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THE RIGHT TO COUNSEL IN CRIMINAL CASES
AN INQUIRY INTO THE HISTORY AND
PRACTICE IN ENGLAND AND AMERICA

Because of recent decisions of the Supreme Court, the right of an accused to counsel in criminal cases is in doubt.¹ A current commentator, in writing about the application of the due process clause of the Fourteenth Amendment to cases involving benefit of counsel by the Court, says: ²

The weight of the Court's opinions leads to the conclusion that there is no absolute right to counsel nor any definite criteria by which the Court determines whether denial of the right resulted in a deprivation of liberty without due process.

The Supreme Court maintains that the Fourteenth Amendment is not to be interpreted as a protection for the rights of an individual who stands trial in the state courts. It guarantees almost no procedural rights, in criminal cases, to those accused in the state courts.³ Since 1942, "the constitutional status of the right to legal counsel" has become "increasingly precarious."⁴ At present, because of recent decisions, the situation is so uncertain, that it is almost impossible for the accused to be positive that he is guaranteed a given procedural right.⁵

¹ *Foster v. Illinois*, 332 U.S. 134 (1947); *Betts v. Brady*, 316 U.S. 455 (1942); *Avery v. Alabama*, 308 U.S. 444 (1940) (See annotation to this case, *Accused's Constitutional Right to Assistance of Counsel*, 84 L. Ed. 383.) Green, *Liberty Under the Fourteenth Amendment: 1942-1943*, 28 WASH. U.L.Q. 251 (1943); Green, *Liberty Under the Fourteenth Amendment: 1943-1944*, 29 WASH. U.L.Q. 437 (1944); Wilkerson, *The Federal Bill of Rights and the Fourteenth Amendment*, 26 GEO. L.J. 439, 460 (1938). See also Note, 13 B.U.L. REV. 92 (1933); 8 WIS. L. REV. 370 (1933).

² WOOD, DUE PROCESS OF LAW 217 (1951).

³ *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Bute v. Illinois*, 333 U.S. 640 (1948); *Foster v. Illinois*, 332 U.S. 134 (1947); *Carter v. Illinois*, 329 U.S. 173 (1946); *Betts v. Brady*, 316 U.S. 455 (1942); *Frank v. Mangum*, 237 U.S. 309 (1915).

⁴ WOOD, *op. cit. supra* note 2, at 218.

⁵ *Holiday v. Johnston*, 313 U.S. 342 (1941) (The accused was erroneously sentenced twice for one offense for which he had been found guilty. This, the Court decided did not constitute double jeopardy.) Cohen, *The Screws Case: Federal Protection of Negro Rights*, 46 COL. L. REV. 94 (1946).

In the case of *Betts v. Brady*,⁶ the right of the accused to counsel in a criminal trial in a state court, was declared a matter to be decided by the states themselves. *Betts*, who had been indicted in a Maryland district court on a charge of robbery, asked the trial judge to appoint an attorney to assist him in his defense. He claimed that he was indigent. The judge refused, stating that it was not the custom of the court to appoint counsel for paupers who were charged with crimes other than murder or rape. The accused was found guilty and sentenced to eight years' imprisonment.

Betts sought release through a habeas corpus proceeding on the grounds that the trial was unfair as he had been denied counsel. The Court pointed out that the due process clause of the Fourteenth Amendment did not include those specific rights which are guaranteed by the Sixth Amendment. The right to counsel in every criminal trial, based on the latter Amendment, is binding only on the federal courts, but not on the state courts.⁷ Due process, according to the Court, is:⁸

. . . less rigid and more fluid than envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of the facts in a given case.

The real issue which the Court was asked to decide was that involving the due process clause. Does this clause require that the state furnish counsel to the indigent in criminal

⁶ 316 U.S. 455 (1942).

⁷ *Id.* at 461-2. Contrast this decision with that of Justice Holmes in *Moore v. Dempsey*, 261 U.S. 86, 91-2 (1923) and Justice Murphy in *Glasser v. United States*, 315 U.S. 60, 70, 76 (1942). See also Nutting, *The Supreme Court, the Fourteenth Amendment and State Criminal Cases*, 3 U. OF CHI. L. REV. 244 (1936).

⁸ *Betts v. Brady*, 316 U.S. 455, 462 (1942). The Court distinguished this case from the case of *Powell v. Alabama*, 287 U.S. 45 (1932) on the basis of fact. Although *Powell v. Alabama* declared that aid of counsel was fundamental to a hearing as intended by the Fourteenth Amendment, the majority in this case held that the rule did not apply. The intelligence of the defendant, his age and the existence of state law made it essential that *Powell* have counsel; whereas, *Betts* was qualified to defend himself. The Court believed that the age of the defendant in the present case (43), his ordinary intelligence, and the fact that he had been in court on previous occasions were adequate to qualify him to defend himself.

cases, regardless of circumstances? ⁹ Does the Sixth Amendment express "a rule so fundamental and essential to a fair trial . . . that it is made obligatory upon the States by the Fourteenth Amendment"? ¹⁰ The Court indicated that in some instances the right to counsel was fundamental, and in others it was not. It explained and justified the rule against requiring the state to appoint counsel for the indigent in serious criminal cases, by the statement that at English common law, one charged might not even *employ* counsel in cases of felony and treason, let alone have counsel *assigned* to him.¹¹ Why, the Supreme Court asks, 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 choosing was not permitted at common law, and statutes were necessary to authorize their employment? ¹² The Court points out, after an investigation of colonial legislation and state statutory and constitutional provisions, that in a majority of the states "it has been the considered judgment of the people, their representatives, and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."¹³

The answer to the question, which the Court poses — Is assistance of counsel, in a criminal case, a fundamental procedural right? — can only be rendered by the study of the

⁹ *Betts v. Brady*, 316 U.S. 455, 464 (1942). In *Glasser v. United States*, 315 U.S. 60 (1942), the defendant had been an Assistant United States Attorney for four years. The Court held that this was immaterial to his right to counsel under the Sixth Amendment.

¹⁰ *Betts v. Brady*, 316 U.S. 455, 465 (1942).

¹¹ *Id.* at 466. Y.B. 9 EDW. IV, pl. 4 (1469). "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." Here we see the decline of medieval criminal procedure. See BRITTON 81 (Nichols' transl. 1901). Statute of Westminster the Second, 1285, 13 EDW. I, c. 10; II HOLDSWORTH, A HISTORY OF ENGLISH LAW 256-8 (4th ed. 1936).

¹² The Treason Act, 1695, 7 & 8 WILL. 3, c. 3 (The accused was permitted counsel in "Cases of Treason and Misprison of Treason."); The Treason Act, 1746, 20 GEO. II, c. 30 (The right to counsel was extended to those impeached by Commons in Cases of High Treason and Misprison of Treason.); The Trials for Felony Act, 1836, 6 & 7 WILL. 4, c. 114 (All persons tried for felonies shall be admitted to make their defense by counsel or attorney.).

¹³ *Betts v. Brady*, 316 U.S. 455, 471 (1942).

history of the rule itself. For past history is one of the chief factors in determining present rights. Liberties and rights are, in a sense, historical entities of a certain age. Perhaps one of their most cogent rationalizations is that of the Middle Ages: "It was ever thus by use and wont and the mind of the eldest inhabitant runneth not to the contrary."¹⁴

A cursory examination of the question of the right of the accused to counsel in criminal cases demonstrates that the Court's observations are some distance from the truth. Christopher Saint Germain in 1523 recognized the right of even the indigent to have counsel assigned in appeals of felony.¹⁵ Sir William Stanford, writing about thirty-four years later, states that in indictments, one charged with treason or felony may have counsel in questions of law but not in questions of fact.¹⁶ The party himself knows the fact better than his counsel would, and his manner of pleading may aid the court in determining the fact, while counsel would only mislead, or delay the appearance of truth.¹⁷ When however, the defendant's answer "exceeds his power to plead he shall have counsel assigned to him notwithstanding that it is against the King."¹⁸ He clearly states a rule to determine prejudice to the defendant, that is, the question of law as opposed to the question of fact.¹⁹ Pulton, whose work was

¹⁴ As early as the laws of Edward the Elder (900-925), we have evidence for due process and a day in court. ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* 121 (1922). The Laws of Edgar, issued shortly before 962, state that: "In the first place, my will is that every man, rich or poor obtain the benefit of the public law and be awarded just decisions." ROBERTSON, *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I* 25 (1925).

¹⁵ SAINT GERMAIN, *THE DOCTOR AND STUDENT* 256-9 (Muchall's ed. 1874).

¹⁶ STANFORD, *LES PLEES DEL CORONE* (1607).

¹⁷ Holdsworth maintains that this concept was justified by the canon law principle "that the prosecution must make his case so plain, that it was useless to look at any evidence to the contrary." HOLDSWORTH, *SOURCES AND LITERATURE OF ENGLISH LAW* (1925). This topic will be given a more complete consideration at the conclusion of this paper.

¹⁸ STANFORD, *op. cit. supra* note 16, at 151.

¹⁹ In practice this rule was less than adequate. "In the case of Joseph Hayes for Treason, A.D. 1684, when the prisoner asked that counsel might be heard against the admissibility of hands as evidence, adding he had been informed it had been denied to be evidence . . . it was refused; Jeffreys saying, 'Somebody has put it into

published in 1609, follows Stanford very closely.²⁰ He recognizes that if the plea exceeds the power, learning and knowledge of the defendant to answer, he shall have counsel assigned. This rule reverts back to the time of Britton (1290), when counsel was permitted the accused in cases involving exceptions to indictments.²¹ Sir Edward Coke,²² Sir Matthew Hale²³ and William Hawkins²⁴ are all in substantial agreement on this point.

The right of the accused to counsel in *questions of law* in criminal cases was considered to be fundamental to a fair trial by the English jurists in the seventeenth century.²⁵ Thus, the Court's observations on the rule "that appointment of counsel is not a fundamental right" at English common law must be modified. Though the great English common law lawyers acknowledged a legal tradition which prohibited the accused assistance of counsel in *questions of fact*, they did permit counsel in *question of law*. Blackstone commented on the inhumanity of the rule "that no counsel shall be allowed a prisoner on trial, upon the general issue in any capital crime, unless some point of law shall arise to be debated," contending that it appeared to be inconsistent "with the rest of the humane treatment of prisoners by the English law."²⁶

your head, and puffed you up with a vain story: there is no such thing; it is a fiction, a mere whim only . . . and no ground in the world for it.' And when the prisoner afterwards objected that his Trial was not, as it ought to have been, under the Stat. 35 H. 8, c. 2, and desired counsel to argue that point, Jeffreys refused it: 'We are of another opinion. If any whimsical notions are put into you by some enthusiastic counsel, the court is not to take notice of their crochets.'" 5 STATE TRIALS 475 (Howell ed. 1809-1826).

²⁰ PULTON, *DE PACE REGIS ET REGNI* 192-3 (1609). This is essentially the opinion expressed by Justice Reed in the case of *Gibbs v. Burke*, 337 U.S. 733 (1949).

²¹ SELDEN SOCIETY, *THE MIRROR OF JUSTICES* 92-100 (Whittaker ed. 1895). Though *The Mirror of Justices* is not a valid source, it contains a very interesting and humanistic analysis of the right to counsel. See also BRITTON (Nichols' transl. 1901).

²² COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 29, 33-34, 136-7, 230 (Brooke ed. 1797).

²³ II HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 236 (1st Am. ed. 1847).

²⁴ II HAWKINS, *PLEAS OF THE CROWN* 554 (1824).

²⁵ Becker and Heidelberg, *Benefit of Counsel in Criminal Cases in the Time of Coke*, 6 MIAMI L. Q. 546 (1952).

²⁶ 4 BL. COMM. *355.

Not only did the first Vinerian Professor of English law challenge the rule on humanitarian grounds, but he also questioned its historical validity. He was not certain that it was a part of medieval English law. A reading of the text of *Leges Henrici Primi* supports Blackstone's contention.²⁷ This first English compilation of private law (neither Roman nor Canon) made early in the twelfth century, does not prohibit the accused assistance of counsel; rather it denies him the right to a *concilium* — the obtaining of advice outside the court from his circle of friends and kinsmen.²⁸ Most modern scholars, basing their conclusions on a mistranslation of *concilium*, maintain that *Leges Henrici Primi* is the origin of the rule denying benefit of counsel. Pollock and Maitland,²⁹ Holdsworth,³⁰ and Bigelow³¹ have erred on this point. The rule is not a part of early common law. It evolved after Britton, perhaps as a result of the gradual elimination of the appeal of felony during the fourteenth and fifteenth centuries.³² History does not support the United States Supreme Court's conclusion that the appointment of counsel is not a fundamental right essential to a fair trial.³³

The Court relates that statutes were necessary to secure the employment of counsel in cases of felony and treason. This is true. Why, however, were they passed by Parliament? There is little evidence to support the hypothesis that medieval English courts denied counsel until the fourteenth century. The prohibition evolved in the subsequent period. The judges themselves recognized the inhumanity of this rule. They relaxed it in cases of felony and treason, before

²⁷ I LIEBERMANN, DIE GESETZE DER ANGELSACHEN 570 (Halle ed. 1903).

²⁸ II *id.* 39; COHEN, A HISTORY OF THE BAR 1-19 (1929); BRUNNER, FORSCHUNGEN ZUR GESCHICHTE DES DEUTSCHEN UND FRANZOSISCHEN RECHTS 423 (1894).

²⁹ I POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1905).

³⁰ II HOLDSWORTH, *op. cit. supra* note 11, at 106.

³¹ BIGELOW, HISTORY OF PROCEDURE IN ENGLAND 218 (1880). *Accord*, RIGHTMIRE, THE LAW OF ENGLAND AT THE NORMAN CONQUEST 35 (1932).

³² II HOLDSWORTH, *op. cit. supra* note 11, at 256. Fortescue in *De Laudibus Legum Angliæ*, written between 1460 and 1470, makes no mention of the right of the accused in criminal cases, either to call witnesses or to have counsel.

³³ *Betts v. Brady*, 316 U.S. 455, 473 (1942).

the passage of the statutes. Why did they suspend it in criminal cases, in some instances? Because they recognized that, in certain instances, without counsel a fair trial is impossible.³⁴ The Court holds that the due process clause of the Fourteenth Amendment should not be interpreted as an "inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."³⁵ Is this holding in accord with legal experience? An examination of English trial records does not substantiate the contention. The fact that criminal trials could not be conducted fairly, without benefit of counsel, was the reason for the passage of the three statutes, which gave the accused the right to legal assistance. A brief analysis of English *State Trials* leads to the conclusion that without counsel criminal prosecutions were often nothing more than legal murders.

The Duke of Norfolk was indicted for high treason in 1571. He appealed to the court for aid of counsel, pointing out:³⁶

"I have had very short warning to provide to answer so great a matter; I have not had fourteen hours in all, both day and night, and now I neither hear the same statute alleged, and yet I am put at once to the whole herd of laws, not knowing which particularly to answer unto. The indictment containeth sundry points and matters to touch me by circumstance, and so draw me into the matter of treason which are not treasons themselves: therefore, with reverence and humble submission, I am led to think I may have counsel. And this I show, that you may think I move not this suit without any ground. I am hardly handled. I have had short warning and no books."

Despite the fact that the Duke cited the case of Humphrey Stafford, who had been indicted for "High Treason" in the reign of Henry VII and had been permitted counsel, the court refused to grant his request. Chief Justice Dier advised the Duke that, "Stafford had counsel only for an incidental point

³⁴ See I STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 424 (1883).

³⁵ *Betts v. Brady*, 316 U.S. 455, 473 (1942).

³⁶ I STATE TRIALS, *op. cit. supra* note 19, at 966.

of law, concerning Sanctuary, and not upon the point of fact of High Treason."

In 1653, that brave soldier in the cause of the Commonwealth, Colonel Lilburne, charged with treason, pleaded that Cromwell's Court grant him counsel; he maintained that he was too ignorant of the law to conduct his own defense: "If you will not assign me counsel to advise and consult with, I am resolved to go no further, though I die for it, and my innocent blood be upon your hands."³⁷ He was denied counsel, despite his plea that as a "freeborn Englishman" he was entitled to a fair trial. The jury remembered, fortunately, the services rendered by that brave soldier in the recent civil war, and acquitted him.

Sir Henry Vane was not so fortunate in the Royal Court. Indicted for high treason in 1662, he entreated the court to assign him counsel, citing five important points of law on which he needed legal advice. His petition, as in the earlier trials of the regicides, was refused; he was found guilty.³⁸

Don Pantaleon, the brother of the Portuguese Ambassador, was indicted for murder in 1654. In reply to his request for counsel to conduct his defense the court said that, "No counsel could be allowed to the Ambassador's brother in Matters of Fact, but if in the proceedings of his Trial he should desire counsel as to Matter of Law, it should be allowed him." On the following day Don Pantaleon appeared in court and pleaded ignorance of the laws of England and asked again that the court assign him counsel. The court answered that "they were of counsel equal to him as to the Commonwealth." The verdict was a foregone conclusion. The trial record ends in these words: "He . . . laid his head on the block, and it was chopt off at two blows."³⁹

³⁷ IV *id.* at 1329.

³⁸ VI *id.* at 153.

³⁹ V *id.* at 479.

The noble maxim, "the judge shall be counsel for the prisoner," appears in practice to be found wanting. "The judge shall see that the proceedings against the prisoner are legal and strictly regular"⁴⁰ is yet another misleading phrase. One unfortunate defendant, immediately after being told by the judge that he would act as his counsel, heard him put a question to the witness "directly tending to elicit proof of the prisoner's guilt." The defendant could not restrain an outcry, "Alas, my lord, if you were my counsel, you would not ask that question."⁴¹

The rule was so unfair that even Justice Jeffreys, the worst of all English judges to sit in Westminster Hall, was moved to condemn this abhorrent practice as contrary to the principles of English justice in these words:⁴²

"I think it is a hard case that a man should have counsel to defend himself for a twopenny trespass, and his witnesses examined upon oath, but if he steal, commit murder or felony, nay, high treason, where life, estate, honour, and all are concerned, he shall neither have counsel nor his witnesses examined under oath."

Despite Jeffreys' moral protestations, he was not hindered from conducting one of the most heinous criminal trials recorded in the annals of English legal history. A certain Mrs. Lisle was convicted, in 1685, of treason for harboring a dissenting minister.⁴³ Jeffreys had acted as counsel for the prisoner, cluttering and browbeating witnesses out of their senses. Mrs. Lisle said, as she mounted the scaffold:⁴⁴

"I have been told the court ought to be counsel for the prisoner; instead of which, there was evidence given from

⁴⁰ 4 BL. COMM. *355.

⁴¹ V STATE TRIALS, *op. cit. supra* note 19, at 464.

⁴² V *id.* at 466.

⁴³ XI *id.* at 297. She is referred to in the *State Trials* as "Lady Alice Lisle." Since she was the widow of John Lisle, who had been one of Charles' judges, her correct status is best described by the appellation "Mrs. Lisle."

⁴⁴ XI *id.* at 322. During the trial Jeffreys had said: "For though we sit here as judges over you by authority from the King, yet we are accountable, not only to him, but to the King of kings, the great Judge of heaven and earth; and therefore are obliged, both by our oaths, and upon our consciences, to do you justice, and by the Grace of God we shall do it, you may depend upon it."

thence, which though it was hearsay, might possibly effect my jury. My defense was such as might be expected from a weak woman; but such as it was, I did not hear it repeated again to the jury. But I forgive all persons that have done me wrong, and I desire that God will do so likewise."

The case of the Rajah Nuncomar is an example of one of the most unfair trials, on a charge of felony, recorded in the *State Trials*.⁴⁵ He was indicted for the forgery of a bond at Calcutta in 1775. The jury was composed of Englishmen living in India. They spoke only English and the Rajah spoke only his native tongue. Most of the witnesses for the crown were also unable to communicate in a language intelligible to the accused. Therefore, it was necessary to conduct the trial through sworn interpreters. The Rajah requested that his counsel be permitted to address the court on his behalf. The Chief Justice refused this reasonable plea, charging the jury in these words: ⁴⁶

"By the laws of England, the counsel for prisoners charged with felony are not allowed to observe on the evidence to the jury, but are to confine themselves to matters of law. . . . But I told them [the counsell] that if they would deliver to me any observations they wished to be made to the jury, I would submit them to you and give them their full force, by which means they will have the same advantage as they would have in a civil case.'

The trial, conducted without full assistance of counsel, could have terminated in only one way; the prisoner was found guilty and hung.

The only justification for this inhumane rule, which precludes the right of the accused to a fair trial, was stated by the Lord Chancellor Nottingham in the trial of Lord Cornwallis to be: ⁴⁷

"No other good reason can be given why the law refuses to allow the prisoner at the bar counsel in matters of fact, where life is concerned, excepting this, that the evidence by which he

⁴⁵ XX *id.* at 923. See V MACAULAY, *CRITICAL AND HISTORICAL ESSAYS* 151 *et seq.* (1900).

⁴⁶ XX *STATE TRIALS*, *op. cit. supra* note 19, at 923.

⁴⁷ VII *id.* at 149.

is condemned ought to be so very evident, and so plain, that all the counsel in the world should not be able to answer it."

A cursory examination of the records of the *State Trials* shows that frequently judgment was not rendered on the basis of "evident facts" but rather on the basis of "hearsay." In our age of relativism there are few "evident facts." These "few facts" become even fewer when the scientific methods of verification are applied to them. When Boroski, in 1662, was put on trial for the murder of Mr. Thynne, he asked the court for benefit of counsel. The Chief Justice denied his request, reasoning that since "he was charged with matter of fact: counsel could do him no good in such a case."⁴⁸

A reading of the text of *Leges Henrici Primi*⁴⁹ — Holdsworth,⁵⁰ Pollock and Maitland⁵¹ and the other great legal historians notwithstanding — will demonstrate that the denial of benefit of counsel did *not* originate in English medieval common law. Rather, it appears to have evolved from two sources diametrically opposed to the spirit of the Anglo-American legal system: canon law and royal absolutism.

In the reign of Mary, magistrates were given power to examine prisoners secretly and through inquisitorial procedures, often under torture.⁵² These examinations were the real trials in the significant state cases of that period. Prisoners were not permitted benefit of counsel; or were they allowed to call witnesses on their behalf. The prohibitions were justified on the canon law principle that "the prosecution must make his case so plain, that it was useless to look at any evidence to the contrary."⁵³ These limits on the liberties of the accused which were contrary to the principles of common law were further buttressed by the concept of the

⁴⁸ V *id.* at 474.

⁴⁹ LIEBERMANN, *op. cit. supra* note 27.

⁵⁰ HOLDSWORTH, *op. cit. supra* note 11.

⁵¹ POLLOCK AND MAITLAND, *op. cit. supra* note 29.

⁵² Stat. 1554-1555, 1 & 2 PH. & MARY, c. 13; Stat. 1555-1556, 2 & 3 PH. & MARY, c. 10.

⁵³ HOLDSWORTH, *op. cit. supra* note 17, at 171.

crown's "extraordinary powers," which could in times of emergency override the common law.

Fair trials, in capital cases, were almost impossible unless the accused had benefit of counsel. This was the reason statutes were passed granting the accused the right to counsel in matters of fact in capital cases. By the common law rule, he had the right to counsel in matters of law. The introduction of criminal procedure, justified by canon law principles and royal absolutism, weakened the rights of the accused to counsel. In no case, however, did they destroy them completely, as suggested by the opinion in the *Betts* case.

An examination of the records of *State Trials*, over a period of four centuries, denies the validity of the Supreme Court's holding that a trial "can be fairly conducted and justice accorded a defendant who is not represented by counsel."⁵⁴ Faulty history and the inability to profit from past experience have led to the negation of the right to counsel.⁵⁵

This development (so dangerous in the light of English legal experience) of negating procedural rights is part of a trend "apparent in due process cases involving other rights."⁵⁶ As a letter published in a leading newspaper pointed out:⁵⁷

Betts v. Brady dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel, for the poor as well as for the rich, is an indispensable safeguard of freedom and justice under law.

Past history does have a bearing on present rights. Legal tradition is the outcome of the past, not the fetter of the

⁵⁴ *Betts v. Brady*, 316 U.S. 455, 473 (1942).

⁵⁵ *Bute v. Illinois*, 333 U.S. 640 (1948); *Foster v. Illinois*, 332 U.S. 134 (1947); *Carter v. Illinois*, 329 U.S. 173 (1946).

⁵⁶ Wood, *op. cit. supra* note 2, at 218. Miss Wood offers an excellent discussion of the present threat to the constitutional status of procedural rights in criminal cases in Chapter III.

⁵⁷ N.Y. Times, Aug. 2, 1942, § 4, p. 6, col. 7.

future. We should study the history of a legal tradition in order to understand the conditions under which it arose, and give it continuity, so that it may be used intelligently by current lawmakers, legislative or judicial. As Holmes said:⁵⁸

. . . 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.

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⁵⁸ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

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