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BLACKSTONE'S USE OF MEDIEVAL LAW IN CRIMINAL CASES INVOLVING BENEFIT OF COUNSEL

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The current problem of benefit of counsel, in criminal cases, under the due process clause of the United States Constitution dates back to the twelfth century. It may well be that its origins run back into the earliest beginnings of English Common Law. Jurists such as Christopher Saint Germain,[1] Sir William Stafford,[2] Sir Edward Coke,[3] Sir Matthew Hale[4] and others, in certain instances of felony, permitted the accused counsel.

Mr. Justice Roberts in *Betts v. Brady*, 316 U.S. 445 (1942) explained and justified the rule against appointing counsel in serious criminal cases by stating that at English common law, an individual charged with felony or treason could not *employ* counsel, let alone have counsel *assigned* to him. Why, asks Mr. Justice Roberts, should one now be *assigned* counsel in cases of felony and treason as a part of due process, when the right to have counsel of one's own engagement was not even allowed at common law?

An examination of Britton on the question of benefit of counsel in criminal cases demonstrates that this observation regarding the English common law is some distance from the whole truth.[5] A cursory reading of the Stuart and Hanoverian jurists shows that counsel was allowed and even *appointed* in appeals of felony and treason; and in matters of law, although not fact, counsel was appointed to aid one charged on indictment of felony and treason. This was the rule in Hawkin's day.[6]

Sir William Blackstone's description of the history of benefit of counsel contradicts Mr. Justice Roberts's contention. He was the first jurist to challenge the rule against benefit of counsel in cases of felony or treason on historical grounds. He denied that counsel was prohibited those accused of capital crimes in the middle ages.

Who was correct in his interpretation—Blackstone or Roberts? Using history as the criteria, Blackstone appears to have been right. Many jurists, before Blackstone, had recognized the injustice of the rule prohibiting coun-

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1. SAINT GERMAIN, THE DOCTOR AND STUDENT OR DIALOGUE BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND 256 ff. (Muchall rev. 1874).
2. STANFORD, LES PLEES DEL CORONE 151 (1607).
3. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN AND CRIMINAL CASES 29, 33-34, 136-137, 230 (Brooke ed. 1797).
4. II HALE, THE HISTORY OF THE PLEAS OF THE CROWN 282 (1847).
5. BRITTON 81 (Nichol's trans. 1901).
6. II PLEAS OF THE CROWN 554 (1824).

sel in cases of felony and treason. None, however, had challenged the historical basis of the rule until the time of Blackstone.[7] This paper is concerned with the historical evidence which Sir William Blackstone used to support his thesis that the denial of benefit of counsel is not "strictly speaking a part of our ancient law."[8]

Blackstone cites *The Mirror of Justices* as an authority on the subject.[9] This work, written about 1285, is "not a serious law book, but a legal romance."[10] As Maitland says, "If at the present day a man wrote a law book, and said in it, law forbids that murderers should be hanged; . . . he would be guilty of no extravagance for which a parallel might not be found in the Mirror."[11] We would have to exhibit greater credulity than Coke if we accepted *The Mirror* as a valid source. And yet it might be profitable if we examined the use Sir William makes of that "incomprehensible work.[12] He refers to the following section:

> When the declaration of the plaintiff has been heard, the adversary is concerned to make a good answer. And because folk do not generally know all the 'exceptions' which can be used by way of answer, pleaders are necessary who know how to set forth causes and to defend them according to the rules of the law and the usages of the realm, and they are the more necessary for the defence in indictments and appeals of felony than in venial cases.[13]

This quotation is from the third book entitled *"Of Exceptions."* This limits the meaning of the words of *The Mirror.* They are *applicable to exceptions* and not necessarily applicable to counsel for contesting issues of fact on the general issue of guilty or not guilty. "An exception is something alleged by way of answer in order to delay or destroy an action."[14] A full statement of the common law rule provides counsel in questions of law, and these may be taken to be exceptions. However, nothing is said in *The Mirror* allowing or denying counsel in *indictments* of felony or treason in *questions of fact.* Blackstone would have us believe otherwise. He writes:

> . . . the Mirrour, having observed the necessity of counsel in civil suits, "who know how to forward and defend the cause, by 'the rule of law and customs of the realm'," immediately afterwards subjoins; "and more necessary are they for defence" upon indictments and appeals of felony, than upon other venial causes. . . .[15]

It is obvious that Blackstone recognized the validity of his authority was dubious. He quotes from a book entitled *"Of Exceptions"* without acknowledging the fact. His misuse of this source may be explained by his desire to find historical justification for the humanization of the law. He

7. 4 Bl. Comm. 355 (1830).
8. *Loc. cit.*
9. The Mirror of Justices 90-91 (Whittaker ed. 1895) (intro. by Maitland).
10. Holdsworth, Sources and Literature of English Law 32.
11. The Mirror of Justices, *supra* n. 9, p. xxxvii.
12. Holdsworth, *loc. cit.*
13. The Mirror of Justices, *supra* n. 9, p. 90.
14. The Mirror of Justices, *supra* n. 9, p. 91.
15. Blackstone, *loc. cit.*

believed that the denial of benefit of counsel was "not at all of a piece with the rest of the humane treatment of prisoners by the English law." He continues in the vein of righteous indignation: "For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?"[16] It may be that his reason for misusing a source was a humanistic mistake. Are not all changes in the law extra-legal?

If Blackstone is perhaps consciously unscholarly in his use of *The Mirror*, he demonstrates his exactitude in analysing *Leges Henrici Primi* (a private compilation of law made shortly before 1118). Most of the modern authorities believe that the origin of the rule which denies benefit of counsel to those accused of felony stems from this code of law. Pollock and Maitland, Holdsworth, Cohen, Bigelow, Pulling and others interpret *Leges Henrici* to mean that this was the first statement prohibiting counsel.[17] Blacktone denies that the Latin text says anything about prohibiting counsel. He writes:

> Father Parsons the jesuit, and after him bishop Ellys. . . have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Hen. I. meaning (I presume) chapters 47 and 48 of the code which is usually attributed to that prince. "*De causis criminalibus vel capitalibus nemo quaerat consilium quin implacitatis statim perneget, sine omni petitione consilii. In aliis omnibus potest et debet uti consilio.*" But *consilium*, I conceive, signifies only an imparlance. . . .[18]

The confusion of the rule is based on the translation of *consilium*. Blackstone contends that the *consilium* sought is not counsel in court but a delay for a conference *(imparlance)* outside of court. The evidence appears to support Blackstone's analysis. In the next paragraph of the *Leges Henrici* it is stated that *consilium* occurs outside of the courtroom. "If, namely, an accused walks out from a King's court to the *consilium*, and does not answer the accusation immediately, he forfeits a fine of fifty solidi."[19] It is evident from this statement that *consilium* takes place outside of the courtroom. The modern commentators have confused *consilium* (advise) with *advocatus* and *forespreca* (counsel or pleader). Liebermann defines *consilium* as "the circle of advisors; the friends' advice given a litigant in regard to answers to be given in a litigation (words to be spoken) outside the room or circle of the court; their advice."[20] *Leges Henrici Primi* prohibits the obtaining of advice while outside the courtroom. It does not deny benefit of counsel to those accused in cases of felony.

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16. *Loc. sit.*

17. POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW 211-212 (2d. ed.); II HOLDSWORTH, A HISTORY OF ENGLISH LAW 106-107 (1903-26); COHEN, A HISTORY OF THE BAR (1929); BIGELOW, HISTORY OF PROCEDURE IN ENGLAND 218 (1880); PULLING, THE ORDER OF THE COIF 72 (1897).

18. BLACKSTONE, *loc. cit.*

19. LIEBERMAN, DIE GESETZE DER ANGELSACHEN 570-571 (Halle, 1903-1916); 3 BL. COMM. 313.

20. 2 BL. COMM. pt. I, p. 39.

The evidence Blackstone draws from *The Mirror of Justices* is invalid. However, his analysis of *Leges Henrici* appears to be correct. There was no prohibition of counsel in the Twelfth Century, in English law. The decline of benefit of counsel occurred in subsequent centuries.[21] Holdsworth suspects that the reason the accused was not permitted counsel after the thirteenth century, in criminal cases involving felonies, was the gradual elimination of appeals of felony during this period.[22]

It appears that Blackstone was correct—denial of benefit of counsel is not a part of the ancient law of England. Mr. Justice Roberts's observations in *Betts v. Brady*, 316 U.S. 445 (1942) are some distance from the truth. Medieval common law did not deny counsel in serious criminal cases as he contended. A reading of Britton, Saint Germain, Stanford, Pulton, Coke, Hale, Hawkins and other authorities challenges Mr. Justice Roberts's contention that at English common law one charged with felony might not *employ* counsel, let alone have counsel assigned to him. Not only was the accused permitted counsel in appeals of felony at English law but counsel was even appointed for him. The *Betts v. Brady* rule as applied does not even provide counsel in questions of law. The common law, inadequate as it was, was better for the prisoner in this regard than the 14th Amendment due process clause which Mr. Roberts said does not guarantee the accused benefit of counsel.

Blackstone ends his consideration of the problem with a statement which substantiates the conclusions of the legal historians. The humanization of English law in the Eighteenth century was a resultant, in part, of the increase of the number of humane and capable judges.[23]

> And the judges themselves are so sensible of this defect, that they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law, arising on the trial, they are entitled to the assistance of counsel.[24]

That Blackstone should have used medieval law to prove that accused has certain rights, is itself in keeping with the history of England after the Glorious Revolution. The triumph of the principles of medieval common law over the forces of absolutism led to a liberalization of the law. It is historically logical that a humane judge should have found the medieval law a handy tool in reasserting the doctrine of fairness to the accused.

The first Vinerian professor of English law in the University of Oxford handled the *Leges Henrici* with more skill than some of the modern historians. He may well be the pedantic antiquarian whose "legal history was often at fault."[25] In this instance, however, he neglected historical considerations less than his more scholarly successors.

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21. Y.B. 9, Edw. IV, pl. 4.
22. II Holdsworth, *op. cit. supra*, 260 ff.
23. I Stephen, History of the Criminal Law of England 424-425 (1883).
24. Blackstone, *loc. cit.*
25. Holdsworth, Sources and Literature of English Law 157 (1925).