courts were offering, and demanded it in Magna Carta.

The two cases that produced these decretals were probably well known. At least one of them involved prominent litigants. In 1179, Stephen of Tournai stood surety for Peter of Blois for a debt Peter incurred on a visit to the papal court. Peter failed to pay his creditors, who began to hound Stephen for their money. Stephen, knowing that Peter had the means to pay, sued Peter in the archbishop of Canterbury's court and, sometime between 1181 and 1185, the pope issued a decretal siding with Stephen, relying on the Roman law rule that the debtor can recover against the sureties only if the primary debtor is insolvent. It would be surprising if elites in the 1180s were not talking about this case. At the time, Stephen was a canonist of international stature and abbot of the influential monastery of Sainte-Geneviève in Paris. Peter was a popular theologian, a Latin secretary and occasional ambassador for Henry II, and chancellor to the archbishop of Canterbury. He would become archdeacon of Bath during the course of the litigation. This case could have been the means of disseminating the *ius commune* rule that the creditors had to seek out the debtor first without communicating it in the vocabulary of the *ius commune*. People who traveled in the elite circles of late 13th-century England would know the result, but they probably would not have heard it quoted in the language of the decretal. When they told the story, nonclerical elites would likely have spoken about *pleges* in the French and Middle English vernacular spoken by the barons, rather than the Latin *fideiussores*. They would now know that if you stood as a pledge for someone who contracted a debt, the ecclesiastical courts would not force you to pay back the debt unless your debtor was insolvent, while the king's courts would require you to satisfy it even if the debtor had the means to pay. Some barons may even have had experience of their own with debt cases in the ecclesiastical courts. People in 12th- and 13th-century Europe engaged in forum-shopping; when the ecclesiastical courts offered a rule or procedure they preferred, they found

125. Pennington, *infra* note 17, at 266.
128. Id.
ways to get into them. A baron who was creditor to a cleric might sue the cleric or his clerical sureties in the ecclesiastical courts, which had personal jurisdiction over all clerics. Barons hired canon lawyers at times to help them navigate the courts of the Church, and those lawyers would almost certainly have known about the two decretals sent to England that constituted the controlling authority on the matter of sureties. Unfortunately, there are no surviving records from the Church courts of the early 13th century, so one cannot know for sure whether laymen did engage in this kind of litigation.

VI. Conclusion: Canon Law, Common Law, and 1215

*ius commune* did leave a mark upon Magna Carta, even if only a very small one. While it is possible that *ius commune* made its way into the text because English legal reformers were looking to the *ius commune* for ideas, there is really very little evidence for this reading of Magna Carta. The evidence more readily supports a conclusion that *ius commune* appears in the text as a political language, a common currency of the political class in the 13th century, forged in the fires of the Becket conflict and the Church reform movement, that certain players in the process could deploy to bring the pope, or the reformist branch of the Church more generally, into the conflict on their side. It was a political and religious language that could be used to give cosmic significance to their parochial concerns. Innocent was concerned with the separation of the sacred from the secular, with placing the papacy on a firmer footing, with the threat posed to him by the political situation in Sicily and the Holy Roman Empire, and with the project of recovering Jerusalem, which had been lost to Saladin 28 years earlier. England’s internal politics were of concern to him, but they were not the first thing on his mind. Both sides knew, however, that if England’s internal politics could be placed within the context of the reform movement, Innocent might become more inclined to intervene.

To the historian or lawyer who is primarily interested in how the *ius commune*, as one legal system, influenced the common law, as another, the answer that the *ius commune* in Magna Carta is mostly there as political posturing is likely to be unsatisfying. The historical debate about civilian influence on the common law has usually assumed the former kind of influence. Frederick William Maitland—who could rightfully be called the father

130. *Id.* at 188–89.
of the modern, academic study of English legal history—even made the case that the earliest English writs, those little pieces of paper that would become the building blocks for the common law system, were modeled on actions available in the ecclesiastical courts at the same time. Subsequent scholars have followed him in arguing for Roman and canon law precedents for the writs. The question of civil law influence on the common law has been reinvigorated in the past two decades. With globalization, common law and civil law are coming into contact more often and legal systems are drawing closer together. In the European context, the European Union has raised issues of common law and civil law compatibility. In spite of the U.S. Supreme Court's general unwillingness to accept foreign precedents, not even the United States has been fully insulated from this process. Any time an American lawyer needs to deal with Japan, China, continental Europe, or Central or South America, she is dealing with a civilian system. With the systems coming into contact, lawyers and historians have become interested in the historical connections between common law and civil law.

It is only natural that historians would extend their inquiry of civilian influence to Magna Carta, since the history of Magna Carta has been bound together with the history of the common law. When lawyers first started to make collections of English statutes in the late 13th century, usually in the form of small reference books that could be carried around as they followed the king's itinerant courts, Magna Carta was included along with the great statutes of Henry III (r. 1216–1272) and his son, Edward I (r. 1272–1307), even though it was not initially written in the form of a statute and it was not treated as one in 1215. These lawyers established Magna Carta as England's first statute, a place of honor it would hold in all subsequent statute collections. When Sir Edward Coke asserted the common law's independence from the Stuart monarchy in the early 17th century, he turned to Magna Carta to do it, presenting it as a statement of immemorial common law. And when a memorial was built at Runnymede in 1957, it was the

133. The assize of novel disseisin was, in Maitland's view, modeled on the ecclesiastical actio spolii. 2 Frederick Pollock and Frederic William Maitland, The History of English Law before the Time of Edward I 48 (2d ed. 1905); Donald Sutherland, The Assize of Novel Disseisin 21 (1973). For the contrary view, that the petty assizes have antecedents in longstanding English practices, not in the ius commune, see R.C. van Caenegem, The Birth of the English Common Law 44 (2d ed. 1988).
136. VINCENT, supra note 74, at 90–91.
137. TURNER, supra note 79, at 147.
American Bar Association that built it to honor Magna Carta’s role in the common law tradition.

In 1215, the idea that Magna Carta was one of the great, foundational texts of the common law was still in the future. Magna Carta started life in 1215 as a peace treaty, and not a very successful one. In fact, at the time Magna Carta was written, no one had yet thought to use the term “common law” to describe the work performed by the king’s courts. By 1215, English people were imagining that work as a single legal system for the whole of England; Magna Carta itself uses the terms *lex regni* (“the law of the realm”) and *lex terrae* (“the law of the land”), although both usages seem to have been relatively new in 1215, as they are attested in few other documents. The term “common law” would not make its first appearance until the 1240s, and it would not be used regularly to describe the law of the king’s courts until the 1270s.

Magna Carta does not supply the kind of civilian influence that common law historians are looking for. It does not show one legal system influencing the reform of another. Additionally, focus on Magna Carta often causes historians to miss the bigger picture with respect to *ius commune* influence on the common law. The *ius commune* has had an influence on English law and did from the very beginning. Canon law was ubiquitous in England in 1215. It was as much the law of England as the nascent common law was. Clerics and laymen alike would have had regular contact with the courts of the Church. Both the royal and ecclesiastical administration employed men trained in Roman and canon law in 1215. Some went as far away as Bologna to be trained in the two laws. Some were teaching it closer to home, at centers like Oxford and Lincoln. One must assume that great value was placed on *ius commune* learning in England if there were people who were prepared to commit several years to its study, possibly in a foreign country.

The ideas these scholars brought back from those periods of study might have had effects on the ways people thought about law and politics in England, even if they were not directly applying *ius commune* doctrine. The elements of *Bracton*, for instance, that had the longest impact on the

138. 1215 Magna Carta chs. 39, 42, and 55, in Holt, supra note 36, at 460–03, 466–07.


140. Brundage, supra note 97, at 224.


development of the common law were not its Romanist legal doctrines, many of which were actually out of sync with legal practice in the English courts and remained so after the treatise was written. Bracton’s influence was more subtle than that but also more fundamental. Roman and canon law gave the authors of Bracton a framework for thinking about the work they were doing in the royal courts—which could as easily be described as administrative work—as a coherent legal system held together by a structure of interlocking abstract concepts.  

It is possible that ius commune had already had similar effects on political thinkers in England by the time Magna Carta was drafted, and a few scholars have pursued this line of research. Cary Nederman, for instance, has suggested that theological and political thought from the schools influenced the way the drafters of Magna Carta thought about liberties. He argues that the concept of Church liberty, as espoused by learned figures like John of Salisbury, was qualitatively different from the contemporary lay concept of liberties as personal privileges that derive from the monarch’s will. Jason Taliadoros likewise suggests that ius commune concepts of subjective right might have influenced the way the drafters of Magna Carta thought about rights. This kind of influence seems more likely to have occurred by the kind of organic osmosis that historians of the common law usually assume. A person trained in one legal system might be taught to understand a word like “liberty” according to that system’s conventions and then carry that understanding over to another system. This subtle form of influence is also more satisfying than the borrowing of doctrine is. Doctrines change over time and most of the doctrines that Helmholz points to as having been borrowed from ius commune did not last. General concepts and ways of thinking about law, however, tend to last. Liberty became an important discourse in the Anglo-American legal tradition. If it owes something to canon law, then canon law has touched the common law in a fundamental way.

Oddly enough, one of the most significant elements of the common law, the criminal jury, did come about as a result of canon law influence and as a result of the events of 1215. Chapter 39 of Magna Carta—the famous, “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land”—usually gets credit for the right to trial by jury, but the origins of the criminal jury have nothing to do with Magna Carta. For the origins of the English criminal jury, one must

146. 1215 Magna Carta, in HOLT, supra note 36, at 461.
go back to the Fourth Lateran Council, because it was the canons of the Fourth Lateran Council and their ban on clerical participation in judicial ordeals that led to the widespread use of criminal juries in England.

Ordeals had been the primary procedure for determining guilt or innocence in criminal trials in the English royal courts up to 1215.147 The ordeal of iron required the accused to carry a red-hot iron several paces. The burns on his hands were wrapped and then unwrapped several days later. If the wounds had festered, the accused was judged guilty.148 In the late 12th century there was increasing skepticism about the efficacy of the ordeal, which largely centered on the fact that it was manipulable and forced God to give an answer on command.149 The Lateran Council, responding to these criticisms, forbade clerical participation in the ordeal. This severely hampered secular courts’ ability to hold ordeals; the ordeal required the presence and participation of a priest, who would hear the accused’s confession, give him communion, and bless the iron.150

After the civil war between John’s party and the barons ended in 1217, the new king’s regency council prepared to send justices into the counties on eyre circuits, the first regular royal courts to operate since 1215.151 The regents sent instructions to the justices in 1218 that they could no longer use trial by ordeal because of the canon of the Lateran Council, which they understood to ban ordeals altogether.152 They did not order the justices to begin using trial by jury, however. They merely instructed them to hold certain accused felons until the king’s government figured out what to do with them, and to release others if they could find sureties for their good behavior.153 The regents—who, it should be noted, had themselves reissued Magna Carta twice already, in 1216 and 1217—did not understand Magna Carta’s chapter 39, “no free man shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land,” to require a jury trial.154 The fact that the chapter contains an “or” itself implies that there were acceptable modes of trial apart from judgment of one’s peers. The “or” has had to be ignored or explained away by later generations of

149. Id. at 102–03.
150. Id. at 109–10.
153. Groot, supra note 147, at 10; Stenton, supra note 152.
154. 1215 Magna Carta, in Holt, supra note 36, at 461.
common-law lawyers who pointed to Magna Carta as the source of the jury right.\textsuperscript{155} When the justices began to use the jury as the primary mode of trial for felons, they did so as a matter of expediency, not because they believed that Magna Carta required trial by jury.\textsuperscript{156}

The Lateran Council created no right to a trial by jury, but it did make the jury the regular means of trial in the English courts. There would likely have been no jury right if the king's regents had not heeded the commands of canon law. The \textit{ius commune}, that combination of Roman and canon law that is the ancestor of the modern civil law, may not have left a significant mark on Magna Carta, but what little it did leave is useful for showing how \textit{ius commune} was operating in England in 1215. It was certainly the law of the ecclesiastical courts. There were some people who were interested in assimilating English law to the \textit{ius commune}, but to the major players in English politics—the people who drafted Magna Carta—it was primarily a language of political dispute, used to turn their local problems into the pope's problems.

\textsuperscript{155} McKECHNIE, \textit{supra} note 36, at 381 (arguing that the Latin word "vel" can mean "and").

\textsuperscript{156} Groot, \textit{supra} note 147, at 12–13, 18–19.