LAW DAY

800 Years of Magna Carta: Symbol of Freedom Under Law

Upholding Justice In the Grand Jury

Jonathan Lippman
Chief Judge
State of New York

Our modern grand juries—and our guarantees of due process and the rule of law more broadly—have roots going back to the Magna Carta. The Magna Carta, signed by England's King John in 1215, has continuing power today far beyond the small group of medieval English barons responsible for its creation. This 800-year-old document embraces the ideas of liberty and the rule of law that form the foundations of our American democracy. When we celebrate the 800th anniversary of the Magna Carta on this Law Day 2015, we celebrate the ideals of liberty, due process, and justice that are foundations of our Constitution and laws.

Our system of grand juries in particular can be traced back to provisions in the Magna Carta. The threads of due process of law and the role of the people in imposing criminal charges run from the Magna Carta to our modern grand juries, enshrined in New York's constitution and laws, where a group of citizens comes together to determine whether sufficient evidence exists to charge an accused person with a crime before prosecution can proceed. For centuries, the grand jury has played a vital role in indicting those who there is reason to believe have committed crimes on the one hand and ensuring against unjust prosecutions on the other.

Lately, the institution of the grand jury has attracted intense attention with the deaths of Eric Garner in Staten Island and Michael Brown in Ferguson. These tragic events were followed by a crisis in confidence in the criminal justice system that resulted in fierce discussion and debate about reform of grand jury procedures in cases of fatal encounters between law enforcement and civilians. It has become evident that in modern America, the medieval institution of the grand jury merits updating. Because the grand jury is a part of the court according to New York law, it is the responsibility of the judiciary to ensure that grand juries, in practice and perception, serve the public interest and operate freely and fairly in accordance with due process guarantees.

Recognizing the need for reform and the role of the court in this area, I introduced legislation this spring designed to restore the public's trust in the grand jury process in New York in two ways. First, the proposed legislation requires that a superior court judge be present during grand jury proceedings in cases involving a possible criminal charge against a police officer for homicide or felony assault while acting in the course of his or her official duties. There is a perception by some that prosecutors' offices are not able to present such cases to the grand jury objectively, given the on-going close working relationship that they must and should have with law enforcement. That perception places prosecutors in a difficult position even assuming strict adherence to the rule of law and the pursuit of justice.

Currently, the role of judges in grand jury proceedings is limited to preliminary instructions and the occasional ruling on a legal question. Under the proposed change, judges would be physically present throughout the proceedings, able to rule on legal issues, determine the admissibility of evidence, advise grand jurors of the possibility of calling additional witnesses, and provide final instructions before deliberation. That said, in no way would the court replace the prosecutor or put its thumb on the scale of justice. Rather, this new legislation would bring the

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One of four surviving copies of the 1215 version of the Magna Carta at an exhibit at Fraunces Tavern Museum in lower Manhattan in 2009.

NYLJ / RICK KOPSTEIN

Embracing Change And Enhancing Courts

A. Gail Prudenti
Chief Administrative Judge
New York State
Unified Court System

King John of England's acceptance of Magna Carta and its written limits on his royal power was a truly watershed moment, establishing for the first time the now firmly ingrained principle that every person, even the king, is subject to the law. Although the original document was later annulled, through its reissuance and reinterpretation over the next several centuries, Magna Carta gained new life and significance and ushered in major and lasting changes. Not only did Magna Carta formally challenge the autocracy of the king, but it became a resounding affirmation of the rule of law that laid the foundation for the common law system in the English-speaking world. The fundamental principles of freedom and equality embedded in the document subsequently informed several constitutional documents, including the U.S. Bill of Rights. The gravity and widespread impact of the changes Magna Carta brought about have made it one of the most important documents in the history of democracy.[1]

While not all change is as fundamental as that ushered in by Magna Carta, con-

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Marriage Equality: A Branch of the Mighty Oak

Luis A. Gonzalez
Presiding Justice
Appellate Division,
First Department

As we celebrate Magna Carta on Law Day 2015, I have chosen to reflect on how the due process protections derived from "the Great Charter" may ultimately support marriage equality in the United States.[1] When England's most powerful feudal barons gathered in the fields of Runnymede, England in June 1215 to force King John to place his seal on a document that would limit his power over them, the barons planted seeds for an American constitutional democracy that would hold as "fundamental" many more rights than those demanded by this particular rebellious aristocratic group.[2] It is widely known and accepted that Magna Carta, and all its incarnations, represent a milestone in history. For the first time, a monarch ceded his power to the written rule of law. Our American constitutional democracy is a direct descendent of the "rule of law" values embodied by Magna Carta. There were 63 clauses in the original Magna Carta, many only relevant to its time, but in this writer's opinion, none more important and fruitful than Clause 39:

No free man shall be seized, or imprisoned or

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We Owe Gratitude To Due Process Precursor

Randall T. Eng
Presiding Justice
Appellate Division,
Second Department

Some of the most fundamental constitutional rights that lie at the heart of the American justice system actually have their origin in a document signed by an English king nearly 800 years ago. This document is the Magna Carta, which King John reluctantly signed at the insistence of his barons in June 1215. The 63 chapters of the Magna Carta granted certain "liberties" to "all the free men of our realm for ourselves and our heirs for ever. " Chief among the liberties granted by the Magna Carta is what we today view as the right to due process of law. Chapter 39 of the Magna Carta, which forms the cornerstone of this right, decreed that "No freeman shall be taken, imprisoned, disseized, outlawed, banished, nor will We proceed against or prosecute him, except by the lawful judgment of his Peers or by the Law of the land." It is from this chapter of the Magna Carta that the framers of our Bill of Rights derived the Fifth Amendment guarantee that no person "shall be deprived of life, liberty, or prop-

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Can I Bring My Rights With Me?

Karen K. Peters
Presiding Justice
Appellate Division,
Third Department

The Magna Carta, signed and sealed 800 years ago, is credited with being the first articulation of many essential rights we enjoy today. One such right is the right to travel, referenced in Paragraph 41, which states in relevant part:

> All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us … .[1]

In the United States of America, the right to travel freely from state to state is an accepted principle firmly rooted in the Privileges and Immunities Clause of the Federal Constitution, which declares that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[2] The more challenging question of whether

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The Great Charter Lives In Judicial Opinions

Henry J. Scudder
Presiding Justice
Appellate Division,
Fourth Department

The massive bronze doors at the front entrance to the U.S. Supreme Court Building are decorated with eight panels depicting significant events in the history of law. On the bottom right panel is an illustration of King John affixing his seal upon the Magna Carta. Inside the ornate courtroom, King John's image is among those carved into a marble frieze that traces the advancement of the rule of law throughout the world. The significance of the Magna Carta is reflected not only in the court's architecture, but also in its opinions where justices of the Supreme Court have cited the Great Charter in nearly 200 cases.

Magna Carta's famous Chapter 39 is most often cited. Chapter 39 provides that "no free man will be taken, or imprisoned, or outlawed, or exiled, or in any way harmed … except by the legal judgment of his peers or by the law of the land." Numerous Supreme Court decisions point to this provision as the source of the Due Process clauses of the Fifth and 14th Amendments. As early as 1855, in

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INSIDE

Sustaining a Beacon for the Course of Our Country

Glenn Lau-Kee
President
New York State Bar Association

Eight hundred years ago, in the meadow on the banks of the Thames River that is called Runnymede, King John and a handful of aristocrats drafted the Magna Carta, a compromise agreement meant to stave off violent rebellion. As a peace treaty, the Magna Carta failed—the charter lasted only 10 weeks.

Much of the Magna Carta—its words printed in Latin on a single sheet of sheepskin parchment—addresses matters that are provincial, and several chapters reflect the prejudices of its times.

This original charter was quickly annulled, yet the Magna Carta was reissued and reconfirmed dozens of times; in the early 17th Century, Sir Edward Coke reinterpreted the charter to stand, strongly, for the concept of habeas corpus. For generations since, the Magna Carta has endured as a symbol.

No man, no matter how powerful, including the King of England, stands above the rule of law. The powers and privileges of those who govern must be clearly defined and limited. A free man cannot be deprived of life, liberty or property except by lawful judgment of his equals or by the law of the land. Laws must be reasonable and fairly executed. Punishment for violations of the law must be proportional to the seriousness of the crime.

These radical ideas, and the very concept that a written document could serve as a framework for government and preserve liberty, were lodged firmly in the minds and spirit of our country's founders. Despite the distance of years and miles and the wide expanse of an ocean, the Magna Carta had become a symbol and a beacon, a guiding light that suggested a path for a new form of government.

A generation of engaged citizens—revolutionaries who were willing to risk everything—founded our country with the U.S. Constitution and the Bill of Rights, documents that are imbued with the concepts of due process and liberty first introduced in the Magna Carta.

One generation in America drafted the framework of liberty under the rule of law of our government.

It is for each new generation to make these values heard and understood. Even felt.

Outside the marble halls of our courtrooms and our capitol buildings, the past year has been marked by mounting cries of outrage and distrust in our system of justice. On the streets of our cities and in tweets and posts gone viral on social media, voices are sounding that something is amiss with our criminal justice system. This season is one period, of many, in our nation's history in which the fabric of our national framework is being tested.

Several weeks ago, Supreme Court Justices Stephen Breyer and Anthony Kennedy added their voices to this clarion call with their testimony before a House appropriations subcommittee about serious problems with the criminal justice system. "In many respects, I think it's broken," Justice Breyer said.

Is it inevitable that the symbol and meaning of the Magna Carta—cast in bronze, etched in granite—will continue to endure as a beacon for the next 800 years? Are the documents that forged our nation strong enough to continue to guide and protect our country's future?

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts." Many will recognize these words as those of Judge Learned Hand.

"These are false hopes," he continued. "Believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it."

Judge Hand spoke these words weeks before the D-Day invasion in which 150,000 American troops landed on the beaches of Normandy, willing to risk everything to restore liberty to Europe.

Today, almost as troubling as the public cries of loss of confidence is the silence of disengagement of so many in our society. Citizens feel so disempowered, so disconnected, that they do not register to vote, and, therefore, do not participate in shaping our future. Our state's voter participation has been in serious decline for over a decade, so much so that in the past three elections, New York ranked 47th nationwide in average voter turnout. Our last presidential election brought only 53 percent of eligible voters to the polls. Cuts in humanities and civics education in the public school system have left many students with only a superficial and limited understanding of their own government.

We are in danger of the public losing touch with our country's founding values. Without continuous and purposeful efforts to re-engage the public, the spirit of liberty that shone so brightly during the dawn hours on Normandy beach will not survive as the essential beacon for our country's future.

At the New York State Bar Association, we are trying to do our part by advocating for a greater commitment to teaching civics educations. We are advocating to modernize our state's voting laws and make it easier for people to register and vote. Together with the courts, the state Legislature, and the Executive, we are advocating for changes in the criminal justice system that will make our system more fair, more efficient, and help prevent the tragedy of a wrongful conviction.

Just as the American colonists watched as England re-dedicated itself to the Magna Carta's values of due process and liberty, the eyes of the world, on every continent, are watching our country at this moment.

There is much we can do. There is much we *must* do to ensure that the Magna Carta, as a symbol of liberty under law, remains a beacon for the course of our country—not just etched in marble, but as a concept that lives in the spirit of our people.

Glenn Lau-Kee is a partner at Kee & Lau-Kee.

The Pluses and Minuses of Original Intent

Debra L. Raskin
President
New York City Bar Association

Alan Rothstein
General Counsel
New York City Bar Association

The Magna Carta is often considered the fundamental law undergirding our Constitution. It is cited as the basis for establishing rights we now take for granted, including due process and equal protection. As originally intended, however, its scope was not that broad. Powerful nobles in England were in an intense struggle with King John, and tried to use their leverage to extract an agreement from a sovereign, an acknowledgement that neither the King nor anyone else is above the law.

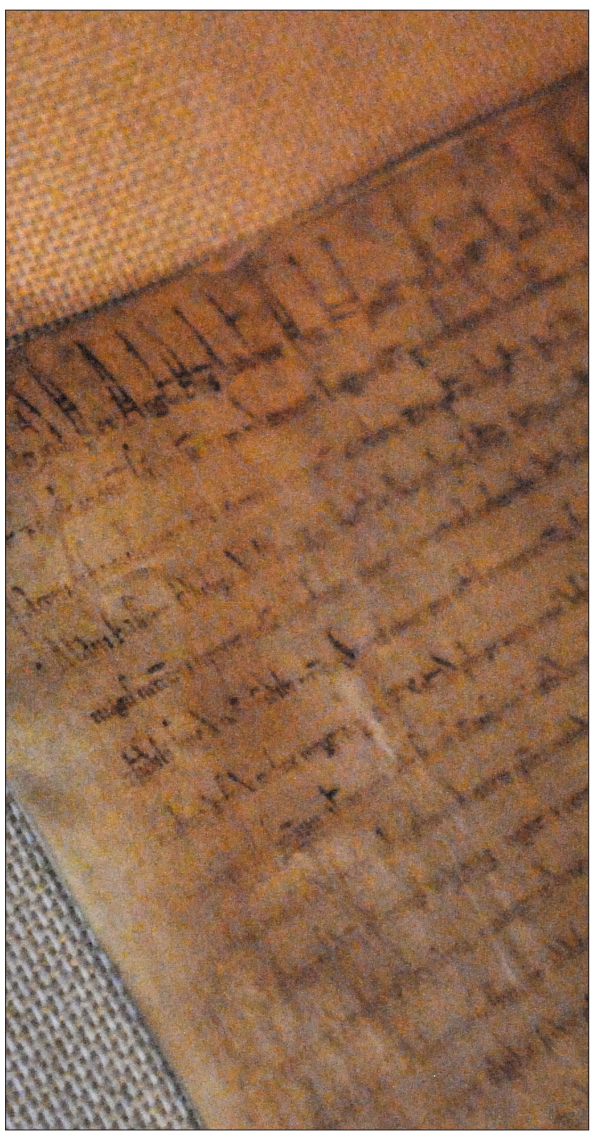
The Magna Carta, which reportedly was hastily prepared, reflected the prejudices of the times. There were provisions to bar the arrest of anyone accused of murder by a woman, except for her husband's death, and absolution from paying certain debt owed to "the Jews." The rights of men of property were preserved and protected. That surely was the "original intent" of the nobles at Runnymede, and the document thus underscores the dangers of interpretation on the basis of original intent. Cf. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) ("*the public understanding* of a legal text in the period after its enactment or ratification ... is a critical tool of constitutional interpretation.").

However, the American colonists selectively took what they wanted of this venerable document, and our Founding Fathers built the notion of a government under the consent of the governed. They were able to leave the prejudices of the Magna Carta drafters behind to extract what was enduring—a government beholden to the people and a rule of law. It is hard to conceive that the nation's founders would have insisted that their "original intent" should be transferred wholly into the 21st Century and beyond, just as they did not adopt all or many of the 63 Magna Carta provisions into our governing fabric.

While being a creature of its time, Magna Carta contains far-thinking concepts. For example, Chapter 45 provided: "We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well." This is an early pronouncement of merit selection of judges, for which the organized bar continues to work. Chapter 52 provided: "If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him ...." The nobles even set up a body to resolve disputed claims under this article. Chapters 41 and 42 provide for safe entry to and exit from England for merchants and others.

We particularly like Chapter 62: "And all the will, hatreds, and bitterness that have arisen between us and our men, clergy and lay, from the date of the quarrel, we have completely remitted and pardoned to everyone." King John did not abide by the Magna Carta, which led to war between the Crown and the nobles, and it took some years and additional versions for the Magna Carta and its principles to be fully accepted in England. Nevertheless, if we can imbue some of Article 62 into our current world situation (and bitter litigation), we would all be a lot better off.

Debra L. Raskin is a partner at Vladeck, Waldman, Elias & Englehard. Alan Rothstein has been general counsel of the New York City Bar Association since 1985.



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Closeup of the 1215 version of the Magna Carta, also known as the "Great Charter," written with ink on sheepskin, above.

Below: Replica of King John's seal, obverse and reverse, as it appears on Salisbury Cathedral's copy—the only copy that retained the king's original seal.

LIBRARY OF CONGRESS (2)

Draw Inspiration From the 'Muse and Mentor'

Lewis Tesser
President
New York County Lawyers' Association

The Magna Carta is a durable document; this year, throughout the United Kingdom, the United States, and elsewhere, the Magna Carta's 800th anniversary is being celebrated.

It began as a template for a specific treaty between a group of mistreated barons and the even-now controversial King John. Yet the ink that was hand-lettered by the King's scribes onto that 18 inch square of sheepskin flowed through centuries to become a source document of the U.S. Constitution.

The Magna Carta was not perfect. It has been revoked, reinstated, reaffirmed and reissued, partially repealed and re-confirmed; it has undergone multiple revisions, and only a fraction of the original piece remains a part of British and common law today. But it is considered the most prominent post-biblical demonstration that injustice may be challenged and that even the most powerful are subject to the rule of law.

The right of trial by jury, right to travel, due process, and other individual rights are part of the American DNA. We view them as entitlements. They are ingrained in our culture and our vocabulary. But the emanation of these rights and liberties, like the continuing process of the rule of law, was and is dependent on the willingness of people to engage—not just for their own specific benefit, but for the implicit ideal of justice inherent in the outcome.

The Library of Congress calls the document a "Muse and Mentor," and we have all benefited from that inspiration and model. We do not embrace all of the words of the Magna Carta. Our maxims are more democratic. But perhaps, with the U.S. Constitution and in our lives as lawyers, we draw from the same well.

In a world where forces express their dissatisfaction and ambitions through terror, when we respond by reaffirming the idealistic and pragmatic necessity of the rule of law, we cannot fail to reference the Magna Carta, the "Great Charter."

Lewis Tesser is a partner at Tesser, Ryan & Rochman, concentrating his practice in litigation and mediation.

Fundamental Liberties Must Be Protected

William Wang
President
Asian American Bar Association Of New York

The Magna Carta, signed in 1215 in England by a group of barons seeking to rein in the tyranny of King John, is the foundation and inspiration for many basic rights that Americans hold dear today, including due process, trial by jury, habeas corpus, and freedom from arbitrary governmental authority. The document was once looked upon as defining the inherent rights of English citizens and was later used by English colonial subjects to break free from colonial rule. The Magna Carta, over the course of history, has been the cornerstone of many important documents, including the Universal Declaration of Human Rights and the U.S. Bill of Rights, and is justly revered as an international symbol of the rule of law and individual liberties.

Although our country's fundamental principles trace their roots to the Magna Carta, the rule of law has not always ensured equal treatment for everyone under the law. In 1882 Congress passed the Chinese Exclusion Act and restricted immigration into the United States of an entire ethnic group for the first time in American history. The Chinese Exclusion Act and ensuing legislation remained the law of the land until Congress finally repealed it in 1943, preventing generations of people from Asia from legally immigrating to the United States. Only three years ago, in 2012, the House of Representatives unanimously passed a bipartisan resolution introduced by Congresswoman Judy Chu of California to formally express the regret of the House of Representatives for the Chinese Exclusion Act of 1882 and other legislation that discriminated against people of Asian origin in the United States.

In 2015, we also celebrate the 50th anniversary of the Voting Rights Act of 1965. The Voting Rights Act, signed into law by President Lyndon B. Johnson on Aug. 6, 1965, aimed to overcome legal barriers at the state and local levels that prevented African Americans from exercising their right to vote under the 15th Amendment. The Voting Rights Act was viewed by many as the culmination of the legal struggle for civil rights in the United States. The passage of the Voting Rights Act came nearly one hundred years after the passage of the Fifteenth Amendment, ratified in 1870, which granted African Americans the constitutional right to vote. Since its passage, the Voting Rights Act has been amended to include the protection of voting rights for non-English speaking American citizens. Thanks to this historic legislation, my parents and many immigrants are able to vote as naturalized U.S. citizens.

Our history includes both reprehensible laws, such as the Chinese Exclusion Act, and landmark legislation enacted to move us forward, such as the Voting Rights Act. The vitality of the Magna Carta in the 21st century is represented by the ability of the rule of law to promote justice and undo past injustices. Today, the vitality of the Voting Rights Act is threatened by the U.S. Supreme Court's controversial 2013 decision in *Shelby County v. Holder*. The court struck down §4 of the Voting Rights Act and effectively eliminated §5 enforcement. Many view the court's decision as a major step back in longstanding efforts to combat voting discrimination. The right to vote is a fundamental liberty that is sacrosanct and must be protected.

Dr. Martin Luther King Jr. stated that "the arc of the moral universe is long but it bends towards justice." On this Law Day marking the 800th anniversary of the Magna Carta, we should all as lawyers and Americans continue to advocate for justice and individual liberty and do our part to ensure that the "arc of the moral universe" bends the right way.

William Wang is a partner at Lee Anav Chung White & Kim.

Living Document Represents Freedom to Marry

Meredith R. Miller
President
The LGBT Bar Association Of Greater New York

Magna Carta has endured as an international symbol of liberty. The Declaration of Independence and the U.S. Constitution trace their lineage back to this document. As we await a decision from the U.S. Court in *Obergefell v. Hodges*, the 800th anniversary of the Great Charter is an encouraging beacon.

In *Obergefell*, the Supreme Court will soon decide whether the 14th Amendment to the U.S. Constitution requires a state to issue a marriage license to two people of the same sex. Fundamentally, this is a question about individual liberty—the freedom of two consenting adults to join in marriage.

Lord Bingham wrote: "The significance of Magna Carta lay not only in what it actually said, but in what later generations claimed and believed it has said." In the spirit of that observation, I will posit that, in broadly representing the principle of liberty, Magna Carta stands for the freedom to marry.

The rebel barons at Runnymede certainly did not reference, let alone contemplate, same-sex marriage. But part of the legacy of Magna Carta is the appropriation of its broad principles to specific circumstances that the barons did not necessarily contemplate. After all, the barons' concept of liberty was not a universal one—for example, Magna Carta did very little to address the plight of the majority of the population, the unfree peasantry.

The barons did, however, specifically address the marriage and property rights of noble heiresses and widows. It is an understatement to observe that the rights and customs of marriage in Medieval England were significantly different than those in the United States in the 21st Century. As just one example, the monarch could attempt to dictate the marriage of a wealthy widow (and, with that, who would receive her property—remember, women in marriage did not own property). In light of this custom, Magna Carta, among many other things, proclaimed, "No widow shall be compelled to marry, so long as she wishes to remain without a husband."

Thus, Magna Carta declared a right of women (albeit the noble ones) to have some measure of autonomy regarding marriage and control of their property. The movement for recognition of same-sex marriage is, at its core, about this very same autonomy. The freedom *from* marriage necessarily finds a corollary in the freedom *to* marry, and both find firm ground in our Constitution.

Magna Carta is a living document; its fundamental precepts have transcended 800 years of shifts in society's norms and customs. As we await a ruling by the Supreme Court, there is hope that the core promises and covenants of Magna Carta will be reinvigorated, as they have so many times.

Meredith R. Miller is an associate professor and director of solo and small practice initiatives at the Touro Law Center and principal of Miller Law, PLLC.

WIKIMEDIA COMMONS

"King John Signing Magna Carta," by illustrator James Edmund William Doyle, which appeared in his Chronicle of England in 1864. Contrary to what the illustration depicts, the Magna Carta was authenticated with the Great Seal, not by the signature of the king.

Advocating for an End To Police Brutality

Taa Grays
President
Metropolitan Black Bar Association

On March 30, 2015, I was standing in the middle of a main road in a suburban neighborhood looking at handwritten signs on a makeshift memorial. The memorial had assorted stuffed animals, dried flowers, toys, and a box of Frosted Flakes neatly organized in a row along the bright yellow lane divider. One sign caught my attention: "Ferguson PD/GOV America's SHAME."

If Magna Carta is a symbol of freedom under the law, this makeshift memorial is a symbol of government's failure to fairly protect those freedoms in the eyes of its citizens.

"The first eight amendments to our Federal Constitution, our explicit Bill of Rights, owes its parentage to Magna Carta," stated late U.S. Supreme Court Justice William Brennan in 1985, "and Americans regard the enforcement of those amendments as the Supreme Court's most important and demanding responsibility."

The protection and enforcement of the Bill of Rights is the domain of the Supreme Court. The means by which the court is able to enforce and protect these rights are lawyers. Our role is to ensure that the principles of Magna Carta are enjoyed by all citizens and hold the government accountable when it violates those principles.

The Metropolitan Black Bar Association (MBBA) is a resource and a mechanism to ensure lawyers can play this pivotal role in the legal system. MBBA is doing this in three ways: (1) Being a stakeholder in the legal profession to advance diversity and inclusion; (2) enhancing our member experience; and (3) focusing our community service efforts on supporting domestic violence victims and advocating for solutions to end police brutality.

My visit to Ferguson underscored the importance of the MBBA's advocacy effort to end police brutality. Our advocacy effort has three parts.

(1) **Educate** the community to protect themselves. Under the lead of MBBA community service director Dweynie Paul, we launched our education campaign in Brooklyn with a Law Day program on February 28 followed by a Leadership Program targeted to black men on March 7.

(2) **Empower** lawyers to be change agents finding solutions to address the perennial injustices to minorities. MBBA wants to bring lawyers into a conversation to use our legal knowledge to find durable solutions to these issues. We are planning to launch our first conversation in Staten Island in late April/early May followed by conversations in the other boroughs.

(3) **Engage** the community at large via social media to not forget that #blacklivesmatter. We kicked off our campaign with the #IamASolution, the brainchild of MBBA VP Jason Clark, on our Facebook page. We are continuing this campaign on Twitter. Follow us @MBBANYC.

On that main road in Ferguson on Aug. 9, 2014, Michael Brown was deprived of his life. Magna Carta states: "To no-one will we sell or deny or delay right of justice." Today, we know this statement as a part of our Fifth Amendment: "No person shall be … deprived of life, liberty, or property, without due process of law." We must continue to fight to en-sure that justice is neither delayed nor denied.

Taa Grays is assistant general counsel and chief of staff at MetLife.

Justice Is an Evolving Discourse

Olivera Medenica

President

Federal Bar Association, S.D.N.Y. Chapter

This year's Law Day theme celebrates the 800th Anniversary of the Magna Carta, an international symbol of the rule of law. This ancient document stands for the simple, and universal, principle that no one, no matter how powerful, is above the law.

There are other anniversaries that we have recently celebrated that reflect the foundational tenets of the Magna Carta. We celebrated the 225th anniversary of our "Mother Court," the Southern District of New York, this just a few years after reaching the same milestone with the U.S. Constitution. In the context of civil rights, we also recently celebrated the 50th anniversary of Selma marches as well as the 50th anniversary of the Civil Rights Act of 1964.

These anniversaries matter. They cause us to pause and reflect on how far we have come and where we should go further. While we celebrate the principles of the Magna Carta, and the many other milestones we have reached, we should remember that justice is an evolving discourse. As leaders in our respective bar associations, it is our responsibility to continue this discourse, to shed light where we need improvement, and celebrate achievements that might go unnoticed unless applauded.

The events in Ferguson, Mo., and the case of Eric Garner reflect a longtime perception within minority communities that law enforcement is working against them. A 2012 survey indicated that 57 percent of white Americans had a great deal of confidence in the police while only 32 percent of African-Americans indicated confidence. To address this disparity, the Obama administration recently launched, by executive order, a Task Force on 21st Century Policing to examine how to promote effective crime reduction while building public trust. These protests are a seminal moment in our history; our response today may be celebrated or deplored centuries from now.

The legal profession grapples with inequalities within its own ranks. Women are grossly underrepresented as partners, associates, general counsels and as members of the judiciary. The percentage of African-American and Hispanic women in such positions is abysmal. As with social justice, these statistics can spur public discourse on how to address and remedy disparities that harm minorities and the competitiveness of our entire society.

The Federal Bar Association held a Town Hall at Cardozo Law School examining the Ferguson and Garner matters, and what steps to take to prevent similar tragedies from occurring in the future. The panel included private and public sector practitioners, members of academia and the judiciary. On March 4, 2015, our Meet the Chiefs event honored a historical first: four women Chief Judges in the Southern and Eastern Districts of New York. These women serve as trailblazers and an inspiration to all women, not just women in the law. Our Second Annual Women in the Law conference in Washington, D.C. on June 5th will feature leading practitioners and members of the judiciary, all women, who will share perspectives on the practice of law.

To celebrate the Magna Carta means we have an ethical duty to come together to address these serious concerns, and ensure that these injustices are eradicated from our society, no matter what race, religion, sex, or social status.

Olivera Medenica handles intellectual property and commercial litigation matters at Medenica Law PLLC.

AP / STEFAN ROUSSEAU

The original wording of the 1215 Magna Carta was amended in 1216, and again in 1217, 1225, and 1297, and confirmed by King John's successors.

The final 1297 document, shown at left at the Lord Mayor's Show in 2014 in London, officially became part of British law. It has been referred to, interpreted and quoted in the courts and in parliaments of countries that have adopted British law, and it inspired the Founding Fathers when they wrote the Declaration of Independence, U.S. Constitution, and Bill of Rights.

Working Toward Fair And Equal Rights

Yacine Barry-Wun

President

New York Women's Bar Association

As we celebrate the Magna Carta's 800th anniversary, it is important to reflect on the critical ideals that it represents—that no person, no matter how powerful, is above the law, and that all people's fundamental rights are equal regardless of the circumstances of their birth. Ironically, the Magna Carta did not initially have anything to do with ordinary people as it arose out of conflicts between a king and the barons who then ruled over the English countryside. Though portions were later modified and even abrogated, the power of the Magna Carta has survived to embody the principle that powerful persons should not have a right to impose their own whims and notions on others without regard to due process, or to the impact on those affected by them.

It is essential that lawyers fight attempts to limit the rights of others. In the past few years, there have been increasing efforts to curtail the voting rights of minorities; the rights of women to have access to safe and confidential control over their own bodies; to limit immigration and penalize the children of undocumented parents; and to oppose the LGBT community's struggle for equal rights and responsibilities. Those in power need to know they will be held accountable if they do not respect the fundamental rights of all people.

It is noteworthy that the Magna Carta recognized the interests of women to the extent of safeguarding inheritance rights of widows and protecting them from being compelled to remarry. The New York Women's Bar Association was founded on the principle of equal rights as it was formed in 1934-35 by six attorneys who were denied admission to bar associations merely because they were women. From the start, NYWBA advocated to improve the status of women and minorities in society and in the legal profession. Our early members used their experiences to become phenomenal lawyers. Founder and 1941-42 President Hon. Florence Perlow Shientag became the first woman to serve as counsel to a sitting mayor, the first woman federal prosecutor in the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, and the first woman to argue—and win—a First Amendment case before the U.S. Supreme Court. Past President Hon. Betty Weinberg Ellerin later became the first woman to serve as an Administrative Judge in New York, the first woman Justice of the Appellate Division, First Department, and that court's first female Presiding Justice.

Examples of NYWBA's commitment can be found in its advocacy for equal pay and equal rights; in its recent participation in the drafting of amicus briefs before the Second Circuit and U.S. Supreme Court on the issue of the rights of same-sex couples to marriage equality; and in our foundation's ongoing grants to help protect the rights of domestic violence victims. As we celebrate the 800th anniversary of the Magna Carta, and the 80th anniversary of the founding of the NYWBA, let us work together to ensure that all people have fair and equal access to justice.

Yacine Barry-Wun is special counsel for Housing Court Initiatives, New York State Courts Access to Justice Program.

Bedrock Principles of Justice Are Ever-Evolving

Russell Penzer

President

Federal Bar Association, E.D.N.Y. Chapter

Strengthening and supporting the federal legal system is the primary mission of the Federal Bar Association. The theme of this year's Law Day invites us to celebrate the document that is widely credited with first recognizing some of the most fundamental tenets of our criminal justice system, including the acknowledgement of individual liberty and the right to trial by jury. We approach this task at a very important time, when many courts are developing programs which re-evaluate the way that certain types of criminal offenders are handled.

The U.S. Supreme Court long ago observed:

> There is nothing in Magna Carta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

Hurtado v. People of California, 110 U.S. 516, 531 (1884). Indeed, the Fifth Amendment to the Constitution is directly influenced by Magna Carta's "Law of the Land" clause, guaranteeing judicial process according to the "law of the land."

Around the country, courts have been developing prison diversion, treatment and re-entry programs pertaining to certain categories of criminal offenders. The Eastern District of New York has been at the forefront of such efforts. Specifically, the Eastern District has developed two widely heralded presentence diversion programs designed to provide alternatives to incarceration. The Pretrial Opportunity Program provides non-violent offenders with documented substance abuse problems an opportunity to be taken out of the traditional sentencing and incarceration paths, and provides them with counseling and improvement programs, such as earning a General Education Development certificate, obtaining employment or gaining college admission. The Eastern District's Special Options Services program offers similar opportunities for certain youthful offenders. In addition to these diversion programs, the Eastern District has developed Supervision to Aid Re-entry courts, which assist offenders with a documented history of substance abuse in re-entering their communities at the conclusion of their prison terms. These programs greatly serve the vision of individual liberty and due process of law that was recognized in the Magna Carta.

Such programs are not limited to the Eastern District of New York. Many courts across the country are successfully adopting diversion, treatment and re-entry programs. As we celebrate the document that first laid some of the cornerstones of our criminal justice system, it is a good opportunity to acknowledge the great strides that are being made to improve our system of justice. The bedrock principles of our criminal justice system set in place by the Magna Carta are ever evolving and as such, re-evaluating how certain criminal offenders are handled and looking at ways to continually evolve our criminal justice system not only benefits the affected offenders, it benefits our society as a whole. More to the point, it continues the vision of justice launched by the Magna Carta.

Russell Penzer is a partner with Lazer, Aptheker, Rosella & Yedid in Melville, N.Y.

The 1215 Magna Carta is carried from City Hall to the 1939 World's Fair site in Queens. The police escort is accompanied by British diplomats and Mayor Fiorello LaGuardia, third from left. Over six million people viewed the document there, its first-ever display in the United States.

LIBRARY OF CONGRESS (2)

At right, the Magna Carta, sealed in a special container, is placed in a vault on ocean liner RMS Queen Elizabeth in New York in 1946, for its return to England. The document was held in the United States for safekeeping during World War II.

Reflect on Where We've Been, Where We'll Go

Marsha Steinhardt

President

Brooklyn Women's Bar Association

Being of a certain age and anticipating the Fiftieth Reunion of my graduating class from Erasmus Hall High School in May of this year I can admit, with all candor, that it has been quite some time since I was a student of either English or American history. That when told of this year's Law Day topic—Magna Carta: Symbol of Freedom Under Law—and encouraged to write an article, I had to "hit the books." Well, the Internet, really. It is 2015! For truly, what could I say, without delving into the subject, about a document that has survived for 800 years; that forms, to a greater or lesser extent, the basis of the liberties that we, as Americans, direct descendants of the British legal system, hold so dear? And although we think, "you can't teach an old dog new tricks" (a statement belied by the activities of my own perky senior citizen pooch!) it was truly a pleasure to learn about the document that symbolizes the principle that no "man is above the law."

The Great Charter was agreed to by King John of England, in a meadow at Runnymede, on June 15, 1215. It was drafted by the Archbishop of Canterbury to make peace between the Crown and a group of rebel barons. It is one of the most important documents in history. It guaranteed the people certain rights and bound the king to certain laws. Three months later it was declared invalid by the Pope but reissued, in a slightly altered form, the following year. Reissued several times thereafter, it is interesting to note that it was not until 1354 that Magna Carta's benefits were extended from "free men" to "men of whatever estate or condition he may be." Although my research revealed nothing with regard to gender, it is hoped, by the president of the Brooklyn Women's Bar Association, the protections afforded by Magna Carta were extended to and meant to include women! Certainly, as time went by, they were.

I was taken with the fact that an original Magna Carta traveled to the United States for the first time in 1939, so that it might be displayed as a part of the New York World's Fair. One can only imagine the security surrounding the crossing. The awe with which those fortunate to attend the Fair observed the document. But it is the continuation of the voyage that to me was the most interesting. For ultimately the Magna Carta and copies of the Declaration of Independence and U.S. Constitution found their way to Fort Knox for the duration of World War II. While tyranny, totalitarianism and dictatorship were rampant around the world, our sacred rights, as epitomized in these writings, that evolved one from the other, were kept hidden and safe. To be returned to their rightful places when the rule of law was secure.

This Law Day, as we celebrate "Magna Carta: Symbol of Freedom Under Law," let us not take our freedoms for granted. Let us pause for a moment to reflect upon where we have come these past 800 years and the directions we are yet to travel.

Marsha Steinhardt is a justice of the New York Supreme Court, Kings County.

Redrafting Bylaws Highlights Democracy's Beauty

Carlos Perez-Hall

President
Puerto Rican Bar Association

On July 1, 2014, the Non-Profit Revitalization Act of 2013 became law. The Act has three general purposes for non-profit organizations in New York state: (1) to eliminate unnecessary administrative and procedural burdens, (2) to modernize the New York nonprofit law, and (3) to strengthen governance through compliance with certain best practices. The Act affects every non-profit organization's bylaws in that the law changes certain notice requirements and committee composition and structure, along with other procedural and substantive modifications. Therefore this year, every organization that has a set of bylaws has to undergo the process of amending and redrafting these bylaws in order to be compliant with the new law.

The Act, however, did not specifically determine how an organization will choose to draft its bylaws nor the exact contents of its bylaws. The process of redrafting bylaws is instead left to an organization itself, through deliberation by, and between, the Board of Directors and its Members.

An interesting comparison can be made between the Magna Carta and a non-profit's set of bylaws in that both are written instruments that limit the scope of authority for a governing body.

In 1215, the feudal barons forced King John of England to sign the Magna Carta in an attempt to limit his powers by law and to protect their rights. It was the first legal document to establish that leaders did not have arbitrary power, but instead were subject to the law of the land. Similarly, an organization's set of bylaws is the legal document that constrains the power of the Board of Directors and its members as well as limits their authority to act.

As a result of the Non-Profit Revitalization Act of 2013, the leadership of many non-profit organizations has undertaken the daunting challenge and responsibility of re-drafting bylaws. One can easily be transported back in time to the era of the drafting of the Magna Carta and envision smoky rooms where English Barons argued viscerally, advocated, and opined in support of their beliefs on the proper constraint to governing authority.

The process of redrafting bylaws for non-profits this year is a reminder of the beauty of our democratic system of government, our freedom of speech, and our ability to have public dissension and discourse without fear of repercussion. It is these freedoms that make our country so wonderful and the practice of law so meaningful.

Carlos Perez-Hall is a partner at Borah, Goldstein, Altschuler, Nahins & Goidel.

SUPREME COURT (2)

Bronze doors of the U.S. Supreme Court with eight bas-relief panels depicting scenes of the evolution of Western law. One of the panels devoted to Magna Carta, at the bottom right of the door, shows King John of England being coerced by the Barons to place his seal upon the Magna Carta in 1215.

Wish List, or Reflection of Actual Governance?

Gloribelle J. Perez

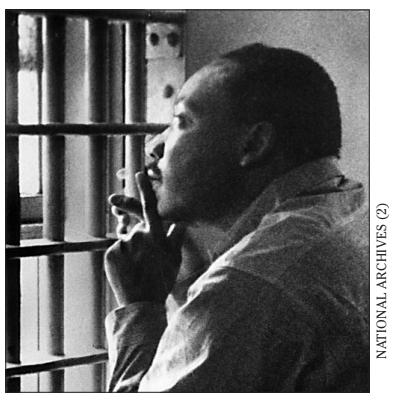
President
Dominican Bar Association

Since King John's seal was affixed on the Magna Carta, its reach has been extensive and prevalent in the 800 years to follow, making appearances in numerous symbols of American culture and law, from the U.S. Postal Service issuing stamps commemorating the Magna Carta in 1965, to being cited in over approximately 170 U.S. Supreme Court opinions, to even influencing the world of hip hop in Jay Z's 2013 album, aptly titled Magna Carta Holy Grail. As one of the earliest writings delineating certain rules of law, such as due process, habeas corpus, right to travel and trial by jury, the Magna Carta has undoubtedly become a symbol of basic human rights in America, furthering the message that the sovereign, and those powerful enough to lead it, are not above the law and must respect the rights of the individual.

Interestingly, despite the Magna Carta's significant role in our development as a nation, many Americans find themselves fighting for some of the basic rights it outlines. One of the most glaring examples has been dominating headlines in recent months: the alleged excessive use of force by police officers towards unarmed males of color (the fatal shooting of unarmed teenager, Michael Brown in Ferguson, and Eric Garner, who died after being put in a chokehold by police officers in Staten Island, being just two examples). Of course, while dramatic events are often at the forefront of the evening news, we rarely hear about the countless times when officers choose to hold fire and display a remarkable level of restraint, even under the most extreme circumstances—situations engulfed by a level of stress and fear that most civilians cannot even imagine. However, given the position of authority held by police officers, whenever a single officer engages in behavior that offends the sense of justice among large sections of the population, this delicate tapestry of societal cooperation begins to erode. And symbols of human rights, freedoms, and fairness remain just that, symbols that lend themselves to poetry or rhetoric, rather than a reflection of actual community interactions.

To help our communities more accurately embrace the teachings of the Magna Carta, we should take stock of the very biases that mold our every move, and encourage others to do the same. Most people would agree that being unaware of one's biases creates a self-imposed handicap of sorts—one that can be particularly dangerous if you also hold a position of power and influence and your views bleed directly into decisions that affect members of the public. Police officers, like the rest of us, are not immune to being captive to personal biases that affect the split-second decisions they are forced to make. My hope is that grand juries, with the benefit of time, can unwrap these scenarios, so that the general principles of due process and justice exemplified in the Magna Carta can be upheld. One can also hope that particularly those in positions of authority, not just police officers, take an opportunity to examine personal biases. But hope has no mandate, which is probably why it's so important to preserve the spirit of the early-human manifesto of liberty and governance embodied in the Magna Carta. This spirit not only pays homage to ancient documents of governance, but also propels us, as individuals and as a civilized society, to better respect the rights of our fellow citizens.

Gloribelle J. Perez is a court attorney to Surrogate Rita Mella in the Surrogate's Court, New York County.



NATIONAL ARCHIVES (2)

An idea that originated in the Magna Carta—that people possess rights that cannot be overruled—inspired many contemporary civil activists and advocates. At left, Eleanor Roosevelt holds a copy of the Universal Declaration of Human Rights in 1949. It was ratified by the United Nations in 1946, and Roosevelt described it as a "Magna Carta for all mankind."

The phrase "Justice too long delayed is justice denied," used by civil rights leader Martin Luther King Jr., above, in his 1967 "Letter from a Birmingham Jail," can be traced back to the Magna Carta.

Be a Servant of the Law

Sam Braverman

President
Bronx County Bar Association

The "Rule of Law" is the fundamental structure of a free society guided by principle and not power. From the earliest times, philosophers questioned how a society ought to be governed and under what authority the people should be ruled. Aristotle wrote in his treatise "Politics":

> It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.

The premise of the "Rule of Law" is that there is a social contract for each of the relationships between sovereigns and citizens, and each compact explains the duties and obligations of one body to the other.

The compact of the duty of the state to the individual is *Constitutional Law*, under which the power of the state is limited in its capacity to enforce its will against the citizen. Examples of this are the Magna Carta, the U.S. Constitution, and the New York Constitution.

The compact of the duty of the citizen to the state is the *Penal Code*, under which the citizen must conform to a minimum standard of behavior.

The compact of the duty of sovereigns to each other is *International Law*, under which the ability of states to impose their will on each other or upon humanity is limited, with authority granted to other states or organizations to restrain abuses of power. Examples of this are the United Nations Charter, the International Atomic Energy Commission, and the International Court in The Hague.

The compact of the duty citizens have to each other is *Contract Law* and its two most important derivatives—the law of property (rights of ownership) and the law of torts (duties to other citizens).

Without these contracts between the parties of society, there would be no stable ownership of property, no freedom to believe, and people would live in fear of tyranny by the strong.

It has become common to wish for fewer laws, to reduce the duties we have to each other, and to demand more "freedom to do as we please." The promise of this libertarian approach is that when everyone is free to do whatever they wish, then creativity and innovation will reign and wealth will grow for all. History has taught us that the contrary is true: Where there are no rules, power dominates and the weakest suffer. This is because no one actually wishes for total lawlessness, but rather to honor laws that benefit their position and to ignore laws that limit their power.

It is only the complete equality of the "Rule of Law" that gives the greatest to all: applied to all equally, restrictions on all equally, empowerment of all equally. It requires honest legislators to create the laws, honest judges to arbitrate the laws, and honest lawyers to zealously enforce the rights of everyone. Although the Magna Carta's first form lasted less than a year, its many incarnations have been a bedrock for liberty now for eight centuries, inspiring people and states towards more peaceful and prosperous lives. It is only through dedication to this principle that society achieves its greatest potential.

As Cicero wrote: "We are all servants of the laws in order that we may be free."

Sam Braverman is a partner at Fasulo Braverman & Di Maggio.

Timeless Document Inspires Legal Reformers

Ronald Castorina Jr.

Director
Richmond County Bar Association

Magna Carta, noted by Lord Denning as the "foundation of the freedom of the individual, against the arbitrary authority of the despot," is the rudimentary charter that was most significant in the historical process that led to the rule of Constitutional Law in the United States and abroad. Drafted upon calfskin (vellum) by the Archbishop of Canterbury in 1215, and sealed in a watery meadow 20 miles west of central London in Runnymede, along the river Thames; Magna Carta was crafted in part to make peace between an unpopular King and a group of rebellious Barons, over heavy taxes and other abuses of power.

Consisting of 63 Articles or Chapters, none is more notable, or widely acknowledged as influential to the spirit of democracy and to the U.S. Bill of Rights, as Articles 39 and 40. These two Articles state in pertinent part, respectively, that "No freemen shall be taken or imprisoned or dis-seized or exiled or in any way destroyed, except by the lawful judgment of his peers by the law of the land," and "To no one will we sell, to no one will we refuse or delay the right of justice." These two principles encapsulate our modern day Sixth Amendment right to trial by jury and our Fifth and Fourteenth Amendments containing clauses that act as safeguards from the arbitrary denial of life, liberty and property by government outside sanction of law, otherwise known as Due Process.

In his "Letter from a Birmingham Jail," Rev. Dr. Martin Luther King Jr. used a phrase "Justice too long delayed is justice denied." Ascribing this powerful legal maxim to "distinguished jurist of yesteryear," it is clear that King, as well as the entire Civil Rights movement in the United States, was greatly influenced by Magna Carta. The phrase itself has become a rallying cry for legal reformers spanning the globe, who seek redress against courts or governments acting too slowly when confronted with legal and social grievances.

Magna Carta has transcended time, and retains relevance because its principles are fundamentally rooted in Natural Law. In 2003 Justice Sandra Day O'Connor calculated that the U.S. Supreme Court alone had cited Magna Carta 50 times in the last 40 years. Surely, Magna Carta will continue to be a part of American jurisprudence in perpetuity. On the event of the 800th anniversary of Magna Carta, we reflect not merely upon its antiquity, but upon its timelessness, and vast fundamental contribution to democracy and enduring notions of freedom, here in the United States and abroad.

Ronald Castorina Jr. practices at The Law Offices of Ronald Castorina Jr., concentrating in civil and criminal litigation.

An Enduring Symbol of a Long Road

John P. McEntee

President

Nassau County Bar Association

By 1215, King John of England was in a bit of a pickle. The Anglo-French War of 1202-1214, where England and France fought for the domination of northern France, ended with a victory by the French in 1214. Returning to England, King John soon ran into a confrontation with the feudal barons who had financed his largely mercenary army. By 1215, fed up with the onerous taxation, the rebel barons renounced their allegiance to King John and captured the city of London. In June 1215, the King and the rebel barons met on a battlefield in southern England where the barons made their formal peace with King John in return for his seal on a document that came to be known as the Magna Carta.

Viewed as a peace treaty, as it was intended, the Magna Carta was a spectacular failure. Soon after placing his seal on the Magna Carta, King John asked Pope Innocent III, the Overlord of England, to annul it. The rebel barons, in turn, refused to surrender control of London. By September 1215, both King John and the barons had repudiated the Magna Carta, leading to the First Baron's War.

Viewed as a symbol—as the embodiment of the basic concepts of the rule of law—the Magna Carta has fared much better. The original seal of the state of Massachusetts, engraved by Paul Revere, shows a militiaman with a sword in one hand and the Magna Carta in the other, while the Magna Carta is on the front door of the U.S. Supreme Court.

The Magna Carta was not meant to protect the rights of all people, but rather feudal barons and freemen when most people fell into neither category. Nevertheless, the Magna Carta embodied a number of revolutionary concepts, including the right of the church to be free from governmental interference, the right of citizens to own and inherit property, the right of access to swift justice, and the right to be free from excessive taxes.

On a broader scale, though, the Magna Carta embodies the concept of the rule of law through provisions providing for due process and a trial by jury: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled … except by the lawful judgment of his equals or by the law of the land." And, with a "security clause" providing for a council of barons to ensure King John's compliance with the charter, and allowing the council to take over command of the kingdom in the event of a breach by the King, the concept that no man, including the King, was above the law was first introduced.

This year, as we celebrate the 800th anniversary of the Magna Carta, we are reminded that the Magna Carta is an enduring symbol of the long road leading to the freedoms and rights we enjoy today and of the unique role lawyers have in supporting and upholding the rule of law.

John P. McEntee is a commercial litigation partner at Farrell Fritz.

Strive Toward Equal Access to Justice

Joseph Carola III

President

Queens County Bar Association

By now, you have read or skimmed over enough articles today to learn the history of the Magna Carta and the flowery platitudes noting the pertinent provisions that form some of the cornerstones of our system of justice. I would like to take this opportunity to play devil's advocate and ask whether this document is still relevant today.

While the barons of yore fought for equal access to the courts and to hold the king to the same rule of law, the by-product of that battle was that the "commoners" also were granted that same access to the courts. However, then as now, the question still remains: Is the right to justice the same thing as equal access to justice?

An example of the inequality of justice that still exists is in the area of residential foreclosures. Here in Queens County, foreclosure litigation has defaults by defendants as high as 50 percent, with residential foreclosures in Queens County having the highest percentage of pro se defendants than any other category of case, in part due to:

- 13.4 percent of the population is 65 years of age (400,000 people);
- 47.8 percent of the population is foreign born;
- In nearly 60 percent of households a language other than English is spoken;
- Only 26 percent of households have broadband access with African-American and Hispanic households having much lower broadband access.

Commercial banks and savings institutions continue to earn net income in the hundreds of billions of dollars while New York remains the epicenter of the U.S. foreclosure crisis. As of May 5, 2014, Queens had 10,060 properties in foreclosure, with minority neighborhoods experiencing 93 percent of pre-foreclosures.

As our Attorney General, Eric T. Schneiderman correctly reported last year, "[f]ighting the fallout from the mortgage crisis is about more than preserving equity—it is about stabilizing our communities. Not only are foreclosures highly disruptive for families, but large numbers of foreclosures within neighborhoods reduce property values and increase crime rates."

Fortunately for the residents of Queens County, there is help. The Queens Volunteers Lawyers Project and its sister legal organizations such as The Legal Aid Society and Queens Legal Services, is dedicated to providing attorneys, on a pro bono basis, to the residents of Queens County who cannot afford to retain a private lawyer to resolve their civil legal problems, especially in the area of residential foreclosures.

It is clear that in this year that we celebrate the 800th anniversary of the Magna Carta, our least sophisticated and most vulnerable defendants still do not have the same access to justice that other segments of society enjoy. Only when the right to justice is synonymous with equal access to justice can we be a great society.

Joseph Carola III is an attorney with Richard T. Lau & Associates.

Prudenti

« Continued from page 1

tinual change and reform, however challenging, have been essential to human progress throughout history. There is no shortage of quotes from great leaders capturing the importance of embracing change. Benjamin Franklin stated bluntly, "When you're finished changing, you're finished," while President John F. Kennedy later recognized that "Change is the law of life. And those who look only to the past or the present are certain to miss the future." President Abraham Lincoln perhaps best captured the need for continual adaptation, observing, "As our case is new, so we must think anew and act anew."

While necessary and often beneficial, change is not always easy. Many of the momentous historical changes that we celebrate today were the subject of fierce debate and opposition. From the struggle to achieve passage of the 13th Amendment abolishing slavery at the end of a bloody four-year civil war, to the fight for women's suffrage and the violent uproar decades later during the Civil Rights Movement, major changes advancing our democracy and equal rights were not easily achieved. Yet despite resistance and apprehension, these and countless other changes throughout our history resulted in undeniable progress, immense benefits for our society and significant advancements for the cause of justice.

As we celebrate historic change on this Law Day, we also recognize that incremental progress on a more operational level can result in significant advancements as well. The New York State Court System has embraced the need for continual change in order to best serve its constituents. Under the leadership of Chief Judge Judith S. Kaye and then Chief Administrative Judge Jonathan Lippman, over two decades ago, our courts began experimenting with "problem-solving courts." These courts combine intensive judicial monitoring, coordination with outside services and treatment where appropriate to better address the underlying problems that repeatedly bring many people into the court system, achieve more meaningful justice and reduce recidivism. At the time, critics objected to the more proactive role of the courts and judges under the problem-solving model.[2] The results, however, proved enormously successful in achieving fair, effective and positive outcomes, not only for the litigants and their families, but also for the public safety of our communities. By taking a traditional institution and its core mission, and adapting it to the world in which we live, our courts have been able to achieve remarkable results. With more than 300 currently in operation throughout the state, our problem-solving courts have become nationally and internationally acclaimed models.[3]

More recently, Chief Judge Lippman's groundbreaking access to justice initiatives, which at times have met with hesitation from some members of the legal community, are making a real difference in the lives of low-income New Yorkers who cannot afford attorneys in civil cases involving the very necessities of life. Among his many innovative efforts to expand access to civil legal services, last year, Chief Judge Lippman established the Pro Bono Scholars Program. More than 100 third-year New York law students in this program, the first of its kind in the country, are currently working in placements through which they will collectively donate over 48,000 hours to New Yorkers unable to afford counsel. Last year, we also launched pilot programs in which trained non-lawyers called "navigators" provide information, guidance and moral support to unrepresented litigants. Preliminary feedback received from both litigants and the judges has been enormously positive, and a recent study demonstrated measurable benefits of the program.[4] Moreover, our experience to date is alleviating concerns that this non-lawyer program poses any threat to the bar, as the assistance provided falls outside the practice of law and is directed towards those who are not able to afford an attorney under any circumstances. These initiatives are ensuring that the court system truly fulfills its promise and its mandate to provide equal justice for all.

With this track record of productive change in mind, we look towards the future with a commitment to building upon this progress and exploring further change. On the access to justice front, the launch of the Poverty Justice Solutions program this year will extend the reach of the Pro Bono Scholars Program by selecting 20 Scholars to serve in two-year fellowships with civil legal service providers after graduation. Their work to help low-income New Yorkers preserve their housing will help prevent homelessness and enable providers to handle an estimated 4,000 additional matters each year. At the same time, we will pursue legislation to build upon the success of the "navigator" program by creating a more substantial role for non-lawyers through a new Court Advocates program in Housing Court and in consumer credit cases.

We have also made significant progress when it comes to e-filing. When the New York courts first began experimenting with e-filing 16 years ago, many raised concerns about how the courts would adequately provide security and feared that users would lack the knowledge and equipment necessary to use the system. Today, with over 58,000 attorneys and others as registered users of the New York State Courts Electronic Filing System and almost one million cases e-filed, those concerns have been allayed. In many regards, e-filing has been able to provide a far greater level of security than that which exists for paper documents, and there have been relatively few instances in which parties and attorneys have felt the need to opt-out, although the option remains available. New York's legal community has embraced the digital revolution and the substantial cost-saving benefits of modern technology.

In light of the tremendous success of e-filing in our courts and the considerable cost-saving benefits of modernization, this year we are seeking the flexibility necessary to expand mandatory e-filing to additional venues, courts and case types.

In the coming months, the courts will also promote much-needed criminal justice reform by working with Gov. Andrew M. Cuomo to finally raise the age of criminal responsibility; seeking to enact additional safeguards against wrongful convictions; and proposing modernization of the grand jury to enhance public confidence in our justice system.

Whether considering changes to New York's bar examination in light of the increasingly borderless practice of law, or taking a good hard look at our state's current system for attorney discipline to enhance efficiency, effectiveness and fairness, we continue to explore change and seek improvement to respond to the new world in which we live and the new challenges we face.[5] Only by doing so can we truly advance justice and best serve the people of our state.

Great leaders throughout history have taught us that strong and successful leadership requires embracing and inspiring change while also being adaptable and willing to adjust whenever necessary. The 800th anniversary of Magna Carta, a document that set the stage for monumental change and the triumph of the rule of law, inspires us to renew our commitment to explore and initiate change that will enhance our system of justice—a commitment our Chief Judge has taken to heart.

1. See generally The Hon. Albert M. Rosenblatt, Response to Lord Goldsmith, Magna Carta Exhibition (July 3, 2002, Philadelphia, PA); Claire Breay & Julian Harrison, "Magna Carta: An Introduction," The British Library, available at http://www.bl.uk/magna-carta/articles/magna-carta-an-introduction; U.S. National Archives & Records Administration, "Magna Carta and Its American Legacy" (Feb. 2, 2015), available at http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html.

2. See, e.g., Leslie Eaton and Leslie Kaufman, "In Problem-Solving Court, Judges Turn Therapist," N.Y. Times, April 26, 2005, available at http://www.nytimes.com/2005/04/26/nyregion/26courts.html.

3. See, e.g., Phil Bowen, "Transatlantic Learning: A Report on the Visit of U.S. Problem-Solving Court Judges to Scotland," Centre for Justice Innovation, 2012), available at http://www.justiceinnovation.org/better-courts/research/transatlantic-learning.

4. The Chief Judge's Committee on Nonlawyers and the Justice Gap, New York State Court Navigator Program, Navigator Snapshot Report, December 2014, available at http://nylawyer.nylj.com/adgifs/decisions15/022415report.pdf.

5. See The Honorable Jonathan Lippman, Chief Judge of the State of New York, The State of the Judiciary 2015: "Access to Justice: Making the Ideal a Reality" (Feb. 17, 2015), available at http://www.nycourts.gov/ctapps/news/SOJ-2015.pdf.

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800-Year-Old Principle Is Still Relevant to Women

Lucia Chiocchio

President

Westchester Women's Bar Association

Truthfully, I knew very little about the Magna Carta before I began writing this article. As I delved into the details, I quickly realized that the basic freedoms that I enjoy as a female American citizen are rooted in this 800-year-old document. The Magna Carta established the basic democratic principal that everyone is subject to the rule of law, no matter how powerful that person is or becomes.

The Magna Carta is the foundation of many of our basic constitutional rights such as due process, habeas corpus, trial by jury, and the right to travel. These are rights that many, at times, take for granted. But, as the history of our country and events unfolding around the world remind us, we should never undervalue the core liberties and rights of our Constitution. All Americans should be mindful of this basic concept as it establishes our freedoms, which are derived from the rule of law.

As a female American citizen, I am grateful for the freedom under the law established by the Magna Carta. Due to the 19th Amendment to the U.S. Constitution, which was only ratified in 1920, I am guaranteed the right to vote. I used the word "only" even though this women's right was established 95 years ago, because it occurred 144 years after the signing of the Declaration of Independence. The Magna Carta principle that everyone is subject to the rule of law, no matter who they are—male or female—was critical to the success of the decades-long efforts of the suffrage organizations.

The importance of the 19th Amendment and the long struggle required for its ratification should not be forgotten, even though it was ratified 95 years ago. Throughout the world, there are still a handful of countries where women are not permitted to vote. While it seems uncivilized that women are denied this basic right in the year 2015, it is a critical reminder that the 800-year-old Magna Carta principle establishing freedom under the law is still extremely relevant.

Commemorating the basic freedoms under the law established by the Manga Carta on Law Day is an opportunity for all Americans to reflect on the importance of this principle to our freedoms.

Lucia Chiocchio is a partner at Cuddy & Feder.

1215 Magna Carta's anniversary commemorative items: 5-cent U.S. postage stamp released in 1965 to commemorate its 750th anniversary, above, and an official website for the Magna Carta's 800th anniversary (http://magnacarta800th.com), below, featuring latest news and events. On June 11-15, 2015 in London, the American Bar Association will present a series of CLE sessions, ending the Association's yearlong celebration of this historic charter.

Lippman

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credibility of the court to the grand jury. By adding judicial oversight in these incendiary cases, this proposal places appropriate supervisory responsibility with the court, assuring public trust in the fairness and objectivity of the grand jury process.

Second, the legislation would lift the veil of grand jury secrecy in cases of important public interest where a grand jury votes not to indict. There are legitimate reasons for maintaining confidentiality surrounding grand jury proceedings generally: to prevent tampering with the proceedings, to protect those who are investigated but not indicted from public embarrassment or stigma, to encourage the full and frank cooperation of reluctant witnesses, and to prevent leaks that could result in the subject of a grand jury investigation fleeing to avoid indictment. But while compelling, these reasons do not justify the broad brush of the current law, which bans virtually all disclosure.

Yet there are cases where the rationale for secrecy is not well served and where maintaining that secrecy significantly undermines public trust in the criminal justice process. When a grand jury votes to indict, information about the case becomes publicly available as the case proceeds. But when a grand jury declines to indict, secrecy rules deny the public even a minimum level of access to the process. This is not inappropriate in most cases. In controversial and high profile cases, however, it becomes an obstacle to meaningful appreciation of the process and to public faith in our institutions of government.

Under the court system's proposed legislation, in cases where a grand jury has voted not to bring charges, the judge will be authorized to disclose material if the general public is likely aware that a criminal investigation was conducted, where the identity of the subject of the investigation has already been disclosed publicly or the subject consents to disclosure, and where there is significant public interest in disclosure. By allowing the public access to information in these cases, the courts will dispel the mystery that for many gives rise to mistrust. The material that may be released would include: the criminal charge or charges submitted, the legal instructions provided to the grand jury, the testimony of public servants and experts, and the testimony of all other witnesses with names redacted. Written applications for disclosure may be made by anyone with notice to the prosecutor or on the court's own motion. In order to prevent harm, the court may limit disclosure where it might lead to the discovery of the identity of a civilian witness, jeopardize a criminal investigation, or pose a threat to the health or safety of a grand juror, a witness, or the public.

With these two changes to the law, it is my hope that we can promote public confidence in the grand jury, a venerable but undeniably ancient institution based on ideas dating back 800 years to the Magna Carta. The grand jury must be updated to meet the multifaceted challenges that we face in the present day criminal justice system.

Peters

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the rights obtained by individuals in one state truly travel with them to another continues to be the subject of much debate and litigation.

Voting Rights

Voting is a fundamental right that many citizens of the United States share. Yet, less than 50 years ago, strict residency requirements prohibited new residents in some states from exercising this fundamental right.[3] In 1970, a law professor moved to Tennessee, attempted to register to vote and was refused because of strict residency requirements—he needed to be a resident of the county for three months prior to the election and a resident of the state for "the one year period next preceding that election."[4] The professor appealed the decision and, upon exhausting his state administrative remedies, commenced an action in the U.S. District Court of Tennessee.[5] The District Court concluded that the durational requirements violated the U.S. Constitution and were therefore null and void.[6] The U.S. Supreme Court affirmed, finding, in relevant part, that the "durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel."[7] However, the court further held that "appropriately defined and uniformly applied requirements of bona fide residence" could withstand constitutional scrutiny."[8] On that basis, in 1972, New York's voter residency requirements were upheld by the U.S. District Court for the Southern District of New York.[9]

Medical Care

The right to medical care has also been reviewed in the context of the right to travel. In 1973, the New York Court of Appeals determined that the provision of medical assistance based on "any minimum period of residence" violated the Equal Protection Clause of the 14th Amendment.[10] However, other states did not share this view. For example, in 1971, after moving from New Mexico to Arizona, an indigent individual suffered a severe respiratory attack and was sent to a nonprofit private hospital.[11] When the private hospital sought to transfer the individual to a county hospital, the county refused, relying on an Arizona statute that required an indigent to be a resident of a county for the preceding 12 months in order to be eligible for free nonemergency care.[12] Subsequently, an action was commenced to determine whether the county was obligated to provide medical care or was liable to the private hospital for costs incurred.[13] Ultimately, the Supreme Court found that the residency requirement impinged on the indigent plaintiff's constitutional right to travel because it penalized interstate travel and had the possibility of deterring migration.[14] Thus, the court held, the requirement could not be upheld because it did not further a compelling state interest.[15]

Veterans Rights

In the 1970s, the New York Constitution and Civil Service Law granted a five-point preference in competitive civil service examinations to honorably discharged veterans who served in time of war and had been New York state residents at the time of induction in the armed forces.[16] Two veterans who were negatively impacted by the residency requirement commenced an action claiming that it offended their constitutional rights to equal protection and to travel.[17] In setting the framework for its analysis, the Supreme Court stated that "[w]henever a state law infringes a constitutionally protected right, [the court must] undertake intensified equal protection scrutiny of that law."[18] The court concluded that the preference violated the veterans' "constitutionally protected rights to migrate and to equal protection of the law" to the extent that it was only available to resident veterans who lived in New York at the time they entered the armed forces.[19]

Marriage Rights

In the 1960s, as a result of anti-miscegenation statutes,[20] interracial married couples faced arrest when traveling to certain states.[21] Such restrictive Virginia laws were challenged by an interracial couple who had been arrested after traveling to the District of Columbia to legally marry and then returning to their home state of Virgina.[22] They were convicted of leaving the state to evade the law and sentenced to one year in jail.[23] Following their convictions, the couple moved to the District of Columbia, where their marriage was legal, and unsuccessfully challenged their convictions on the ground that the statutes under which they were convicted were unconstitutional.[24] The Supreme Court ultimately agreed, finding that Virginia's statutes violated both the Equal Protection and Due Process Clauses of the 14th Amendment inasmuch as they restricted the freedom of citizens to marry solely based on racial classifications.[25] Specifically, the court held that "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[26]

Today, the question of whether the right to marry travels from state to state remains unanswered for same-sex couples. While same-sex marriage has been legalized in 37 states and the District of Columbia,[27] there are 13 states that prohibit it. This incongruence threatens the rights of same-sex married couples who wish to migrate to those 13 states while maintaining, among other things, shared health insurance, custody, tax incentives, property ownership and the right to divorce. The Appellate Division, Third Department dealt with this very issue prior to New York's legalization of same-sex marriages, when two female New York residents who had entered into a civil union in Vermont sought dissolution in New York.[28] Ultimately, the court determined that, despite the fact that the parties could not enter into a civil union in New York, this state's courts could, as a matter of comity, recognize the civil union status of the parties and entertain an action for dissolution.[29] While New York settled the matter in favor of same-sex couples, other states have not.[30] As a result, numerous same-sex married couples have filed lawsuits to seek clarity and fairness.[31]

In January 2015, the Supreme Court granted four petitions for writ of certiorari from the Sixth Circuit Court of Appeals.[32] The petitions were filed by four states in the Circuit—Kentucky, Michigan, Ohio and Tennessee—and consolidated into one appeal.[33] The grant of certiorari is limited to the following two questions:

> 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the 14th Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?[34]

This much awaited decision will, unquestionably, have a significant effect on the rights of citizens to travel freely from state to state.

Conclusion

As we look to the future, we New Yorkers look forward to the day when every individual, without regard to ethnicity, sexual orientation, income status or choice of residency, can share in the freedom to migrate from state to state without the fear of losing fundamental rights.

1. http://www.constitution.org/eng/magnacar.htm.
2. U.S. Const, art IV, §2, cl 1.
3. *Blumstein v. Ellington*, 337 F. Supp. 323 (M.D. Tenn. 1970).
4. Id. at 324.
5. Id.
6. Id. at 329-30.
7. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972).
8. Id. at 343-44.
9. *Hardy v. Lomenzo*, 349 F. Supp. 617, 620 (S.D.N.Y. 1972).
10. *Corr v. Westchester County Dep't of Social Servs.*, 33 N.Y.2d 111, 116 (1973); see *Shapiro v. Thompson*, 394 U.S. 618 (1969).
11. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 251 (1974).
12. Id. at 252.
13. Id. at 252-53.
14. Id at 261-62.
15. Id. at 269.
16. N.Y. Const., art V, former §6; Civil Service Law former §85.
17. *Soto-Lopez v. New York City Civ. Serv. Commn.*, 755 F.2d 266 (2d Cir 1985).
18. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986).
19. Id. at 911.
20. Such laws prohibited a "white person" from marrying any person other than a "white person."
21. New York state has never enacted anti-miscegenation laws. See http://lovingday.org/legal-map.
22. *Loving v. Commonwealth*, 206 Va. 924 (1966).
23. Id. at 925.
24. Id.
25. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).
26. Id. at 12.
27. Marriage Equality Update, Journal of the American Academy of Matrimonial Lawyers, 27 J. Am. Acad. Matrimonial Law 123, 150 (2014/2015).
28. *Dickerson v. Thompson*, 73 A.D.3d 52 (2010).
29. Id. at 54-57.
30. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).
31. Id.
32. *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015).
33. Marriage Equality Update, Journal of the American Academy of Matrimonial Lawyers, 27 J. Am. Acad. Matrimonial Law 123, 150 (2014/2015).
34. *DeBoer*, 135 S. Ct. 1040.

Eng

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erty without due process of law." The 14th Amendment similarly protects against the deprivation of these basic individual rights by any action of state government that does not comport with due process, and thus also rests upon Chapter 39 of the Magna Carta.

The right to due process, historically derived from the liberties granted by the Magna Carta, was the foundation for the Appellate Division, Second Department's 2014 opinion in *People v. Hamilton*, 115 A.D.3d 12. In *Hamilton*, the Second Department, over which I preside, held that a "freestanding" claim of actual innocence may serve as a ground to vacate a criminal conviction under CPL 440.10(1)(h). In recognizing such a claim for the first time at the appellate level, my colleague Justice Sylvia Hinds-Radix, who authored the opinion, wrote on behalf of the court that "it is abhorrent to our sense of justice and fair play that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit."

In *Hamilton*, the defendant was convicted of murder in the second degree stemming from the shooting of Nathaniel Cash in Brooklyn. At his 1993 trial, the primary witness against the defendant was the victim's girlfriend, Jewel Smith. Although the defendant had intended to present an alibi defense, he did not do so because one of his planned witnesses claimed to be too ill to appear, and the other claimed to be too frightened to appear. After the jury verdict but prior to sentencing, Smith recanted her testimony, asserting that she had testified falsely because the police had threatened her with criminal prosecution and the removal of her children. The defendant then moved to set aside the verdict pursuant to CPL 330.30, relying largely upon Smith's recantation. Following a hearing, the trial court denied the defendant's motion, finding that the recantation was unreliable. The defendant was then sentenced to an indeterminate term of 25 years to life imprisonment.

In 1994, the defendant made the first of several motions to vacate his conviction pursuant to CPL 440.10. The 1994 motion was based on the testimony of a newly discovered eyewitness, who claimed that the defendant had not committed the murder. During a hearing on the motion, the defendant sought to present the testimony of two newly discovered alibi witnesses, who had not been named in his pretrial alibi notice. The defendant alleged that two new alibi witnesses, one of whom was a New Haven police officer, had been unavailable at the time of trial because they could not be located. The Supreme Court did not permit the two new alibi witnesses to testify. The Supreme Court thereafter denied the defendant's 1994 motion, finding that the testimony of the new eyewitness was not credible, and explaining that it had not permitted the two new alibi witnesses to testify because they had not been listed on the defendant's alibi notice, and the defendant had failed to establish that they could not have been located in time to testify at trial with the exercise of due diligence.

After several intervening motions were denied, in 2009 the defendant again moved to vacate his conviction pursuant to CPL 440.10. In support of his 2009 motion, the defendant argued that he was entitled to an evidentiary hearing based upon evidence of his actual innocence, which included affidavits of the two alibi witnesses who had not been permitted to testify at the hearing on his 1994 motion. The Supreme Court denied the defendant's motion without a hearing, concluding, among other things, that the affidavits of the alibi witnesses did not constitute newly discovered evidence.

On appeal, the Second Department held in *Hamilton* that the imprisonment of an innocent person violated the Due Process Clause of the New York Constitution. Thus, a defendant's actual innocence is a cognizable ground upon which to vacate a conviction pursuant to CPL 440.10(1)(h), which authorizes a court to vacate a judgment which was obtained in violation of an accused's constitutional rights. In reaching its holding, the Second Department emphasized that a person who has not committed any crime has a liberty interest in remaining free from punishment. Accordingly, the conviction or incarceration of an innocent person, "which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution."

The Second Department also pointed out that subjecting an innocent person to punishment was inherently disproportionate to the acts committed by that person, and therefor violated the New York Constitution's prohibition against cruel and unusual punishment. In the defendant's case, the Second Department found that he had made a prima facie showing of actual innocence by submitting evidence of a credible alibi and manipulation of witnesses, and of the fact that the primary witness against him had recanted. The Second Department concluded that this showing entitled the defendant to a hearing at which all reliable evidence could be considered in determining whether he had established, by clear and convincing evidence, that he was actually innocent.

The barons who demanded that King John accede to the rule of law could not have foreseen that the liberties granted by the Magna Carta would endure over the centuries and guide government action, in a representative democracy far from their shores. We nevertheless owe a debt of gratitude to the Magna Carta, for it is the precursor of the concept of due process, which has now been declared to protect a person who can establish his or her factual innocence of a crime from continued imprisonment.

Gonzalez

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deprived 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.

In the 800 years after their memorialization, the words "law of the land" have taken hold and grown roots. Imagine if you will, those roots leading to the growth of the mighty oak of constitutional democracy. This mighty oak includes the constitutional grant of "due process of law" in the Fifth and 14th Amendments to the U.S. Constitution. These amendments remain steadfast in providing a guarantee against unequal treatment and the arbitrary denial of life, liberty or property without legal process. These guarantees, first afforded only to "free men," have expanded in many directions, like branches of a tree, as society evolves and flourishes.

The U.S. Supreme Court has served as a significant vehicle for advancing the protections and rights of individuals. Article III of the Constitution vests the Supreme Court with the ultimate authority to determine whether laws enacted by Congress and the states comport with the U.S. Constitution, the supreme law of the land. Throughout the years, application of constitutional principles have evolved along with our societal experiences and knowledge, consistent with our expanded wisdom regarding what we stand for as a country.

In January 2015, the U.S. Supreme Court agreed to hear four cases, on appeal from the Sixth Circuit, addressing the issue of whether the 14th Amendment precludes states from banning same-sex marriage and/or refusing to recognize marriages lawfully licensed and performed in other states. *Obergefell v. Hodges*, _ U.S. _, 135 S. Ct. 1039 (2015) (*Obergefell* cases).[3] A decision on this issue may further expand one of the branches of civil rights that has been growing out of our mighty oak for over 40 years.

Loving v. Virginia, 388 U.S. 1 (1967) provides a legal background for advancing marriage equality, the issue argued in the Supreme Court this past week. In *Loving*, a black woman and a white man from Virginia got married out of state, where their union was legal, and, upon their return to Virginia, the couple was arrested, indicted, and pled guilty to violating Virginia's criminal miscegenation law. They were sentenced to a year in prison, with the sentence suspended on condition that they not return to the state for 25 years. The Lovings instituted a class action lawsuit challenging Virginia's statute under the 14th Amendment. On appeal, the Supreme Court struck down the Virginia statute, and it held that the law violated the Lovings' rights under both the Equal Protection and Due Process clauses of the 14th Amendment. The decision stated in part: "[T]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness . … one of the 'basic civil rights of man,' fundamental to our very existence and survival." Id. at 12 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (marriage is "one of the basic civil rights of man") and *Maynard v. Hill*, 125 U.S. 190 (1888)).

Approximately 35 years later, the Supreme Court was asked to consider the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. *Lawrence v. Texas*, 539 U.S. 558 (2003). The two petitioners in *Lawrence* were arrested in one of their homes, which the police had entered upon a report of a weapons disturbance, when observed engaging in conduct prohibited by the statute. Id. at 562-63. The petitioners challenged the Texas statute, and by 6-3 vote, the Supreme Court struck it down. In doing so, the court overruled its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that the Texas statute violated the Due Process clause of the 14th Amendment. The decision stated: "Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, and education . … Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Id. at 574.

In June 2013, the Supreme Court rendered two decisions which, in conjunction with the decisions in *Loving* and *Lawrence*, may provide some clues as to how the Supreme Court will decide the *Obergefell* cases. In *United States v. Windsor*, _U.S. _, 133 S. Ct. 2675 (2013), the court held, by 5-4 decision, that the Defense of Marriage Act, which defined the term "marriage" under federal law as "a legal union between one man and one woman," deprived same sex couples who are legally married under state laws of their Fifth Amendment right to equal protection. The same day, the court issued a decision in *Hollingsworth v. Perry*, _ U.S. _, 133 S. Ct. 2652 (2013), which involved a challenge to an amendment to the California Constitution, commonly known as Proposition 8, providing that "only marriage between a man and a woman is recognized by California."

In *Perry*, two same sex couples sued the California state officials responsible for enforcement of the amendment, claiming that it violated their 14th Amendment rights. When the state officials named in the suit refused to defend the measure, the proponents of the amendment intervened to defend it. The district court held that Proposition 8 violated both the Due Process and Equal Protection Clauses of the 14th Amendment and permanently enjoined its enforcement. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). On appeal, the Supreme Court held, by a 5-4 decision, that the proponents of Proposition 8 did not have Article III standing to appeal the district court's decision. This left the district court's holding intact, in effect killing Proposition 8.

The cases that were argued last week before the Supreme Court may decisively establish that marriages between same-sex couples are constitutionally protected. Should marriage equality come to pass, it will be but another sturdy branch extending from the mighty oak which was planted 800 years ago in the fields of Runnymede, when those feudal barons took the unprecedented step of sowing the fertile seeds of "the rule of law."

1. For a more detailed discussion on Magna Carta in the United States and in New York, please see Luis A. Gonzalez, "Celebrating the Legacy of the Magna Carta," New York Law Journal, Jan. 26, 2015.
2. Tony Mauro, "Roberts Hails Magna Carta I Appearance Before ABA," National Law Journal (Aug. 11, 2014).
3. The grant of certiorari of the Sixth Circuit's decision (772 F.3d 388 (6th Cir. 2014)) in *Obergefell* (Ohio) was linked with grants in the companion cases of *Tanco v. Haslam* (Tennessee), *DeBoer v. Snyder* (Michigan), and *Bourke v. Beshear* (Kentucky).

Scudder

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Murray v. Hoboken Land, 59 U.S. 272, the court declared that, "[t]he words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Carta." Id. at 276.

It is indisputable that the Magna Carta has had a powerful influence on the development of American constitutional law. The Supreme Court has cited the Magna Carta on a wide variety of constitutional issues, including the rule of law, the right to petition, the right to a speedy trial, protection from unlawful search and seizure, habeas corpus, the right to a jury trial, the prohibition against cruel and unusual punishment, the right to appear before a judge trained in the law, separation of powers, double jeopardy, protection against compulsory self-incrimination and the right to due process of law.

The Supreme Court opinions refer to the Magna Carta in almost reverential tones. In *Brown v. U.S.*, 12 U.S. 110 (1814), the Magna Carta was referred to as "that venerable foundation of English law and liberty." In *Twining v. State of New Jersey*, 211 U.S. 78, 105 (1908), the court quoted an English history book describing the Magna Carta as "a sacred text, the nearest approach to an irrepealable fundamental statute that England has ever had." And in *Moody v. Daggett*, 429 U.S. 78 (1976), the court, referencing a prior decision describing the right to a speedy trial as one of the most basic rights preserved by our constitution stated: "[t]hat holding rested in part on common law tradition of such a foundational nature as to be reflected in Magna Carta itself." Id. at 92.

Reference to the Magna Carta is not limited to the court's 18th and 19th century jurisprudence. Chapter 20, which states that "a free man shall be fined only in proportion to the degree of his offence" was frequently cited by the court in a series of Eighth Amendment cases decided at the end of the 20th century. In *Solem v. Helm*, 463 U.S. 277 (1983), Helm was convicted of uttering a bad check and sentenced under South Dakota's recidivist statute to life imprisonment without the possibility of parole. The court held that the Eighth Amendment prohibits sentences that are disproportionate to the crime committed. Justice Lewis F. Powell Jr. found the proportionality principle deeply rooted in common law, noting that "in 1215 three chapters of the Magna Carta were devoted to the rule that amercements may not be excessive." Id. at 284. Eight years later, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the principle of proportionality was again at issue and the court again noted that the principle derives in part from the Magna Carta's ban on excessive amercements.

Discussion of the Magna Carta's proportionality principle is also found in 20th century civil cases. In *Browning Ferris Industries v. Kelco Disposal*, 492 U.S. 257 (1989), Kelco, a garbage disposal company in Vermont, brought antitrust and tort claims against Browning Ferris. A jury awarded Kelco $51,146 in compensatory damages, and $6 million in punitive damages. The court examined the history of the Eighth Amendment and held that it does not apply to awards of punitive damages in cases between private parties. The court cited Magna Carta 33 times. Justice Harry Blackmun, writing for the majority, concluded that the excessive fines clause was intended to limit only those fines directly imposed by, and payable to, the government. For support, Blackmun traced the Eighth Amendment to the Magna Carta, noting that "[t]he compact signed at Runnymede was aimed at putting limits on the power of the king." Id. at 271.

Not surprisingly, many of the principles found in the Magna Carta were incorporated into our state Constitution. The New York Court of Appeals has cited the Magna Carta in criminal and civil cases. In *People v. Isaacson*, 44 N.Y.2d 511 (1978), the court held that it may impose higher standards under the New York Constitution's Due Process Clause than those held to be necessary under the U.S. Constitution, and dismissed a drug conviction based on police misconduct. The doctrine that the outrageous conduct of law enforcement may offend due process "is an ancient one traceable to Magna Carta." Id. at 522. Later, in *Brown v. State*, 89 N.Y.2d 172 (1996), the court determined that a civil cause of action may be asserted against the state for violation of search and seizure clauses of the state Constitution. The court stated that "the prohibition against unlawful searches and seizures originated in the Magna Carta and has been part of our statutory law since 1828." Id. at 188.

The Magna Carta became a foundational document for our federal and state constitutions. The numerous citations to the Magna Carta in American judicial opinions demonstrates that it has helped shape the course of our legal history and it remains one of the most enduring symbols for the rule of law.