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Magna Carta in Supreme Court Jurisprudence

Stephen Wermiel

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»» by Stephen J. Wermiel

Editor's Note: This article is adapted from "Magna Carta in Supreme Court Jurisprudence," which appears as Chapter 5 in Magna Carta and the Rule of Law, *Daniel Magraw et al., eds., published by the American Bar Association in 2014.*

There is no doubt that Magna Carta has influenced conceptions of rights and power in the United States and elsewhere and has shaped the evolution of the common law. But what influence has Magna Carta had on the jurisprudence of the Supreme Court? The U.S. Reports of the Supreme Court's decisions refer to Magna Carta in more than 170 cases. There is a common theme that spans two centuries: the role of Magna Carta is largely symbolic. For the Court, Magna Carta is venerable historical evidence invoked to establish the pedigree of a claim that a particular right exists or to determine what that right means. As justices have made clear in speeches and decisions, however, Magna Carta is not and cannot be positive law in the Supreme Court, since it far predates the writing of the U.S. Constitution, which created the Supreme Court.

The first reference to Magna Carta in the U.S. Reports appears to be in the summary of oral arguments by the very first Supreme Court reporter of decisions, Alexander J. Dallas. In the official report of *State of Georgia v. Brailsford*, Dallas wrote in 1794 that lawyers for the defendant, Brailsford, a British citizen who lived in Great Britain, referred to Magna Carta in their argument in a string of authorities.

The first reference to Magna Carta in a justice's opinion appears to be by Justice Joseph Story in a dissenting opinion from the majority ruling of Chief Justice John Marshall in 1814 in the case of *Brown v. United States*. The case from a Massachusetts court was a lawsuit over the ownership of timber. Armitz Brown, a U.S. citizen, claimed the timber was rightfully his, but the federal government, in the midst of war against England, claimed to own it as forfeited enemy property. Chief Justice Marshall ruled that Congress had not authorized the seizure of enemy property so the property belonged to Brown. Justice Story had written the opinion for the circuit court of Massachusetts and cited Magna Carta several times there. In his Supreme Court dissent, he repeated his own words from the circuit court, reiterating his references to Magna Carta.

At the other end of the span of centuries, the Supreme Court most recently resorted twice in 2012 to Magna Carta. In *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*, Chief Justice John Roberts concluded that the church autonomy guaranteed by the religion clauses of the First Amendment precludes a minister from suing her church for employment discrimination. Setting the historical context for the issues raised by the case, Roberts wrote in January 2012:

> Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There King John agreed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." The King in particular accepted the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church."

In *Southern Union Co. v. United States*, Justice Stephen Breyer referred to Magna Carta in a June 2012 dissenting opinion that was joined by Justices Anthony Kennedy and Samuel Alito. The court's majority, in an opinion by Justice Sonia Sotomayor, ruled that the Sixth Amendment requires that juries, not judges, determine any relevant facts that increase the amount of a criminal fine. Justice Breyer argued that enhanced criminal fines, unlike sentences of imprisonment, could be based on factual determinations by judges. Breyer noted that any limitations on the power of judges in imposing fines were historically included in Magna Carta.

As a final preliminary matter before examining the ways Magna Carta has been used, it is instructive to examine the frequency of references in different periods and by different justices. An informal examination of references to Magna Carta produced the following statistics:

- 19th Century – 56 references
- 20th Century – 103 references
- 21st Century – 13 references

The spread of usage in the twentieth century tends to support the idea that Magna Carta was used most often in a period in which the Supreme Court was taking an expansive view of civil rights and liberties. Prior to 1950, there were twenty-four references to Magna Carta in the twentieth century. There were eight more references between 1950 and 1959. But from 1960 to the end of the twentieth century, Supreme Court justices referred to Magna Carta seventy-one times, more than in the entire nineteenth century.

Roughly half of the references to Magna Carta have been in majority opinions. For the other half, about three-quarters of the references have been in dissenting opinions and about one quarter in concurring opinions. The most frequent users of Magna Carta have been justices of relatively recent vintage. Here are the most frequent users of Magna Carta among Supreme Court Justices:

- John Paul Stevens (1975–2010) 16 cases;
- Hugo Black (1937–1971) 14 cases;
- John M. Harlan (1877–1911) 11 cases;
- William O. Douglas (1939–1975) 9 cases.

Although these leaders in usage of Magna Carta are largely progressive justices, resort to Magna Carta does not seem to be purely ideological. Justice Felix Frankfurter, who took a narrow view of the Court's role, referred to Magna Carta in six cases; Justice Antonin Scalia, who says the Constitution must be read according to its language and the intent of its authors, referred to Magna Carta in seven cases.

Parsing the frequency and statistical analysis of Supreme Court references to Magna Carta does not capture the true sense of how justices use the importance of the document. Only examination of specific cases can illuminate that picture with sufficient detail and depth.

There are a number of instances in which justices used Magna Carta to establish benchmark perceptions of the origins of and importance of rights. For example, Justice Henry Baldwin wrote in an 1837 opinion,[1] "From the beginning of the revolution, the people of the colonies clung to magna charta, and their charters from the crown; their violation was a continued subject of complaint."

More than a century later, Justice Felix Frankfurter articulated another principle when he observed, "The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta."[2]

Justice Hugo Black had another, similar take on the fundamental influence of Magna Carta to promote fairness in the judiciary, especially the criminal justice system. Writing in 1956 in *Griffin v. Illinois*, Black wrote:

> Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: "To no one will we sell, to no one will we refuse, or delay, right or justice. . . . No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. . . .

Reference to Magna Carta to define and bolster the meaning of due process is far and away the most frequent usage among Supreme Court justices and arises in about 28% of the references. Trial by jury cases represent 13% of the total; cases generally evaluating the influence of Magna Carta on the Constitution account for 8%; those raising antitrust issues, and those raising habeas corpus issues each totaled about 6%; other civil rights and liberties were about 5% of the total; and cruel and unusual punishment and excessive fines each represented about 4%.

Due Process

In the Court's early years, well before ratification of the Fourteenth Amendment imposed the requirements of due process on the states, Justice William Johnson articulated a concept like due process—being free from arbitrary government action—found in the Maryland state constitution and based on Magna Carta. In *Bank of Columbia v. Okely*, Johnson wrote in 1819:

> As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Fast forward more than 170 years. In their joint, lead opinion on abortion rights in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter referred to Magna Carta to make the point that while due process applied in the form of the "law of the land" clause to limit "tyranny" by the executive branch, under the Constitution due process also protected against the actions of the legislative branch.

Trial by Jury and Right to a Speedy Trial

After due process, the right of trial by jury is one of the subjects on which justices turn to Magna Carta most often for historical support. A good example is the majority opinion of Justice Frank Murphy in 1942 in *Glasser v. United States* overturning a criminal conviction for one defendant while upholding the convictions of two others. Justice Murphy wrote:

> Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression, but while proclaiming trial by jury as "the glory of the English law", Blackstone was careful to note that it was but a "privilege". Our Constitution transforms that privilege into a right in criminal proceedings in a federal court.

The first Justice John Harlan wrestled with the question of what a right to trial by jury meant in 1898 in *Thompson v. Utah*. In particular the issue was whether trial by jury meant twelve jurors for a felony tried in Utah when it was still a territory and before it became a state. Justice Harlan analyzed the issue at some length, including a discussion of the meaning of Magna Carta:

> Assuming, then, that the provisions of the constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. . . . This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., "but by the judgment of his peers or by the law of the land," it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power."

In *Duncan v. Louisiana* in 1968, Justice Byron White writing for the majority and Justice Hugo Black concurring, both resorted to Magna Carta for support. White's decision held that Louisiana had to provide jury trials for offenses like battery, which although it was classified as a misdemeanor, carried a possible sentence of two years in prison. Justice White wrote:

> The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.

Along with the right to trial by jury, the Supreme Court referred to Magna Carta at some length to establish the pedigree of a right to a speedy trial. The most extended discussion of this right is by Chief Justice Earl Warren in 1967 in *Klopfer v. North Carolina*. Covering some of the same ground used to analyze the right to trial by jury, Warren wrote for a unanimous court:

> We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, "We will sell to no man, we will not deny or defer to any man either justice or right"; . . . but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166). . . .

Habeas Corpus

The right to habeas corpus does not appear directly in Magna Carta. But Supreme Court justices have referred to Magna Carta in cases involving habeas corpus as a way of connecting the dots between the expectation of fair and impartial trials and habeas corpus as the means of vindicating that expectation.

In *Boumediene v. Bush* (2008), Justice Anthony Kennedy used Magna Carta to help establish the historical importance of habeas corpus and, of greater significance to the development of the law, to demonstrate its application to restrain the actions of the crown or the executive. Justice Anthony Kennedy wrote:

> Magna Carta decreed that no man would be imprisoned contrary to the law of the land. . . . Important as the principle was, the Barons

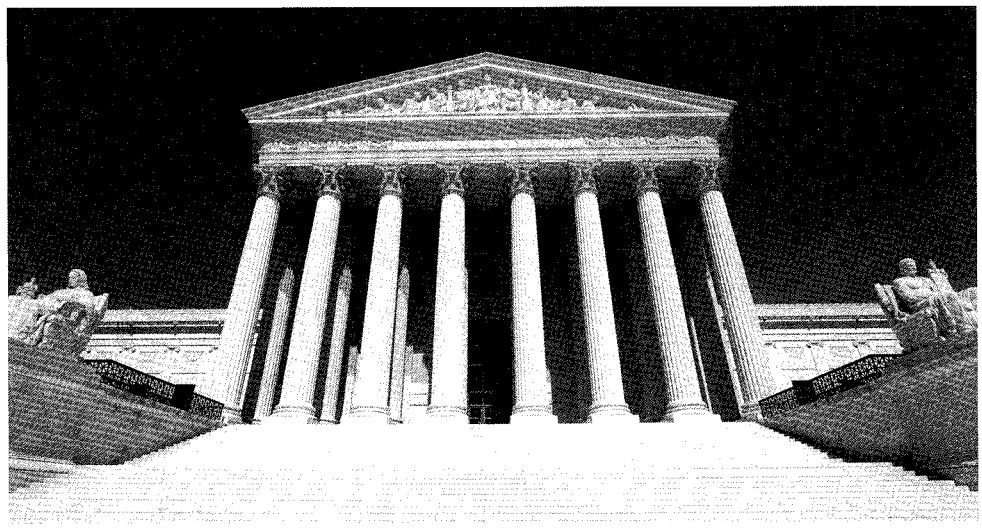
at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. 9 W. Holdsworth, *A History of English Law* 112 (1926) (hereinafter Holdsworth).

Distinguishing Magna Carta: Freedom of Speech

There is one significant set of rights in which Supreme Court justices have made clear that Magna Carta does not provide the benchmark for constitutional development. When it comes to freedom of speech, the First Amendment and the Supreme Court have followed an entirely different path, according to the leading opinions.

In *Bridges v. California* (1941), Justice Hugo Black discussed the evolution of free speech as following an entirely different path from what developed under Magna Carta. Black said:

> In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press."
>
> More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: "Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body (Parliament), the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution."



The U.S. Supreme Court has cited Magna Carta over 170 times in judicial opinions.

Regarding freedom of speech, therefore, Magna Carta is not the iconic fountain of liberty it has become regarding other issues.

There is no question that Magna Carta has influenced decisions by the justices of the Supreme Court. The venerable text and rich history of Magna Carta do not have the force of law per se in Supreme Court jurisprudence, since the document predates the formation of the United States. But the principles articulated on a field in Runnymede in 1215 and reiterated and recast on numerous occasions thereafter clearly have played an important part in the evolution of thinking about rights and government authority of critical importance to Supreme Court justices and Supreme Court jurisprudence.

As the many cases and opinions make clear, it is hard to top the pedigree of being able to trace a right back to Magna Carta or of attributing particular meaning to development at the time of Magna Carta. Perhaps this is not surprising in a judicial system that relies so heavily on precedent and that defines rights implicit in the Constitution based on history and tradition.

Resort to Magna Carta to define the dimensions of a right has the unique ability to transcend ideological differences among the justices. Reliance on Magna Carta to clarify our understanding of the Constitution and its origins has been used by liberal and conservative justices, alike.

After 800 years, the tradition of justices turning to Magna Carta remains strong, and Magna Carta will undoubtedly be resorted to by justices in the future as an iconic fountain of liberty.

Stephen Wermiel is a professor at American University's Washington College of Law. A former journalist, his expertise is in the U.S. Supreme Court, having covered the court for the Wall Street Journal *from 1979 until 1991.*

1. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837).

2. *Bridges v. Cal.*, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting).

Commemorating Magna Carta at 800 Highlights

The American Bar Association is offering a variety of programs and resources to help teachers and students celebrate and learn about 800 years of Magna Carta.

1. Law Day: May 1, 2015 Magna Carta: Symbol of Freedom Under Law

www.lawday.org

Perhaps more than any other document in human history, Magna Carta has come to embody a simple but enduring truth: No one, no matter how powerful, is above the law. In the eight centuries that have elapsed since Magna Carta was sealed in 1215, it has taken root as an international symbol of the rule of law and as an inspiration for many basic rights Americans hold dear today, including due process, habeas corpus, trial by jury, and the right to travel. As we mark the 800th anniversary of Magna Carta, join us on Law Day, May 1, 2015, to commemorate this "Great Charter of Liberties," and rededicate ourselves to advancing the principle of rule of law here and abroad.

2. Magna Carta Traveling Exhibit

www.ambar.org/mctravelingexhibit

The American Bar Association has joined with the Library of Congress and its Law Library to present a special traveling exhibit commemorating the 800th anniversary of the sealing of Magna Carta. Curated by the Library of Congress, the exhibit features 16 banners, 13 of which reflect spectacular images of Magna Carta and precious manuscripts, books, and other documents from the Library of Congress's rare book collections. The exhibit also incorporates a video showing the Law Librarian and the exhibit curator handling selected materials depicted in the exhibit and explaining their significance. *Insights* readers may see where the exhibit is stopping, or request a visit from the exhibit in their school or community.

3. Essay Contests

The ABA is partnering with National History Day and Sons of the American Revolution to offer prizes for Magna Carta–related essays written as part of these organizations' annual programs.

National History Day

http://www.nhd.org/SpecialPrizeinfo.htm

A $1,000 ABA prize will be presented to the outstanding entries in each of the junior and senior History Day divisions that incorporate Magna Carta as an important building block in the advancement of the rule of law and of individual rights in the United States against the arbitrary exercise of governmental power.

Sons of the American Revolution

http://www.sar.org/book/export/html/246

The topic of the essay shall deal with an event, person, philosophy, or ideal associated with the American Revolution, the Declaration of Independence, or the framing of the United States Constitution. Contestants may also choose a topic that relates to Magna Carta and its influence on the Revolution or one or more of the Founding Fathers. First prize is $2,000 and a commemorative medal.

4. Video Contest: What's So Great About the "Great Charter?"

www.ambar.org/abavideocompetition

Students in grades 9–12 or equivalent are invited to create a video of not more than 15 minutes celebrating the 800th anniversary of the sealing of Magna Carta. Participants should use their videos to answer the title question: "Magna Carta: What's So Great About the 'Great Charter'?" Entries must be received by January 15, 2015.

5. Coming in 2015: Icon of Liberty Under Law

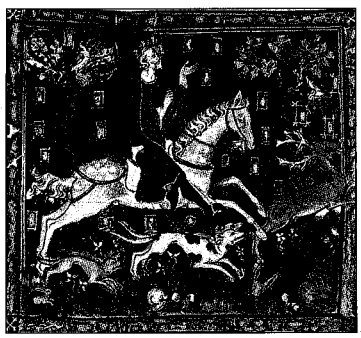
www.iconofliberty.org

Icon of Liberty Under Law will catalog representations—documents, murals, public architecture, public monuments, historical sites—related to Magna Carta. Video interviews with scholars and curators will complement images, while virtual tours and short essays will interpret the featured images and places. The site will also invite visitors to propose their own ideas and "blueprints" for imagined commemorative art and memorials that recognize Magna Carta's contributions to our law, culture, and governance.

WHAT'S ONLINE?

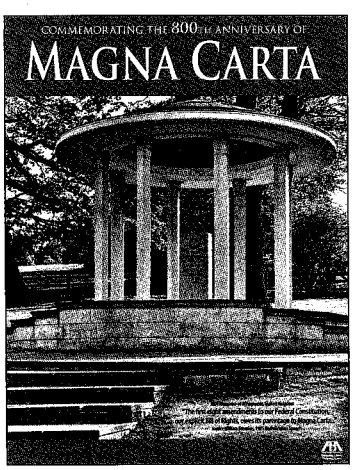
Download Teaching Resources—

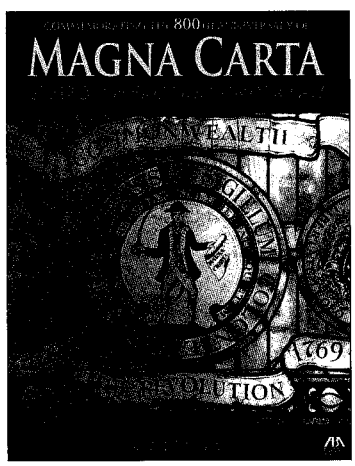
All of the handouts and other teaching materials referenced in this issue are available in this one location. Go get them!



Dive Deeper—

Find articles, exhibits, and podcasts related to Magna Carta. Discover something new, guaranteed.





We Need Your Vote: Magna Carta Posters and Teaching Toolkit

Vote on the Magna Carta poster that provides the most teaching opportunities for your classroom, then request your free resource packet for teaching about Magna Carta. Votes must be in by December 31, 2014, but the resource packet will be available throughout 2015.

www.ambar.org/magnacartavote

Nominate "Profiles"

Know an innovator in the classroom? A dynamic expert in the field? Please let us know.

Connect

Link to the sites for the worldwide commemoration of Magna Carta's 800th anniversary. You will want to celebrate!

Tell Us What You Think!

Propose topics for future issues, share your ideas for the classroom, or tell us your favorite feature of the magazine.

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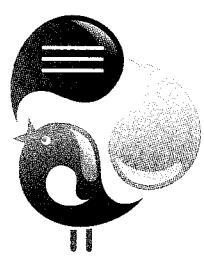

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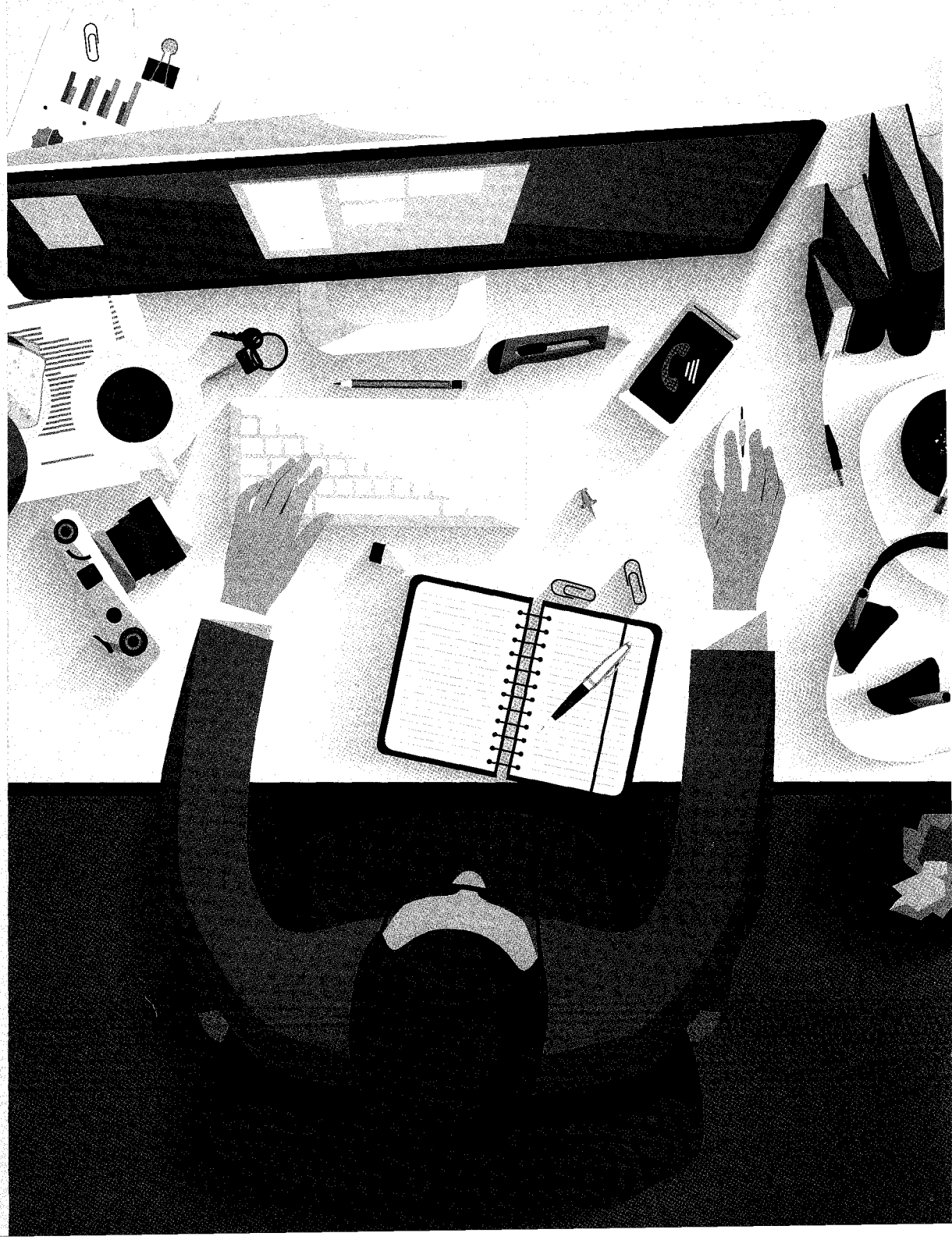

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