

# APPEALING MAGNA CARTA

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## Abstract

In 1999, Professor Richard Helmholz published [\*Magna Carta and the Ius Commune\*](#), in which he argued that some of the ideas and language found in Magna Carta provide evidence that the early common law was engaging with the *ius commune*, the ancestor of modern civil law traditions. This Essay examines one piece of evidence highlighted by Helmholz and more recently by Professor Charles Donahue: that the Articles of the Barons, a preparatory document for Magna Carta, uses a phrase borrowed from canon law, *appellatione remota* (without possibility of appeal). Helmholz and Donahue pointed to its use as evidence that canon law formed part of the discussion when the drafters of Magna Carta were thinking about the common law. In this Essay, I argue that the use of this phrase is not actually evidence that canon law was being brought into discussions of the common law, since the phrase is used in the context of an ecclesiastical procedure. This example is nevertheless useful for highlighting some important features of Magna Carta. First, although there is a long tradition of associating Magna Carta with the common law, Magna Carta is not a text that is primarily about the common law. Rather, it contains provisions on several different types of law, including common law, forest law, and canon law, and underscores the pluralistic nature of English law in the thirteenth century. Second, the authors of the text seem to have gone to some length to keep these different types of law “discursively separate,” using common law terminology and canon law terminology only when appropriate to the context. And finally, although Roman and canon law were likely to have been part of the conversation about the contours of royal justice, they probably would have entered into the conversation at a high enough level of abstraction that they would not be visible in the text of Magna Carta. Overall, Magna Carta does not provide conclusive evidence whether contemporaries were thinking about Roman and canon law when reforming the common law.

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## Introduction

Around the time King Henry II and his advisers were experimenting with new ways of using writs, juries, and courts—experiments that would eventually coalesce into a legal tradition known as the common law—there was also a significant increase in interest in canon law and Roman civil law in the Latin West. Professor Kenneth Pennington has referred to this explosion of interest in Roman law and canon law as the “big bang,” and the use of that phrase is apt.<sup>1</sup> It occurred very quickly. In a period of a few decades, teachers of Roman and canon law spread throughout Latin Christendom. People from England travelled long distances, to Bologna, to study with the masters of Roman law there.<sup>2</sup> The first teacher of Roman law in England, Master Vacarius, arrived in the 1140s and there were people teaching Roman and canon law in Oxford from the 1170s at the latest.<sup>3</sup>

Roman and canon law were important in England. By the early thirteenth century, the king employed a number of people who were trained in the two laws and the Church applied canon law in its own courts.<sup>4</sup> The extent, therefore, to which the common law interacted with civil and canon law is one of the central questions of the scholarship on the early common law. Scholarly interest in this issue is, in part, a reaction to a traditional narrative about the common law that treats it as a peculiarly English invention. English exceptionalism looms large in the history of the common law. As Professor David Seipp observed, “the long-standing debate about Roman influences on the English common law has borne more than its share of hidden agendas and overt prejudices.”<sup>5</sup> Over the last few decades, however, there has been scholarly discussion of some of the hallmarks of the early common

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<sup>1</sup> Kenneth Pennington, *The “Big Bang”: Roman Law in the Early Twelfth-Century* 18 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 43, 70 (2007).

<sup>2</sup> THOMAS J. MCSWEENEY, PRIESTS OF THE LAW: ROMAN LAW AND THE MAKING OF THE COMMON LAW’S FIRST PROFESSIONALS 91–92 (2019).

<sup>3</sup> JASON TALIADOROS, LAW AND THEOLOGY IN TWELFTH-CENTURY ENGLAND: THE WORKS OF MASTER VACARIUS 3 (2006); L.E. Boyle, *Canon Law Before 1380*, in THE HISTORY OF THE UNIVERSITY OF OXFORD, VOLUME I: THE EARLY OXFORD SCHOOLS 531, 533 (J.I. Catto ed., 1984).

<sup>4</sup> MCSWEENEY, *supra* note 2, at 72–76; R.H. HELMHOLZ, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, VOLUME I: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S, at 125–26 (2004).

<sup>5</sup> David Seipp, *Bracton, the Year Books, and the ‘Transformation of Elementary Legal Ideas’ in the Early Common Law*, 7 LAW & HIST. REV. 175, 177 (1989).

law and whether Roman or canon law may have been part of the conversation when they were created. Scholars have discussed the possibility of Roman law or canon law influence on the assize of novel disseisin, the jury of presentment, and the trial jury.<sup>6</sup>

In 1999, Professor Richard Helmholz published a meticulously researched article that went through Magna Carta chapter-by-chapter, looking for evidence of Roman and canon law in that text.<sup>7</sup> Part of Helmholz's point in this article was that Roman and canon law likely influenced the development of the early common law.<sup>8</sup> This Essay examines one piece of evidence highlighted by Helmholz and more recently by Professor Charles Donahue: that the Articles of the Barons, a preparatory document for Magna Carta, uses a phrase borrowed from

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<sup>6</sup> R.H. Helmholz, *The Early History of the Grand Jury and Canon Law*, 50 U. CHI. L. REV. 613, 627 (1983); Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 LAW & HIST. REV. 537, 590 (1999); Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 AM. J. LEGAL HIST. 280, 295–305 (2006); Anne J. Duggan, *Roman, Canon and Common Law in Twelfth-Century England: The Council of Northampton (1164) Re-Examined*, 83 HIST. RSCH. 397, 407 (2010).

<sup>7</sup> See generally R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999).

<sup>8</sup> See, e.g., *id.* at 302–06, 311–14, 329–31, 347–50. Helmholz's piece has elicited debate. Professor John Hudson, for instance, has argued that most of the evidence for Roman law or canon law in the text is ambiguous. Hudson points out that the only unambiguous references to the two laws in the Charter appear in six chapters that have to do with the Church and matters within its jurisdiction; we would expect to find canon law doctrines and terminology in chapters such as these, as canon law would, jurisdictionally, be the proper law to apply in such matters. John Hudson, *Magna Carta, the Ius Commune, and English Common Law*, in *MAGNA CARTA AND THE ENGLAND OF KING JOHN* 99, 110–11 (Janet S. Loengard ed., 2010). I myself have written in response to Helmholz, arguing that the paucity of language derived from Roman and canon law in the charter is suspicious and that, in several chapters where we do find it, the terms and ideas we find may not have been coded as canon law by contemporaries, as they had become part of a broader language of political debate. Thomas J. McSweeney, *Magna Carta, Civil Law, and Canon Law*, in *MAGNA CARTA AND THE RULE OF LAW*, 281–83 (Daniel Barstow Magraw, Andrea Martinez & Roy E. Brownell eds., 2014). In response, Donahue has argued that, given the prevalence of Roman and canon law in England in 1215, “[i]t is only if one adopts a particularly rigorous form of Ockham’s Razor that one can exclude what seems to be a relevant element of context.” Charles Donahue, *“The Whole of the Constitutional History of England Is a Commentary on This Charter”*, 94 N.C. L. REV. 1521, 1543 n.77 (2016).

canon law, *appellatione remota* (without possibility of appeal). Helmholtz and Donahue pointed to its use as evidence that canon law was part of the discussion when the drafters of Magna Carta were thinking about the common law.

In this Essay, I argue that the use of this phrase is not actually evidence that canon law was being brought into discussions of the common law, since the phrase is used in the context of an ecclesiastical procedure. This example is nevertheless useful for highlighting some important features of Magna Carta. First, although there is a long tradition of associating Magna Carta with the common law, Magna Carta is not a text that is primarily about the common law. Rather, it contains provisions on several different types of law, including common law, forest law, and canon law, and underscores the pluralistic nature of English law in the thirteenth century. Second, the authors of the text seem to have gone to some length to keep these different types of law “discursively separate,” using common-law terminology and canon-law terminology only when appropriate to the context. And finally, although Roman and canon law were likely to have been part of the conversation about the contours of royal justice, they probably would have entered into the conversation at a high enough level of abstraction that they would not be visible in the text of Magna Carta. Overall, Magna Carta does not provide conclusive evidence that contemporaries either were or were not thinking about Roman and canon law when reforming the common law.

## **I. Without Possibility of Appeal**

In June of 1215, a group of rebellious barons presented King John with a list of demands. Known today as the Articles of the Barons, they bear the heading, “These are the chapters which the Barons seek and the lord king concedes” and bear the king’s seal at the bottom, which was probably applied to them on June 10, just five days before the famous meeting at Runnymede where King John assented to Magna Carta.<sup>9</sup> They were clearly used in the drafting of Magna Carta; all of the demands made in the Articles appear in Magna Carta, although most of the chapters were altered in some way, often significantly, in the days between the sealing of the Articles and the sealing of the Charter.<sup>10</sup> The supposition is that King John placed his seal upon the Articles as a signal that he was generally willing to accede to the barons’ demands. But negotiations continued over the

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<sup>9</sup> DAVID CARPENTER, *MAGNA CARTA* 18 (2015).

<sup>10</sup> *Id.*; John Hudson, *From the Articles of the Barons to Magna Carta*, in *ANGLO-NORMAN STUDIES XXXVIII: PROCEEDINGS OF THE BATTLE CONFERENCE*, 2015, at 8 (2016).

next few days, and many of the specifics were altered before those demands, recast as promises and written in the royal voice, were promulgated in Magna Carta.

Chapter 25 of the Articles deals with King John's unjust disseisins, as well as those committed by his two predecessors: his brother, Richard I, and his father, Henry II. The barons complained that John and the two prior kings had deprived people of their land by their own will, without obtaining court judgments. Chapter 25 of the Articles says that King John is to immediately restore land to anyone who has been unjustly disseised, and provides a process for deciding cases where there is dispute about whether the disseisin was unjust.

At the end of Chapter 25, however, the text says "and the archbishop and bishops are to deliver judgment at a specific day, without the possibility of an appeal (*appellatione remota*), as to whether the king ought to have the term of other crusaders."<sup>11</sup> The text is referring to the "crusader's respite," a doctrine of canon law that "suspended most legal actions against absent crusaders."<sup>12</sup> John had taken up the crusader's cross on March 4, 1215, just a few months before Magna Carta was issued, creating a question as to whether he should be given the crusader's respite with respect to the types of claims against him discussed in Chapter 25.<sup>13</sup> This chapter specifies that the archbishop of Canterbury and the other English bishops were to make a decision as to whether John would receive the respite, and that there was to be no appeal from that decision.

Helmholz focuses on the last words of the chapter, *appellatione remota*, roughly meaning "without possibility of appeal" (literally "with appeal having been withdrawn."). He rightly points out that this phrase comes from canon law, and was a technical term used to signal when a decision could not be appealed to a higher authority.<sup>14</sup> When Chapter 25 of the Articles was reworked into Chapter 52 of the 1215

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<sup>11</sup> *Articles of the Barons*, in MAGNA CARTA AND THE RULE OF LAW 281 (Daniel Barstow Magraw, Andrea Martinez & Roy E. Brownell eds., Henry Summerson trans., 2014); J.C. HOLT, MAGNA CARTA 364 (3d prtg. 2015) ("[E]t si rex debeat habere terminum aliorum cruce signatorum, tunc archiepiscopus et episcopi faciant inde iudicium ad certum diem, appellatione remota.").

<sup>12</sup> Helmholz, *supra* note 7, at 349.

<sup>13</sup> *Id.* at 348.

<sup>14</sup> *Id.* at 307–08.

Magna Carta, however, the words “*appellatione remota*” were deleted.<sup>15</sup> Helmholz uses this example to make the point that the drafters of Magna Carta “would have felt little hesitation in ignoring, modifying, or rejecting rules from the *ius commune* where they did not fit local conditions or needs.”<sup>16</sup> In this case, Helmholz says, it was removed because, although the general idea of preventing a delay in justice by limiting the right to appeal was likely attractive to the drafters, “use of the term made little sense in a common law setting, because in 1215 the common law knew no system of appeals in the canonical or the modern form.”<sup>17</sup> Donahue, agreeing with Helmholz, likewise says that the phrase was removed because it was “totally inappropriate in an English context.”<sup>18</sup> Thus, as Helmholz and Donahue see it, canon law was part of the preliminary discussions for the drafting of this chapter on unjust disseisins. It was ultimately rejected as inappropriate in the context of this common law procedure, but had been part of the behind-the-scenes debate about what to do about unjust disseisins.

## II. Appropriate to the English Context

When Helmholz and Donahue point out that the words *appellatione remota* were included in the Articles of the Barons, but were removed before the final version of Magna Carta was issued because “use of the term made little sense in a common law setting,” they imply that the appearance of the words *appellatione remota* shows us that ideas from Roman and canon law may have influenced the common law in ways that are not necessarily evident on the face of Magna Carta.<sup>19</sup> Donahue notes that responses to Helmholz’s piece have not explained “how ‘*appellatione remota*,’ a technical term in canon law, made it into the Articles of the Barons (c. 25) . . . a provision that does not concern the clergy.”<sup>20</sup> If canon law was part of

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<sup>15</sup> See CARPENTER, *supra* note 9, at 56–57 (Magna Carta, ch.52). Chapters 53 and 57 also contain discussions of the crusader’s respite. Chapter 53 discusses disputes over land that was afforested (declared to be royal forest) by John’s brother and father, wardships of heirs that the crown has claimed, and abbeys that have been founded on lands other than the royal demesne. *Id.* at 58–59 (Magna Carta, ch.53). Chapter 57 mirrors the provisions of Chapter 52, but concerns Welshmen who have been disseised. *Id.* at 60–61 (Magna Carta, ch.57).

<sup>16</sup> Helmholz, *supra* note 7, at 307.

<sup>17</sup> *Id.* at 308.

<sup>18</sup> Donahue, *supra* note 8, at 1543.

<sup>19</sup> Helmholz, *supra* note 7, at 308.

<sup>20</sup> Donahue, *supra* note 8, at 1543.

the discussion behind Chapter 52 of Magna Carta, perhaps it was behind other chapters, as well. This may have been the one, chance survival of discussions that took place concerning many of the chapters of Magna Carta. It may be the tip of an iceberg.

The problem with this line of argument is that the relevant portion of Chapter 25 is not about common law at all; rather, it is about an ecclesiastical procedure. Chapter 25 of the Articles reads in full:

If anyone has been disseised or dispossessed without judgment by the king of lands, liberties, and his right, it is to be restored to him immediately; and if a dispute arises about this, it is to be settled by judgment of the twenty-five barons; and those who were disseised by the king's father or brother are to have their right without delay by judgment of their peers in the king's court; and the archbishop and bishops are to deliver judgment at a specific day, without the possibility of an appeal, as to whether the king ought to have the term of other crusaders.<sup>21</sup>

The chapter discusses three procedures. First, for disseisins that had been made by John himself, the king was to restore the lands immediately. If there was any dispute as to whether the disseisin was unjust, the Articles turn to the twenty-five barons to judge between John and the plaintiff. Here the Articles refer to a body that would be described in more detail in the final version of the Charter. Chapter 61 of Magna Carta, usually referred to as the security clause, calls for the barons to choose twenty-five of their number to enforce the terms of the Charter. If John or his officials violated the Charter's terms, the Charter empowered them to distrain the king.<sup>22</sup> For this first group of disseisins, the twenty-five barons would sit as a court and decide the claims. Second, for those who were disseised by John's predecessors, Richard I and Henry II, Chapter 25 states that judgment was to be by their peers in the king's court.

A provision stating that there was no possibility of appeal from these two types of procedures would likely have been redundant and inappropriate, as Helmholz and Donahue suggest, as there was nothing quite like an appeal in the modern sense in the king's courts. But the words *appellatione remota* are not attached to these two types of proceedings. They are attached to the third: the archbishop and the bishops are to deliver judgment on the issue of whether John will

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<sup>21</sup> *Articles of the Barons*, *supra* note 11, at 281; see HOLT, *supra* note 11, at 364 (providing the quote in the original Latin).

<sup>22</sup> CARPENTER, *supra* note 9, at 62–65 (Magna Carta ch.61), 325–31.

receive the crusader's respite. It is from this judgment that the text says there shall be no appeal. And here the words are less out of place. The text is discussing a judgment by bishops, which the drafters may have thought of as an ecclesiastical procedure. Appeals were certainly known in the ecclesiastical courts. The drafters were presumably worried that if the bishops gave a judgment that was not to John's liking, denying him the crusader's respite, John would appeal to the pope. In other words, once we realize that the words *appellatione remota* are applied to an ecclesiastical procedure, they do not seem inappropriate to the context at all.

Indeed, the fact that the words *appellatione remota* are used here highlights some important things about Magna Carta. Magna Carta is not solely, or even primarily, a text about the common law. Over time, Magna Carta came to be perceived as part of the common law. A text confirming Magna Carta in 1297 stated that Magna Carta should be "allowed as common law," and in later centuries the idea developed that Magna Carta was simply a declaration of the common law.<sup>23</sup> In the seventeenth century in particular, both Magna Carta and the common law came to be associated with England's "ancient constitution."<sup>24</sup> Both came to be seen as expressions of a kind of liberty that was peculiarly English.

But while Magna Carta came to be perceived as a part of the common law, the common law is not its primary subject. Magna Carta does contain several important provisions on the law of the king's courts. Chapters 17 to 21 all concern fairly specific issues related to the practices of the king's courts.<sup>25</sup> When it came to royal justice, the drafters of Magna Carta wanted more of it, not less, demanding that the king's justices visit each county four times a year, for instance.<sup>26</sup> They wanted royal justice to be more regular and less bound to the

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<sup>23</sup> SIR JOHN BAKER, *THE REINVENTION OF MAGNA CARTA, 1216–1616*, at 13–15 (2017). Statutes were often perceived in this way, as minor tweaks or improvements to the common law, and partaking of the common law's essence. In the seventeenth century, Sir Edward Coke was an important proponent of the idea that Magna Carta was essentially a restatement of the principles of the common law, identifying Magna Carta with the common law, and both with English liberties. *Id.* See also J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY*, A REISSUE WITH RETROSPECT 44–46 (1987).

<sup>24</sup> POCKOCK, *supra* note 23, at 44–46.

<sup>25</sup> CARPENTER, *supra* note 9, at 44–47.

<sup>26</sup> *Id.* at 45–46 (Magna Carta, ch.18).



king's arbitrary will.<sup>27</sup> But Magna Carta contained provisions related to other types of courts and other bodies of law. It contained several provisions about the law of the forest, which contemporaries treated as a distinct body of law. As the author of the twelfth-century *Dialogue of the Exchequer* put it, forest law was “separate from the other judgments of the realm” and “based not on the common law of the realm, but the arbitrary institution of princes.”<sup>28</sup> Additionally, canon law is expressly referenced in provisions about the Church and the clergy. As Professor Jason Taliadoros recently pointed out, it is useful to think of Magna Carta as a pluralistic text.<sup>29</sup> Different provisions of Magna Carta deal with different types of law. Thus, the fact that a canon law phrase appears in the Articles of the Barons or in Magna Carta does not, by itself, provide evidence that canon law was entering into discussions about the common law. We would expect to find canon law in a provision that discusses an ecclesiastical proceeding.

Magna Carta thus reflects the pluralistic legal culture of thirteenth-century England, in which there were a number of different types of courts with overlapping jurisdiction, that applied different bodies of norms: canon law, common law, and forest law, among others. That, in itself, is important to point out. We often think of England as a monolithic common law system. When Sir William Blackstone wrote in the eighteenth century about the “Laws and Customs of England,” he imagined those laws and customs as being synonymous with the common law. Even in Blackstone's time, this was a fantasy. The common law of Blackstone's time existed alongside other types of law, such as equity.<sup>30</sup> But in the context of 1215, when the king's court might still be described as an extraordinary jurisdiction designed to

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<sup>27</sup> *Id.* at 44–47 (Magna Carta, chs.17, 18, 19), 52–53 (Magna Carta, chs.39, 40).

<sup>28</sup> JOHN HUDSON, OXFORD HISTORY OF THE LAWS OF ENGLAND, VOLUME II, 871–1216, at 455 (2012) (quoting RICHARD FITZ NIGEL, *DIALOGUS DE SCACCARIO* 90 (Emilie Amt ed., 2007)) (alterations omitted). When Magna Carta was reissued in 1217, the chapters on the forest were removed and expanded upon in a separate Charter of the Forest. CARPENTER, *supra* note 9, at 412.

<sup>29</sup> Jason Taliadoros, *Legal Pluralism Past and Present: Magna Carta and a First Nations' Voice in the Australian Constitution*, in *THE IMPACT OF LAW'S HISTORY: WHAT'S PAST IS PROLOGUE* 277, 285–91 (Sarah McKibbin, Jeremy Patrick & Marcus Harmes eds., 2022).

<sup>30</sup> Philip Girard, ‘Of Institutes and Treatises’: Blackstone's *Commentaries*, Kent's *Commentaries* and Murdoch's *Epitome of the Laws of Nova-Scotia*, in *LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE* 48–49 (Angela Fernandez & Marcus D. Dubber eds., 2012).

handle only certain types of cases, placing too great an emphasis on the common law is even more misleading. England had a number of different types of courts and bodies of legal norms.

The fact that England in 1215 was a legally pluralistic society does not necessarily mean that the boundaries between its various courts and their customs were permeable. And if the boundaries *were* permeable, we have to ask *how* permeable. Professor Kenneth Pennington has argued that those boundaries were likely very permeable. Pennington has argued that scholars who draw lines between common law and Roman or canon law are engaging in the balkanization of law. Pennington sees this as a relic of nineteenth-century thought about legal systems. The writing of history in the nineteenth century was heavily influenced by nationalism; histories were, for the most part, national histories, and the discipline of history developed largely as a nationalist enterprise, to tell the story of the nation-state.<sup>31</sup> Pennington is certainly correct that nineteenth-century nationalism has cast a long shadow and still influences the way we write the history of law today. In the context of the common law, nineteenth-century nationalism combined with a much older tradition of treating the common law as exceptional, both different from and superior to continental civil law. We find this theme at least as far back as Sir John Fortescue's writings in the fifteenth century, but we also see it in, for example, Sir Thomas Smith's writings in the sixteenth century, in which Smith claims that the common law did not employ judicial torture, as the civil law did, because it makes people "servile," and the English are free.<sup>32</sup>

The later nationalist understanding of the common law is an important part of the background to the current debates about the interactions between the early common law and civil and canon law, and it has certainly led to strange and overblown claims about the exceptionalism of the common law. This is one of the reasons why scholars such as Helmholz, Donahue, and Pennington have found it so important to emphasize the canon law in Magna Carta, to point out that Magna Carta was not a uniquely English production, but a part of a cosmopolitan thirteenth-century legal culture.

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<sup>31</sup> See generally Ken Pennington, *Reform in 1215: Magna Carta and the Fourth Lateran Council*, 32 BULL. MEDIEVAL CANON L. 97 (2015).

<sup>32</sup> Much of Fortescue's *De Laudibus Legum Angliae* (*On the Praise of the Laws of England*) is concerned with demonstrating the superiority of the common law over the civil law. See SIR JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 29–66 (1997); SIR THOMAS SMITH, DE REPUBLICA ANGLORUM 105 (L. Alston ed., 1906).

Pennington is clearly correct that nationalist history is the wrong lens through which to view the common law of the thirteenth century. But there is evidence that people in thirteenth-century England observed significant boundaries between different bodies of law. The fact that Magna Carta uses canon law terminology when discussing canon law and common law terminology when discussing common law appears to fit more neatly with a point recently made by Professors John Hudson and Sarah White about William Longchamp, who served as bishop of Ely, papal judge-delegate, justiciar of England, and chancellor during the reign of Richard I. William sat regularly as a judge in both secular and ecclesiastical courts, and even wrote an *ordo judiciariorum* for the ecclesiastical courts, explaining court procedure.<sup>33</sup> Hudson and White have pointed out that people like William were able to “happily operate within multiple legal jurisdictions” and to keep the rules of secular and ecclesiastical courts “discursively separate.”<sup>34</sup> They argue that contemporaries saw this as a matter of the custom of the court; different courts had different customs, and it was important to observe the customs of the court in which one was sitting.

By 1215, it would make sense for a person working in both of these courts to keep their separate bodies of legal knowledge “discursively separate.” The king’s courts had already developed a technical vocabulary in both Latin and French that was quite distinct from that of canon law.<sup>35</sup> Professor Paul Hyams argued that the fact that so much of the vocabulary of the common law derived from French hints that much of the thought and debate that went into the creation

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<sup>33</sup> BRUCE C. BRASINGTON, *ORDER IN THE COURT: MEDIEVAL PROCEDURAL TREATISES IN TRANSLATION* 172–96 (2016).

<sup>34</sup> Sarah White & John Hudson, Professors, Legal Jurisdictions Project Workshop (Jan. 22, 2021). We find another example of the same phenomenon in Jocelin of Brakelond’s description of Abbot Samson of Bury Saint Edmunds. Samson served as a justice in the royal courts and as a papal judge-delegate. Jocelin describes Samson’s education in secular and ecclesiastical law in very different terms, however, as if these two types of courts required different sets of skills altogether. MCSWEENEY, *supra* note 2, at 80–81.

<sup>35</sup> See generally Paul Brand, *The Latin of the Early English Common Law*, in *LATIN IN MEDIEVAL BRITAIN* 133 (Richard Ashdowne & Carolinne White eds., 2017); Paul Brand, *The Languages of the Law in Later Medieval England*, in *MULTILINGUALISM IN LATER MEDIEVAL BRITAIN* 63 (D.A. Trotter ed., 2000).

of the early common law took place in French, rather than the Latin of Roman and canon law, suggesting a degree of discursive distance.<sup>36</sup>

Not everyone in England thought that Roman and canon law, on the one hand, and common law, on the other, should be kept discursively separate. The authors of the Bracton treatise, for instance, thought that if the law of the king's courts was worthy of the name "law," it should be possible to describe it in Roman law terms, although they actually found it fairly difficult to do this. The law of the royal courts was different enough from Roman law by the 1230s that it was hard to express one using the terminology of the other in any kind of consistent way.<sup>37</sup> Of course, one could borrow ideas from canon law and use them to discuss the king's courts while still keeping the two fields discursively separate; one could, for example, borrow doctrines while maintaining the technical terminology of the court in which he was sitting. But there does seem to have been a sense, at least among some people, that when one was sitting in the king's court, one should apply the customs of that court, and when one was sitting in the ecclesiastical court, one should apply the customs of that court. There were people in England who had strong opinions about this. Matthew Paris (c. 1200–1259), the well-connected chronicler of St. Albans Abbey, claimed that in 1251, the senior justice of the court of common pleas, Roger of Thirkleby, in response to the king's use of *non obstante* clauses to annul previously granted privileges, lamented that "[t]he civil court is now tainted by the example of the ecclesiastical, and by a sulphurous spring the stream is poisoned."<sup>38</sup>

There were people like Longchamp who were operating in multiple sets of courts, but that fact alone does not mean that canon law must have been brought to bear on discussions about the common law. There is ample evidence that people who were trained in canon law could separate the discourses of canon law and common law, and often did, and for perfectly medieval reasons that had nothing to do

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<sup>36</sup> Hyams also notes that, intriguingly, most of the language of proof derives from Latin and is "taken more or less directly from the Roman law system." This might suggest that the discursive distance was more important in some areas than in others. Paul R. Hyams, *Thinking English Law in French: The Angevins and the Common Law*, in FEUD, VIOLENCE AND PRACTICE: ESSAYS IN MEDIEVAL STUDIES IN HONOR OF STEPHEN D. WHITE 175, 183 (Belle S. Tuten & Tracey L. Billado eds., 2010).

<sup>37</sup> MCSWEENEY, *supra* note 2, at 106–07.

<sup>38</sup> *Id.* at 15; MATTHEW PARIS, 5 CHRONICA MAJORA 211 (Henry Richards Luard ed., 1880).

with the nation-state.<sup>39</sup> They accepted that different courts had different customs. Ideas and terms that were appropriate in the ecclesiastical court might not be in the king's court and vice-versa.

We need, then, to think about the ways in which the boundaries between these bodies of norms may have been permeable. In Magna Carta itself, the drafters seem to have kept the different types of law discussed in the charter discursively separate. All of the unambiguous uses of canon law terminology occur in chapters of the Charter that deal with the Church or ecclesiastical procedure.<sup>40</sup> Magna Carta uses canon law language in those places where canon law is relevant and it uses common law language in those places where common law is relevant. The drafters may have actually been drawing fairly careful lines around the different legal discourses that are present in the text.

When we see *appellatione remota*, it is because the drafters of the Articles of the Barons were discussing an ecclesiastical procedure, where those words would have been wholly appropriate and not at all surprising. And this makes a certain amount of sense; the level of terminology was probably the level at which these discourses were the least permeable. By 1215, common law and canon law had developed their own, very different, technical terminologies, and it would have been fairly obvious even to a person who operated in both sets of courts when he was using the terminology appropriate to one rather than the other. The same is probably true on the level of legal rules and practices. It would have been easy to identify which rules belonged to which court, as Roger of Thirkleby identified the use of *non obstante* clauses with ecclesiastical practice.

Pennington is probably correct that habits of thought brought over from canon law might affect someone like Longchamp, who also presided over secular courts, in more subtle ways.<sup>41</sup> His training might affect the way he approached problems, for instance. The drafters of Magna Carta were probably not even aware of the habits of thought they had developed during their Roman law or canon law training, and may not have even consciously associated those habits of thought with

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<sup>39</sup> Kenneth Pennington, *The "Ius Commune," Suretyship, and Magna Carta*, 11 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 255, 255–58 (2000).

<sup>40</sup> Indeed, three of the six chapters that unambiguously refer to canon law are about a single topic: the crusader's respite. CARPENTER, *supra* note 9, at 56–57 (Magna Carta, ch.52), 58–59 (Magna Carta, ch.53), 60–61 (Magna Carta, ch.57).

<sup>41</sup> Pennington, *supra* note 31, at 124.

Roman and canon law.<sup>42</sup> In my own work on the Bracton treatise, I argue that Roman and canon law influenced the thinking of a group of royal justices about what it meant to be a person whose identity was built around their work with law, what we might call a lawyer in the broadest sense of the word.<sup>43</sup> And when Helmholz discusses the general legal principles of the famous Chapters 39 and 40, for instance, he is right to suggest that recent developments in civilian and canonist thought were likely an important part of the context. There were likely trained canonists in the room, and it is difficult to believe that they would not have brought ideas learned in the schools of canon law to bear on their thought about what Donahue, following Professor S.F.C. Milsom, has referred to as “fundamental legal ideas.”<sup>44</sup> I agree with Helmholz and Donahue that those types of types influences—or, as Donahue puts it, “congruences,” a word that suggests a less unidirectional process—are very likely to have occurred. When ideas were being discussed at a high level of abstraction, that is when it seems most likely that Roman law and canon law, as a “relevant element of context,” would have been part of the discussion.<sup>45</sup>

That type of subtle influence strikes me as more likely than the borrowing of terminology, such as *appellatione remota*, or even of specific rules. But it is also much more difficult to detect. And I am not sure Magna Carta can tell us much about that. What we can see in Magna Carta—terminology and rules—seems to show us drafters who were keeping these different bodies of legal norms separate from each other, using the customs and terminology of canon law in sections about ecclesiastical courts and the customs and terminology of common law in the sections about the king’s courts. The kind of congruence Helmholz, Donahue, and Pennington discuss doesn’t strike me as something Magna Carta can show us.

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<sup>42</sup> It took me quite a long time after I graduated from law school to realize that I had developed the habit of making major life decisions by constructing presumptions and telling myself, “in the absence of sufficient evidence to the contrary, you should do X.”

<sup>43</sup> MCSWEENEY, *supra* note 2, at 3.

<sup>44</sup> Charles Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 59 (1979); S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* 37 (1976).

<sup>45</sup> Donahue, *supra* note 8, at 1543 n.77.

### III. Why Don't They Appear in Magna Carta?

If the words *appellatione remota* were appropriate to the context, why, then, were they removed when this chapter was revised and placed in Magna Carta, as Chapter 52? I think the answer to this question is that they were no longer needed. Chapter 25 of the Articles says that the archbishop and the bishops will make a decision as to whether John will receive the crusader's respite, and there will be no appeal from that decision. Chapter 52 of Magna Carta, however, says that John will restore all lands taken without judgment *immediately*, and then goes on to say:

But for all those things of which anyone was disseised or deprived without lawful judgment of his peers by King Henry our father, or by King Richard our brother, which we hold in our hand or which are held by others under our warranty, we shall have respite for the usual crusader's term; excepting those cases in which a plea was begun or inquest made on our order before we took the cross; when, however, we return from our pilgrimage, or if perhaps we do not undertake it, we will at once do full justice in these matters.<sup>46</sup>

Where the Articles said that the bishops were to meet to decide whether John would receive the ordinary crusader's respite, Magna Carta says he *will receive* the crusader's respite for certain disseisins and not for others. It does not refer to the judgment of the bishops, the proceedings to which the words *appellatione remota* were attached, at all. Why the change?

The most likely answer is that the bishops refused to be involved, and never made any judgment with respect to the crusader's respite, leaving John to make a deal with the barons. In his papal bull quashing Magna Carta, Pope Innocent III makes reference to the process for deciding whether John should receive the crusader's respite. He says that John "asked the archbishop and the bishops to execute our mandate, to defend the rights of the Roman Church, and to protect himself in accordance with the form of the privilege granted to crusaders," but "[w]hen the archbishop and bishops would not take any action, seeing himself bereft of almost all counsel and help, he did not dare to refuse what the barons had dared to demand."<sup>47</sup> David

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<sup>46</sup> CARPENTER, *supra* note 9, at 58–59. Similar discussions of when John will receive the respite and when he will not occur in Chapters 53 and 57. *Id.* at 58–59, 60–61.

<sup>47</sup> ENGLISH HISTORICAL DOCUMENTS: VOLUME III: 1189–1327, at 326 (Harry Rothwell ed., 1975).

Carpenter has argued that Archbishop Langton was, in the days leading up to Magna Carta, trying to avoid being drawn into the fight between John and the barons. Carpenter suggests that “the barons were asking Langton to do things which, once he engaged with the Articles at Runnymede, he either refused to do or agreed to do in a more qualified fashion.”<sup>48</sup> The last chapter of the Articles, for instance, stated that Langton and the other bishops would guarantee that John would not appeal any of the terms to the pope. This does not appear in Magna Carta, and Carpenter suggests that Langton negotiated its removal because he did not want to serve in this role.<sup>49</sup> Langton and the bishops may have also refused to issue judgment on the crusader’s respite, and indeed Pope Innocent’s letter suggests that they did just that. There was no judgment of the bishops to appeal, only a compromise made between John and the barons that stated that John would receive the crusader’s respite in some cases and not others. With no mention of the process, there was no need to mention the possibility of appeal from it.

And even if the bishops had made some sort of judgment, John had agreed to its terms: the decision about what to do about John’s claim to the crusader’s respite was written into the Charter, in John’s voice, as a condition John had accepted. John placed his seal upon it on June 15. With John’s acquiescence to the terms laid out in Chapter 52, there was presumably no further need to mention the process for making this decision, the judgment by the bishops (or lack thereof), or the fact that there was to be no possibility of appeal. A decision had been made, and John had agreed to it.

Of course, the possibility that John would appeal was still a live one on June 15, when Magna Carta was sealed. John did appeal to Pope Innocent III, who declared the entire Charter to be null.<sup>50</sup> But even if the barons were still concerned about the possibility that John would appeal, there would have been two additional reasons for removing this language from the final version in Chapter 52 of Magna Carta. First, Chapter 61 of Magna Carta contained a general provision that had the effect of banning appeals from any part of the Charter; that chapter would have done the same work as a specific provision in Chapter 52.<sup>51</sup> Second, the barons were probably also concerned about putting too fine a point on their prohibition of appeals, and probably

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<sup>48</sup> CARPENTER, *supra* note 9, at 333.

<sup>49</sup> *Id.* at 334.

<sup>50</sup> *Id.* at 295–99.

<sup>51</sup> *Id.* at 62–67 (Magna Carta, ch.61).



wanted to downplay provisions banning them. When the final draft of Magna Carta was written, the language that had appeared in Chapter 40 of the Articles of the Barons, specifically prohibiting appeals to the pope, was softened. Where the Articles said that the archbishop, bishops, and papal legate would act as sureties for John's promise not to appeal any provision of the charter to the pope, Chapter 61 of Magna Carta drops the mention of sureties, and the king promises:

[W]e will obtain nothing from anybody, by us nor by another, by which any of these concessions and liberties may be revoked or diminished; and if any such thing is obtained, it is to be invalid and void, and we will never use it, either through ourselves or through another.<sup>52</sup>

The language is cagey to say the least. Gone is any mention of the pope. The charter simply says that John "will obtain nothing by anybody" by which the Charter may be revoked or diminished. Why was the provision drafted in this way? The final language of Magna Carta was the result of negotiations among several parties who had different interests and motives. But one motive that was likely at play here was a desire, on the part of the barons, to avoid angering the pope. The barons wanted to prevent John from appealing to the pope, but, at the same time, they did not want to be too overt about it. The barons were courting the pope as a source of support in the summer of 1215 just as John was, and a clause explicitly forbidding John to appeal to the pope could be taken as a challenge to the pope's authority and jurisdiction, a particularly fraught endeavor given that Innocent III was known for taking a broad view of the pope's authority.<sup>53</sup> In addition to his jurisdiction as pope, Innocent was John's lord, as John had surrendered England to him in 1213 and received it back from him as a papal fief.<sup>54</sup> Innocent was likely to take offense, and did indeed take offense, at the suggestion that he should not hear an appeal from John, either in his role as pope or as John's lord.<sup>55</sup> If the drafters were

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<sup>52</sup> *Id.* at 66–67 (Magna Carta, ch.61).

<sup>53</sup> EAMON DUFFY, SAINTS AND SINNERS: A HISTORY OF THE POPES 111 (1997).

<sup>54</sup> W.L. WARREN, KING JOHN 208–10 (1961).

<sup>55</sup> In his bull declaring Magna Carta "null, and void of all validity for ever," Pope Innocent discussed John's attempts to appeal to him, in this case in Innocent's role as John's lord, since John had surrendered England to the papacy and received it back as a papal fief. Innocent rejected the barons' attempts to prevent an appeal to his tribunal, quoting Jeremiah: "I have set

trying to avoid being too overt about their prohibition of appeals from the Charter, repeating such a prohibition in Chapter 52 was probably not a good idea, and was redundant, at any rate, given the language in Chapter 61.

## Conclusion

I do not want to over-essentialize the common law as it stood in 1215. As I myself have written, this was a period when the common law was not yet the common law.<sup>56</sup> This was only a few decades after Henry II had begun his experiments in royal justice, and, although the phrase “common law” was sometimes used in this period, no one had yet settled on a standard term for that body of rules and norms applied in the king’s courts.<sup>57</sup> The common law was clearly not a hermetically sealed, internal discourse. On the other hand, the king’s courts had already developed their own technical vocabulary, which was quite different from the vocabulary of Roman and canon law. When the authors of the Bracton treatise, writing in the 1220s and 1230s, attempted to reconcile the law they were applying in the king’s courts with Roman law, it was difficult to do. The fact that they persevered when it had become obvious to them that there was no simple way of using the Roman terms *possessio* and *proprietas*, for example, to describe what they were doing in the royal courts, is actually a testament to their commitment to the project of reconciling these two discourses.<sup>58</sup>

The phrase *appellatione remota* in the Articles of the Barons does not, however, provide us with proof that people were discussing canon law concepts in the context of conversations about the operation of royal justice. Indeed, it seems to me that the authors of Magna Carta were being fairly careful about how they used the technical vocabulary of the king’s courts, on the one hand, and the two laws, on the other. Vocabulary was the area where they were most likely to keep these bodies of law discursively separate. There is an important implication to that: on the level where we can observe the law in Magna Carta, congruence between the common law and the two laws is not visible. I agree with Helmholz, Donahue, and Pennington that on the level of more abstract thought, where general ideas or habits of mind adopted from the study of Roman and canon law might come into

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thee over the nations and the kingdoms.” ENGLISH HISTORICAL DOCUMENTS, *supra* note 47, at 326 (quoting *Jeremiah* 1:10).

<sup>56</sup> MCSWEENEY, *supra* note 2, at 17–23.

<sup>57</sup> *Id.* at 17.

<sup>58</sup> *Id.* at 114–18.

play, things that an individual might not even consciously associate with Roman and canon law, it is much more likely that ideas, norms, or values from Roman and canon law would have been part of the discussion that went into the drafting of the parts of the charter about the operation of the king's courts. At that level of abstraction, the discursive walls were probably much more permeable. That kind of influence is far less likely to leave a mark in the Charter, however.

It would be going too far, however, to say that Magna Carta does not tell us anything about the relationship between the king's courts and the two laws. Even if the phrase *appellatione remota* is not connected with the common law or the secular courts, the crusader's respite itself provides us with an example of the secular and ecclesiastical courts interacting with each other. The Church claimed jurisdiction over crusaders and the secular courts in England accepted that claim, at least to a degree.<sup>59</sup> It was an established principle of canon law that pilgrims and crusaders were under the special protection of the Church. To ensure that they received this protection, canon law granted them the *privilegio fori*: according to canon law, pilgrims and crusaders could only be sued in ecclesiastical courts, although it made an exception for cases concerning land. The royal courts in England do not appear to have accepted that principle, but they did accept the crusader's respite, another doctrine of canon law intended to protect crusaders. This was one of a number of areas where the Church and the crown claimed overlapping jurisdiction, and the two worked out the boundaries of that jurisdiction. That type of interaction between the two jurisdictions operated through mechanisms such as writs of prohibition, where the royal courts prohibited an ecclesiastical judge from going forward with litigation that was not within his jurisdiction, and consultation, by which a royal court conferred with an ecclesiastical court to decide an issue that was recognized as being within the ecclesiastical jurisdiction.<sup>60</sup> Neither *appellatione remota* nor the crusader's respite, however, provide us with evidence that, when the drafters of Magna Carta looked to reform the common law, they turned to canon law for ideas. The words *appellatione remota* were not inappropriate to the English context, but that is because they were being used in the context of an ecclesiastical procedure, which was just as much a part of England's pluralistic legal context as common law.

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<sup>59</sup> JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW AND THE CRUSADER* 172–74 (1969).

<sup>60</sup> For examples, see *Early Registers of Writs*, 87 SELDON SOC'Y. 138, 142–43, 325 (Elsa De Haas & G.D.G. Hall eds., 1970).

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