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BENEFIT OF COUNSEL IN CRIMINAL CASES IN THE TIME OF COKE

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and

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Any explanation of the humanization of criminal law must, in part, be historical.¹ During the medieval period the economic, social and political conditions were reflected in the substance of the criminal law. The central authority was incapable of performing many of the functions which are today handled by the modern territorial state.² Private usurpation of public function weakened the authority of the medieval monarch³ who, at best, could be described as "the first among equals." There was little the sovereign could do to insure the peace and security of the realm. The tenurial system of dependence, the granting of immunities, the evolution of private loyalties and foreign invasion, had each contributed to reduce the power of the Crown.⁴

The Norman conquest of England reoriented that island toward Europe. The Norman dukes pursued (unconsciously in most instances) those ends which would strengthen their position as English kings.⁵ The pragmatic empirical pursuit of regularized civil procedure was accelerated by the Crown in the twelfth and thirteenth centuries. Progress along these lines was much slower in the sphere of criminal procedure. Under Norman law the accused could defend himself "by oath" and "witnesses" only in land cases. Never was such a defense permitted in criminal cases. It was later that the right was extended to cases of assault.⁶ It was only by the middle of the fifteenth century that the principles of trial in criminal cases were partially, though not entirely, established.⁷ Isolated cases of

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1. I STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 355 ff. (1883).

2. *Leges Burgundionum*, in MONUMENTA GERMANIAE HISTORICA Bk. III, ¶ 1, 7 (de Salis ed. 1892); *Leges Visigothorum* in MONUMENTA GERMANIAE Bk. III, ¶ 4, 3 (Zeumer ed. 1902); *id.* at Bk. VII, ¶ 3, 3; CAESAR, DE BELLO GALICO Bk. VI, TACITUS, GERMANIA c. 7. The dooms cited in this paper are all from LIEBERMAN, GESETZE DER ANGELSACHEN (1903); *Dooms of Wihthraed* ¶ 18; Bk. II *Dooms of Aethelstan* ¶ 3; Bk. III *Dooms of Edgar* ¶ 2; Bk. II *Dooms of Canute* ¶ 17.

3. LIEBERMAN, *op. cit. supra* note 2, at 235 ff.; CAM, LOCAL GOVERNMENT IN FRANCIA AND ENGLAND 100 ff. (1912).

4. LIEBERMAN, *op. cit. supra* note 2, at 486 ff., 172 ff., 268; *Dooms of Alfred* ¶ 4. The king had a wergeld like any other freeman. The concept of *lese majeste* had not as yet evolved (*primus inter pares*).

5. LIEBERMAN *op. cit. supra* note 2; *Leges Henrici* ¶ 43, 7.

6. *Trés ancien coutumier* in XI SOCIÉTÉ DE L'HISTOIRE DE NORMANDIE 3 (Tardif's ed. 1881); SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH HISTORY (Stubbs ed., 9th ed., H.W.C. Davis, 1913); *The Assize of Clarendon*, 2; *Domesday Book* (Record Commission, 1834) 262b; *Leges Henrici* ¶ 41, 10; ¶ 68, 2; ¶ 81, 1.

7. FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE c. CXXXII.

violation of these principles can be cited well into the seventeenth century.⁸ Criminal law, in part, was a weapon used by the Crown to protect the social organism.⁹ This was necessitated by the inadequacy of the police force and army at the Crown's disposal. Therefore, only a harsh and swift criminal procedure could be used to protect society from those whose actions seemed to constitute a threat to the existing order.¹⁰ The underlying premise in cases of felony or treason was that the accused was guilty. The trial was quick and the man was freed or sentenced in short order.¹¹ Society was too insecure and the monarchy too weak for either to tolerate any long-standing threat to their safety.

With the decline of the feudal aristocracy and the establishment of the territorial state, the fabric of society was tightened considerably. The state became so much more powerful than the individual that it could afford to be more humane. What harm could a single individual do to society which society could not reciprocate a thousand-fold? This more humane attitude came to permeate the executive, judicial and legislative branches of the government. This was the direct antithesis of the situation which had existed in Medieval England, where the maintenance of public safety was predicated upon the person of the king. Then great religious, economic, social and political questions depended for their solution on the monarch. This monarch without adequate police or military power could not enforce his decision on the underlying population. Society was not confident that it could weather even the most trivial crises (by modern standards). A man accused of treason or felony constituted a threat to the very existence of society. Therefore an accused had few rights. He could not summon unwilling witnesses to testify in his behalf; his preliminary interrogation was held in secret and in his trial the rules of evidence (as understood by the modern lawyer) did not exist.¹² Finally, that which is the subject of this paper, benefit of counsel, was denied in criminal cases involving felonies or treason.¹³

As early as the *Leges Henrici* (which seems to have been compiled shortly before 1118) in an accusation of felony, the accused was permitted to have no counsel but was required to answer the charges immediately.

8. I STEPHEN, *op cit. supra* note 1, at 260 ff. These cases were tried in the 1650's but they have more of the justice of the Anglo-Saxon period than of the Commonwealth.

9. LIEBERMAN, *op. cit. supra* note 2: *Dooms of Hlothaere* ¶ 1-3; *Dooms of Aethelberht* ¶ 1-28; *Dooms of Alfred* ¶ 39; *Dooms of Ine* ¶ 37, "If a *ceorl* often has been accused of theft, and finally he is proved guilty, either by the cauldron, (ordeal of boiling water) or by being caught in the act, he shall have his hand or his foot cut off."

10. LIEBERMAN *op. cit. supra* note 2: *Dooms of Ine* ¶ 36; *Dooms of Alfred* ¶ 4, 7; *Dooms of Wihthraed* ¶ 26; *Dooms of Aethelberht* ¶2, c. 9, 21.

11. *Leges Henrici*, *supra* note 5, at ¶ 46-48.

12. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 231 (1908); I STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 76 ff. (1880); JENKS, *THE BOOK OF ENGLISH LAW* 202 (1929).

13. I POLLOCK AND MAITLAND, *THE HISTORY OF ENGLISH LAW* 211 (2d ed. 1905).

In cases of misdemeanor, however, he was allowed to avail himself of the services of a professional pleader.¹⁴ Felonies obviously constituted a graver threat to the security of society than did misdemeanors. Felonies included theft, murder, treason, robbery, outlawry, housebreaking, arson, counterfeiting and capital crimes generally.¹⁵

Glanville, writing in about 1187, stated that individuals involved in civil litigation might have had a *responsalis*. However, he said nothing that could lead one to infer that the accused had the right to select a pleader in criminal litigation.¹⁶

In *Britton*, issued by Edward I, about 1290, there are enumerated certain types of felonies where the accused was permitted to have counsel. An example of this is shown in the charge of forgery:¹⁷

Upon presentment of this felony, we will that the sheriff do cause all those who are indicted of it to be instantly taken, and their bodies kept safely in prison; and they be brought before us or our Justices; and to the intent that no one may be unprepared with his answer, let those who are so taken have fifteen days at least, if they pray it, to provide their defence and in the meantime let them be kept safely.

In other instances of felonies punishable by death, *Britton* also recommended that the accused be permitted the services of a pleader. In *Britton*, we see a transition toward a humanization of the law.¹⁸ Cohen conjectures that this transition was made manifest between the time Bracton stopped writing (*ca.* 1290) and the time *Britton* began his legal studies.¹⁹

Benefit of counsel was in decline during the later centuries. In the *Year Book 9 Edward IV*, we read: "And note that the defendant in indictment of felony shall not have counsel against the King if it is not a matter in law; but in appeal it is otherwise."²⁰

Fortescue, in *De Laudibus Legum Angliae*, written between 1460 and 1470, made no mention of the right of the accused in criminal cases either to call witnesses or have counsel.²¹

Holdsworth suspects that the reason the accused was not permitted

14. *Leges Henrici*, *supra* note 5, at ¶ 46-48; ¶ 46, 3. "Bonum autem est, ut cum alicui consilium in placito redditur, cum emendatione dicendum praedicatur, ut si forte perorator vel superadecerit aliquid, vel omiserit emendare licet ei. Saepe enim fit, ut in sua causa quis minus videat quam in alterius, et in ore alterum plerumque poterit emendare quod in suo non liceret."

15. BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND* 229 (1880).

16. GLANVILLE, *TRACTATUS DE LEGIBUS ET CONSUECUDINIBUS REGNI ANGLIAE* c. XI (Woodbine ed. 1932). It might be conjectured, as Cohen does, that no well-defined legal class emerged in England until the time of Coke. COHEN, *A HISTORY OF THE BAR* 121 (1929).

17. *BRITTON* 81 (Nichols' trans. 1901).

18. *Id.* at 21.

19. COHEN, *op. cit. supra* note 16, at 191.

20. *Y.B. 9 Edw. IV*, pl. 4.

21. FORTESCUE, *supra* note 7, at c. CXXXII.

counsel after Britton's time, in criminal cases involving felonies, was the gradual elimination of appeals of felony during this period.²²

In 1523, Christopher Saint Germain, in his *Dialogue between a Doctor of Divinity and a Student in the Laws of England*, recognized the right of even the indigent to have counsel assigned in appeals of felony.²³

By Coke's day, the right of benefit of counsel had been transferred to indictments; in questions of law the courts were to assign counsel to the poor. Consequently we can see that even in 1528 or 1628, the poor had more right to counsel than was allowed in Maryland in 1942 in the case of *Betts v. Brady*.²⁴ Further, those who could afford counsel had greater rights at common law than they are generally thought by the Supreme Court of the United States and current commentators to have had.

Let us see what Coke said about benefit of counsel: ²⁵

II. Where any person is indicted for treason or felony, and pleadeth to the treason or felony, not guilty, which goeth to the fact best known to the party: (See before cap. Petit Treason. fo. 29.34. 9 E. 4. 22. Stanf. pl. cor. 151. b. otherwise it is in an appeale which is the suit of the party) it is holden that the party in that case shall have no counsell to give in evidence, or alleage any matter for him: but for as much as *ex facto jus oritur* it is necessary to be explained, what matters upon his arraignment, or after not guilty pleaded, he may alleage for his defence, and pray counsell learned to utter the same in form of law.

1. And first upon the arraignment what advantage he may take in case of high treason by the common law. If it be for compassing the death of the king, he may alleage, that in the indictment there is no such overt or open act set down in particular, (1 H. 7. 22) as is sufficient in law or the like. For it is to be observed, that in no case the party arraigned of treason or felony, can pray counsell learned generally, but must shew some cause.
2. Secondly, in case of high treason by force of any statute, he may alleage, that the indictment being grounded upon a statute, the statute is either mistaken or not pursued.
3. Thirdly, of what matters he may take advantage equally concerning them both. He may alleage, that there was not at the time of the indictment of high treason, two lawfull accusers, that is, two lawful witnesses.
4. Fourthly, of what matters he may generally take advantage in all cases of treason and felony. He may alleage, that the offence is not certainly alleaged in respect of the matter, time, and place, or that he is not rightly named, or have not a right

22. II HOLDSWORTH, A HISTORY OF ENGLISH LAW 260 ff. (1903-26).

23. SAINT GERMAIN, THE DOCTOR AND STUDENT OR DIALOGUE BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND 256 ff. (Mutchall rev. 1874).

24. 316 U.S. 445 (1942). The Court held that since English common law did not permit an accused counsel in serious criminal cases there was no right to counsel here.

25. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN AND CRIMINAL CASES 136-137 (Brooke ed. 1797).

addition, or that the offences were done before the last general pardon.

5. Fifthly, after he hath pleaded not guilty, what advantage he may take upon the evidence: he may alleage, that he ought to have two lawfull witnesses in case of high treason to prove the fact against him.
6. Sixthly, he may take advantage in arrest of judgment, if the verdict be found against him, that the traill came not out of the right place: as it fell out in Arundels case, (Lib. 6. fo 14. Arundels case.) convicted by a jury of wilfull murder; he informed the court that the jury that tried him came out of of a wrong place, and thereupon he had counsell learned assigned him; who indeed found, that the *venire facias* was mis-awarded, and the court thereupon by the counsell being informed, judgement was stayed. And that the prisoner may alleage these or the like matters, (9 E. 4. 22) *it is evident, because for every matter in law arising upon the fact, the prisoner shall have counsell learned assigned him.* (Stanf. ubi sup. 7 H. 4. 34, &c. See before fo. 19) Also it is lawfull for any man that is in court, to informe the court of these matters, lest the court should erre, and the prisoner unjustly for his life proceeded with. And the reason wherefore regularly in case of treason and felony, when the party pleads not guilty, he was to have no counsell, was for two causes. First, for that in case of life, the evidence to convince him should be so manifest, as it could not be contradicted. Secondly, the court ought to see, that the indictment, triall, and other proceedings be good and sufficient in law; otherwise they should by their erroneous judgement attaint the prisoner unjustly.

. . . Robert Chirford counselled the prior of the priory of Binham in Norfolke, (Rot claus 14 E. 2. 17 27 Octob.) that John of Leiscester the kings serjeant at armes, comming to the priory with the kings writ of privie seale, should not be admitted to the priory: for which counsell he was indicted in the kings bench, and depending the proces upon the indictment, the king doth pardon him: and in the pardon is contained a supersedeas to the justices, commanding them to proceed no further.

As the reason for the rule, Coke recognized that given also by St. Germain, namely, that the court itself is to provide "proceedings good and sufficient in law," *i.e.*, the court is to be "counsell for the prisoner." Coke further added that the evidence in death cases must be "so manifest, as it could not be contradicted," and "so clear and manifest as there can be no defence of it." Is this more proof than that currently required, *i.e.*, beyond a reasonable doubt? If it is, then this changed the standard of proof. It might have reflected itself in requiring counsel in serious criminal cases.

The rules spoken of refer to the right to obtain counsel, but note also that the court assigned counsel in law matters even when not asked: "for seeing the offender is allowed no counsell, the court ought to do him justice and assigne him counsell *in favorem vitæ* though he demand it not, to plead

any matter in law appearing to the court for his discharge." Thus rich and poor alike had counsel in law matters—to the honor of the English common law of Coke's day—and to the disparagement of the current common law of Maryland, for example.

If we compare *Doctor and Student* with Coke we will see that all discussion of right to counsel in felony appeals is omitted from the writings of the latter, though recognized in *Doctor and Student*. Further, the right to have counsel assigned for questions of law in indictments was recognized by Coke, though such assignment was limited in *Doctor and Student* to felony appeals. This indicated a decided humanization of the law. Further, the distinction between questions of law and questions of fact was established by Coke, and, clearly, one indicted might have counsel in all questions of law upon the facts, though in *Doctor and Student* the judge was only to aid the defendant in his pleadings to indictments. This also was clearly a humanization of the law; a growth from a judge counsel to assigned private counsel and from aid in pleading to aid in all law questions. Either is more advanced than *Betts v. Brady*.

Describing the procedure in the trial of a peer for treason and other high crimes, Coke said:²⁶

11. But the prisoner, when he pleadeth not guilty, whereby he denieth the fact, he needs have no advice of counsell to that plea. *But if he hath any matter of law to plead*, as Humfrev Stafford in 1 H. 7. had, viz. The privilege of sanctuary, *he shall have counsell assigned to him to plead the same, or any other matter in law*: as to plead the generall pardon, or a particular pardon, or the like. And after the plea of not guilty, the prisoner can have no counsell learned assigned to him to answer the king's counsell learned, nor to defend him. And the reason thereof is, not because it concerneth matter of fact, for *ex facto jus oritur*: but the true reasons of the law in this case are: First, that the testimonies and the proofs of the offence ought to be so clear and manifest, as there can be no defence of it.*. Secondly, the court ought to be in stead of counsell for the prisoner, to see that nothing be urged against him contrary to law and right; nay, any learned man that is present may inform the court for the benefit of the prisoner, of anything that may make the proceedings erroneous. And herein there is no diversity between the peer and another subject. And to the end that the triall may be the more indifferent, seeing that the safety of the prisoner consisteth in the indifferency of the court, the judges ought not to deliver their opinions beforehand of any criminall case, that may come before them judicially.

Discussing the case of one Scarlet, Coke said:²⁷

Fifthly, consideration was had of the act of 3 H. 8. cap. 12 and resolved clearly that this statute had not altered the act of 11 H. 4. in any thing concerning the offence of Scarlet, as upon

26. *Id.* at 29.

27. *Id.* at 33.

that, which shall be said of the act of 3 H. 8. shall appear. And upon hearing of counsell learned what they could say in arrest of judgement, at last judgement was given, that he should be fined and imprisoned, and ordered by the court that no process should goe out upon the said indictments found by the said great inquest, whereof Scarlet was one.

Reference is then made to Stanford, Pleas of the Crown:²⁸

Note the act faith, that they were outlawed before themselves, or of any other, as *amicus curiae*; but the safest way for the party indicted is to plead, upon his arraignment, the special matter given up to him by the statute of 11 H. 4. for the overthrow of the indictment, for such averments, as by law are required, (agreeable to the opinion of the Lord Brook. *Ubi supra.*) and to plead over the felony, and to require counsell learned for the pleading thereof, which ought to be granted, and also to require a copy of so much of the indictment, as shall be necessary for the framing of his plea, which also ought to be granted. And these laws made for indifferency of indicters, ought to be construed favourably, for that the indictment is commonly found in the absence of the party, and yet it is the foundation of all the rest of the proceeding.

In another place Coke stated:²⁹

And at the same sessions Syer was again indicted for the same burglary, (for seeing the offender is allowed no counsell, the court ought to do him justice and assigne him counsell *in favorem vitae*, though he demand it not, to plead any matter in law appearing to the court for his discharge;) and thereupon he stayed the proceedings against him, and the assises being at hand he acquainted the justices of the assize, Wray chief justice and justice Peryam with this case, and with the doubt conceived thereupon; who answered him, that etc.

Thus we see that by Coke's day the rule was that there was to be no counsel in indictments of treason or felony if a "not guilty" plea were entered, since that "goeth to the fact," *i.e.*, is what one must "give in evidence." But on some matters the prisoner might have counsel if he "shew some cause" "because for every matter in law arising upon the fact, the prisoner shall have counsell learned assigned him." The word "assigned" suggests that this right was for rich and poor alike. So Coke allowed counsel for the poor in law questions whereas the poor now have no right to counsel in legal questions or any other according to the view expressed in *Betts v. Brady*. The later development of the rule of that case under due process theory, however, suggests an approximation of the common law rule of Coke's day, since now the United States Supreme Court says that counsel must be assigned whenever failure to do so would prejudice the defendant. Does this not suggest the Coke rule of counsel in law questions? Are not ques-

28. *Id.* at 34.

29. *Id.* at 230.

tions such as those regarding admissions of evidence, recognized in *Gibbs v. Burke*,³⁰ for example, questions of law?

The current problem of benefit of counsel in criminal cases under the 14th amendment due process clause of the United States Constitution dates back to Coke's time. It may well be that its origins run farther back into the earliest beginnings of English common law. Mr. Justice Roberts in *Betts v. Brady* explained and justified the rule against appointing counsel in serious criminal cases by the statement that at English common law one charged with a felony or treason might not even *employ* counsel, let alone have counsel *assigned* to him. Why, the Supreme Court says, should one now be *assigned* counsel in serious criminal cases as a part of due process, when the right to have counsel of one's own engagement was not even *allowed* at common law, and statutes were necessary to authorize this employment?

An examination of Coke's writings 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. Counsel was indeed 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 by indictment with felony or treason. *This* was the rule in Coke's day.

Assuming that history has a bearing on present rights, we may say that legal tradition, seen in true perspective, is actually the outcome of the past, not the fetter of the present and future. We may study the history of a legal tradition in order to understand the conditions under which it arose, and to give it continuity so that it may be used intelligently by current law makers, legislative or judicial. As Holmes said, "the rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step towards an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules."³¹

30. 337 U.S. 773 (1949). The Supreme Court gave negative protection to the accused against improper admission of evidence.

31. Holmes, *The Path of the Law*, 10 HARV. L. REV. 469 (1896-97).