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BOOK REVIEWS

Magna Carta, Religion and the Rule of Law. Edited by Robin Griffith-Jones and Mark Hill. Cambridge: Cambridge University Press, 2015. Pp. 430. $39.99 (paper). ISBN: 9781107494367.

Studies, investigations, and celebrations of Magna Carta in its octocentenary year, 2015, have generally taken one of three possible directions: analysis of the Charter, its causes and effects in the early thirteenth century; assessment of the later reputation and use of the Charter in various periods, and of what this reputation and use tells us about those periods; assessment of the inspiration to be drawn from the Charter for contemporary thought about constitution, law, rights, and freedoms. The present volume seeks to include all three of these directions, brought together by concentration on two fields, religion and the rule of law, fields that some but not all of the contributors take to be related. Given these fields of interest, not surprisingly the book concentrates on only a few of the clauses of the 1215 Charter: part of clause 1, granting "that the English church is to be free, and shall have its rights undiminished and its liberties unimpaired"; clauses 39 and 40 (or clause 29 in the 1225 Charter that formed the basis of the text that entered statute books): "No free man is to be taken or imprisoned or disseised or outlawed 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. To no one will we sell, to no one will we deny or delay right or justice." Various of the chapters (especially chapters 11 and 14) also pay considerable attention to clauses 10 and 11, on relations between Jewish creditors, their debtors, and the king.

The volume is divided into four parts. Part one, "Introduction," consists of an essay by the editors, "The Relevance and Resonance of the Great Charter of 1215 for Religions today," a title indicating how the editors hope that the volume will pull together the historical and the contemporary in analysis of the Charter. This is followed by Lord Judge's elegant historical introduction to the Charter, which sounds a first warning about present-day distorted readings or interpretations of the text: "however the liberties of the Church were confirmed in Magna Carta, [clause 1] was not a declaration about—or designed to achieve—freedom of worship" (27).

In part two, "The Birth of Magna Carta and the Spread of Its Principles," most of the essays take the first two approaches summarized above: analysis of the Charter, its causes and effects in the early thirteenth century, or assessment of the later reputation and use of the Charter in various periods. In an essay titled "Due Process in Magna Carta: Its Sources in English Law, Canon Law and Stephen Langton," the late John Baldwin argues, as he has done elsewhere, that the production and the content of the Charter owes much to Stephen Langton, archbishop of Canterbury in 1215. This emphasis on Langton also appears elsewhere in the volume (e.g., 17). It is an element of a renewed emphasis on the religious and intellectual context of the Charter, in part in reaction to the more secular emphasis of the dominant twentieth-century writer on Magna Carta, Sir James Holt. The reopening of this issue is very welcome, but it risks underestimating the centrality of the baronial contribution to the Charter, the possibility that lay political thinking was quite sophisticated. For example, Baldwin notes certain legal collections that contain phrases similar to some in Magna Carta but states that "since these compilations survived in few copies it is questionable whether the contemporary barons ever encountered them directly" (33). This statement is simply incorrect: it is becoming clear that the baronial leader Robert fitz Walter had a connection with the most important of the collections, and also that, at least in London, there was much political, legal, and constitutional discussion that crossed any division between lay and ecclesiastical.

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Inclusion of an essay making the case contrary to Baldwin's would have helped, because too many of the later essays that look back to 1215 tend simply to take the centrality of Langton as established fact, as when Lord Sacks writes, "The Charter itself was in many ways the work of Archbishop Stephen Langton" (301; cf. his quotation from Holt at 309, a quotation based on a very different analysis of early thirteenth-century political thinking; see further George Garnett and John Hudson, introduction to J. C. Holt, *Magna Carta*, 3rd ed. (Cambridge: Cambridge University Press, 2015). The essay by R. H. Helmholz, "Magna Carta and the Law of Nations," again considers the intellectual setting of the Charter but does so in a new and very stimulating way. Helmholz has been the most learned and subtle of the advocates of considerable influence from Roman and canon law upon the Charter. He now develops a related but different argument, in part to explain the Charter's "seemingly strange mixture of large principle with minute details of legal practice":

> [These] strange bedfellows ... were different, but they were not discordant. ... Magna Carta, which was meant to form part of the *ius civile* in England, was undergirded by the law of nature and consistent also with the law of nations. It stated rules of positive law that gave effect to larger principles of justice contained in the more general sources of law. Removal of fish weirs, for example, was a concrete means of securing a freedom found both in the law of nature and the *ius gentium*: freedom of navigation. (76)

The remainder of the essays in this section are concerned with late medieval and early modern interpretations of Magna Carta. Margaret McGlynn assesses "readings," that is lectures in the Inns of Court, on clause 1 of the Charter to excellent effect in her essay "From Charter to Common Law: The Rights and Liberties of the Pre-Reformation Church." She shows how changes in these readings illustrate changes in law and legal thinking, for example changes regarding the exemption of English clergy and nuns from the jurisdiction of secular courts in serious criminal cases, also known as the "benefit of clergy": "The readings given on Magna Carta after 1511 spend little or no time on benefit of clergy, and it seems likely that they shared Snede's understanding of the privilege as a lay one. In practice this meant that it no longer belonged in discussions on the privileges of the Church, again reflecting how significant change over time was hidden beneath the general words of the chapter [i.e., clause 1]" (65). These words might be taken as a general warning that ahistorical use of the Charter must be undertaken with great care. John Witte, Jr.'s essay, "Towards a New Magna Carta for Early Modern England," is in many ways most interesting, and highly valuable, in showing the limitations of what seventeenth-century writers could find in the Charter, moving away from the common lawyers, in particular Sir Edward Coke, to others, most notably John Milton. Also very valuable and interesting is David Little's paper, "Differences over the Foundation of Law in Seventeenth- and Eighteenth-Century America." It is very appropriate that this essay comes at the end of part two, with its historical approach, as Little shows how complicated it is to work out the significance of the part played by Magna Carta in early American legal and constitutional thought, thereby questioning the basis for celebration of the Charter as a major influence on the U.S. Constitution: "the New England colonial experience in general, and the Rhode Island experience in particular, introduced into the American bloodstream a conception of the foundation of law, constitutional government and the protection of rights that was logically quite distinct from (however intertwined with) the English tradition of Magna Carta and common law" (153).

Part three, "Comparative Religious Approaches to Magna Carta's Rule of Law," moves away from the more strictly historical, the essentializing phrase, "Magna Carta's rule of law," showing the shift of perspective. In fact, part three might have been more aptly titled "Comparative Religious Approaches to the Rule of Law." Many of the essays, such as Norman Doe's, "The

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Still Small Voice of Magna Carta in Christian Law Today," use the Charter just as a starting point for distinct investigation. Wael B. Hallaq's "Quranic Magna Carta: On the Origins of the Rule of Law in Islam" is immensely valuable in providing an exposition of fundamental elements of Islamic legal thinking, an exposition that should stimulate valuable comparative analyses. Anver M. Emon uses clauses 10 and 11 of the Charter, on treatment of the Jews, in his "Shariʿa and the Rule of Law: Preserving the Realm." Sudipta Kaviraj, in "Democracy and the Power of Religion: Some Lessons from India," is one of the few authors to examine the security clause of the 1215 Charter, intended to ensure royal observance of the Charter's terms.

Part four, "The Contemporary Inheritance of Magna Carta," like most of part three, only engages with Magna Carta to a limited extent, largely either as a starting point for contemporary arguments or as a myth with contemporary power. Sir Rabinder Singh's "The Development of Human Rights Thought from Magna Carta to the Universal Declaration of Human Rights" primarily treats Magna Carta as a founding myth for an important element in modern legal and constitutional thinking, while Javier Martínez-Torrón barely touches on Magna Carta in his essay "Strasbourg's Approach to Religion in the Pluralist Democracies of Europe." Lord Sacks's essay, "The Great Covenant of Liberties: Biblical Principles and Magna Carta," does engage much more directly with the Charter, including with the thought of Langton and others. The notion of Magna Carta as covenant is stimulating, but care is needed with the historical evidence. He writes that the Charter "is in the form of a *covenant* of liberties: a covenant between God, the king and the people, laying down the principles on which the king would reign" (302). However, the Charter is *not* in the form of a covenant or agreement; the prior partial draft of the Charter known as the Articles of the Barons had indeed referred to a *conventio* or agreement between king and kingdom, but John made sure that this terminology was not included in the 1215 Charter. Rather, the Charter is in the form of a grant to God and to all the free men of the king's realm. If the Charter came to be considered a covenant, it was through the sort of process of adaptation that McGlynn and others analyze.

Such tensions between the various parts of the volume raise not only the issue of how well the volume holds together, but also how compatible are the three directions taken in the study and celebration of Magna Carta, which I outlined at the beginning of this review. In terms of the volume, this problem of cohesion is in part a matter of how closely related are the aspects of religion and rule of law. Some contributors are concerned with religious foundations for the notion of rule of law, some with the rule of law's effect on religion, in particular on freedom of religious observance. That there is no necessary link between rule of law and freedom of religious observance is the central point of the volume's pivotal article, that by Sir John Baker, "Magna Carta and Personal Liberty." This essay, both learned and sparkling, subverts many of the presuppositions that seem to underlie certain other essays and perhaps the premise of the volume itself. For example, Baker writes, "it is often supposed that English law was somehow based on the law of the Christian Church. This is deeply misleading. Those who created and nurtured the common law were, of course, Christians and influenced by Christian morality. But the basic ideas of property and obligation were pre-Christian" (87). The English church, or the Church of England, "has never been very interested in rights and liberties" (86). Common lawyers rather than churchmen are Baker's heroes, celebrated in language mingling that of great nineteenth-century Protestant historians with that of Maitland at his most satirical: "the common law did not sentence people to be burned alive for refusing to believe (or, rather, to profess belief) in fanciful abstractions; it would not so much as fine them for refusing to believe in the undeniable and observable truths of feudal tenure or primogeniture. It did not try people without telling them the case against them, or force them to accuse themselves by disclosing their private thoughts upon oath. The chief obstacle to freedom of

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religion, then, was the Church" (88). It was the common lawyers who in the sixteenth century struck against the inquisitorial procedures of the church, reliant as they were on *ex officio* procedure. And these lawyers were influenced by Magna Carta. It was they who were responsible for "the end of the oath *ex officio*, the forcible prying into men's hearts and minds with a view to punishment of their thoughts. Magna Carta had thus, in the end, played its part in the establishment of that liberty as well" (108). This questioning of the role of religion, this analysis of the changing effect of Magna Carta over time, raises very substantial problems for several of the essays in parts three and four—for example the critical attitude towards the secularization of law and its administration in Ali Gomaa's "Justice in Islamic Legislation," or the assumptions about the Charter displayed in Simon Lee's "The Cardinal Rule of Religion and the Rule of Law: A Musing on Magna Carta." It is at times unclear, indeed, whether all contributors have carefully read other essays in the volume even when they cite them. The essays in part four, furthermore, make one ponder the relationship between historical study of the Charter and the contemporary value of its myth. The editors state, "a contemporary understanding of Magna Carta, religion and the rule of law is impossible unless first it is viewed through the prism of history" (9). But what is meant by viewing through "the prism of history"? It cannot simply be the complete avoidance of anachronism and inaccuracy that hypothetically might be achieved through historical contextualization, because the volume also gives a sense of an atemporal value in Magna Carta. The interesting essay by Maleiha Malik, "Magna Carta, Rule of Law and Religious Diversity," raises a difficult point by suggesting that Magna Carta has been used as both a good and a bad "ethno-nationalist," symbol. The latter is referred to as "the misuse" of Magna Carta. Yet what of uses of Magna Carta that might be seen as positive in effect but again involve not just distortion of the thirteenth-century context of the Charter but simply an ignorance or an ignoring of the Charter's words? Are historians only to be called on to attack bad myths, while good myths are to be maintained on ahistorical utilitarian grounds? *Magna Carta, Religion and the Rule of Law* provides an excellent basis upon which historians, lawyers, religious thinkers, and political theorists can debate such thorny issues.

John Hudson
William W. Cook Global Law Professor, University of Michigan; Professor of Legal History, University of St. Andrews

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