

2012

## The Community Right to Counsel

Laura Appleman

---

### Recommended Citation

Laura Appleman, *The Community Right to Counsel*, 17 BERKELEY J. CRIM. L. 1 (2012).  
Available at: <http://scholarship.law.berkeley.edu/bjcl/vol17/iss1/1>

### Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38SWSW>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Criminal Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# The Community Right To Counsel

Laura I. Appleman\*

## TABLE OF CONTENTS

Introduction .....	2
I. Legitimacy, Democracy and Stability: The Right to Counsel in Historical Context .....	4
A. The British Common Law Tradition .....	5
B. Colonial Rights and Community Interests .....	8
1. Early Colonial Society .....	11
2. Pre-Revolutionary Charters and Laws .....	16
a. Friends as Advocates .....	16
b. Distrust of Lawyers .....	24
c. Fading Prejudice Against Defense Counsel.....	26
d. Counsel Privileges Not Written, but Assumed ...	27
3. Legal and Political Theory.....	30
a. Cesare Beccaria .....	30
b. Matthew Hale.....	33
c. Edward Coke .....	34
d. William Blackstone .....	36
e. Revising Colonial Legal Texts .....	37
C. The Right to Counsel in the Sights of the Revolution ....	41
1. State Constitutions and Declarations of Rights .....	42
2. Federal Constitution/Bill of Rights .....	44
II. The Supreme Court and Misunderstanding .....	46
A. The Historical Right to Counsel .....	47
1. <i>Powell v. Alabama</i> .....	47
2. <i>Faretta v. California</i> .....	48
3. <i>Rothgery v. Gillespie County</i> .....	51
III. Implications and Applications .....	52
A. Self-Representation .....	56

Copyright © 2012 by Laura I Appleman.

\*Associate Professor of Law, Willamette University. J.D., Yale University; B.A., M.A., English, University of Pennsylvania. Many thanks to Sam Buell, Jennifer Collins, Rose Cuison Villazor, Caroline Davidson, David Friedman, Carissa Hessick, Bill Nelson, Alice Ristroph, Nick Rosenkranz, Rodney Villazor, Norman Williams, and the faculties at Seton Hall and the University of Cincinnati for their helpful advice and comments on this paper. Thanks also to Willamette for its research support.

B. Appointed Counsel .....	57
C. Ineffective Assistance of Counsel .....	58
IV. Conclusion .....	61

## INTRODUCTION

Contrary to popular understanding, the Sixth Amendment right to counsel was originally a community right. Documentary historical evidence reveals that what we now interpret as an individual right to counsel was, in the colonial era, commonly understood as a right that belonged to the general community. We have either glossed over the true history of the right to counsel or ignored it completely, leading to decades of misinterpretation by both the Supreme Court and scholars. In response, this Article provides the missing historical and constitutional reasoning for the creation of the Sixth Amendment right to counsel. In doing so, I will show that the original right to counsel was collective, not individual, as it is currently envisioned.<sup>1</sup>

Exploring the original understanding of the right to counsel also helps answer one of American legal history's enduring questions: why did the right to counsel arise in the colonies nearly 200 years before it was granted in England? The answer to that question, I contend, lies in the particular nature of the community in the colonial and Revolutionary era. I contend that colonial communities primarily granted the defendant the use of counsel as a form of social insurance, not merely to protect the defendant's personal rights. By granting counsel privileges, the colonial leaders ensured that the community trusted the criminal justice system, strengthened community legitimacy, and helped bring the community back to a state of normalcy after crimes had been committed. In this way, the community's need for stability and fairness took priority over any individual right to counsel, something that ranked far lower in importance.

We have consistently and incorrectly viewed the right to counsel through just one lens, mistakenly ascribing the right *only* to the accused. Much of the original understanding of the right to counsel has been lost due to our focus on the raft of individual liberties currently granted to a defendant. Additionally, much of the conventional understanding treats

---

<sup>1</sup> Throughout the paper, I define individual rights as constitutional rights we envision belonging primarily, or solely, to an individual, such as the right to silence or the right to privacy. Collective rights, on the other hand, are constitutional rights that redound largely to the community, such as the right to a jury trial.

the Sixth Amendment right to counsel as an outgrowth of the adversary system, an impossibility given that such a system simply did not exist at the time that the right to counsel arose in the early colonies.

The right to counsel, however, for the British colonies and later the confederation of states, was largely about the fledgling American community's ability to have a democratic, legitimate, and stable public forum for criminal justice. This forum—the public trial—provided a kind of social protection absolutely critical for the successful functioning of a very new society. Indeed, as I will show, counsel privileges were at least partially intended to stabilize the social order and reinforce community interests.

As a result, the conventional history is both incorrect and incomplete, misinforming our current jurisprudential and social understanding of the right to counsel.

Critically, this collective aspect of the right to counsel—ensuring the stability of the fledgling eighteenth-century American community—has import for our current regime of criminal punishment and sentencing. Since the Court has consistently relied on the colonial- and Founding-era history to chart the boundaries of the modern right to counsel, we must fully understand the contours and ramifications of that historical right to counsel to plot our future path. Understanding the right to counsel through the lens of the community not only provides a strong basis for interpreting a key constitutional right, but also has important implications for three aspects of the right to counsel: 1) self-representation; 2) appointed counsel; and 3) ineffective assistance of counsel, particularly in light of *Padilla v. Kentucky*.

Part I of the Article explores the historical meaning of the right to counsel, providing my positive case. I offer a textual-historical reading of the right to counsel clause of the Sixth Amendment based on seventeenth- and eighteenth-century colonial society, linguistic usage, and colonial- and Founding-era documents, and conclude that a conception of the right to counsel as partially an expression of the community interest in democracy and legitimacy is plausible. I do so by exploring the historical evolution of the right to counsel and its intertwining with the community's central role in all aspects of criminal justice, tracing it from its early beginnings in the colonies through the post-Revolution and Constitution-drafting periods.

The important role of right to counsel in providing stability to the fledgling colonial society, and, later, in the constitutional era, was

reflected in several contemporary sources: colonial charters and declarations of rights; John Adams' work as defense counsel for the British soldiers on trial for the Boston Massacre; the influential theoretical works and law treatises of Matthew Hale, Cesare Beccaria, and William Blackstone; colonial bills of rights and early state constitutions; and the Founding-era writings of American essayists, statesmen, politicians, and citizens. Based on these sources, this Article contends that both a seventeenth- and eighteenth-century audience would have understood the right to counsel to be as important to the community interest as it was a defendant's prerogative.

In Part II, I discuss the ways the Supreme Court has only partially understood the history of the right to counsel, and how this has sowed confusion and uncertainty in interpreting its bounds.

Part III briefly explores some implications of my historical findings on the future of the right to counsel. I argue that when invoked, the collective right to counsel has strong significance for three aspects of the right to counsel: 1) self-representation; 2) appointed counsel; and 3) ineffective assistance of counsel, particularly in light of *Padilla v. Kentucky*. I conclude that applying a collective right to counsel alongside an individual right to counsel would help ensure better outcomes for both criminal defendants and their communities.

The collective right to counsel should not be viewed as simply a historical artifact, of interest only to historians and scholars. Properly understood and interpreted, it can provide a useful way to strengthen the right to counsel where traditional Sixth Amendment analysis falters. The right to counsel arose so much earlier in the colonies than in England in part because of the community's desire to have a legitimate and fair system of criminal justice. These collective desires, eventually solidified into rights, were essential to the survival of the American venture.

### **I. LEGITIMACY, DEMOCRACY AND STABILITY: THE RIGHT TO COUNSEL IN HISTORICAL CONTEXT**

Although the origins of the right to counsel have been explored, most of the work has been primarily focused on the concerns of the defendant. Thus the existing scholarship on the historical right to counsel is largely incomplete, as it has neglected the role of the community.

Historians studying the right to counsel in seventeenth- and eighteenth- century America have typically focused on how the right emerged so much earlier in the colonies than in England, but have not

come up with any satisfactory reasons why. The handful of legal scholars who have analyzed the origins of the right to counsel have explained it as a natural outgrowth of the rise of the adversarial system.<sup>2</sup>

In the following sections, I contest the idea that the creation of the adversarial system was the force underlying the right to counsel. Instead, I contend that the right to counsel was originally a collective right, a privilege granted to the community to ensure fairness at trial. In support of my claim, I return to documentary historical sources, and show how a collective right to counsel was always an integral part of the common law, continuing to be viewed as such through our War of Independence and the writing of the Constitution.

Although I do not deny that the colonial criminal defendant possessed a stake in the matter, accounts from contemporary newspapers, legal treatises, and popular writing show that the privilege of counsel for the accused was primarily understood as a way to keep the community stable, functional, and harmonious. In other words, although counsel privileges might have also functioned to assist the defendant, the driving force behind the original grant of counsel rights was primarily protection of the community. It is in this way that the right to counsel was originally a collective right.

By exploring the history of the jury trial right from its colonial beginnings through the Revolutionary period, I hope to deepen our comprehension of not only the role of the community in the creation of the right to counsel, but also the role of the community in mediating criminal punishment for offenders. To be true to our origins and the true meaning of the right to counsel, we must return to historical sources.

#### A. The British Common Law Tradition

When the colonists first arrived from England, the system of criminal justice they brought with them had a tradition of prohibiting

---

<sup>2</sup> See, e.g., Pamela Metzger, *Beyond the Bright Line: A Contemporary Right-To-Counsel Doctrine*, 97 NW. U. L. REV. 1635 (2003); *Faretta v. California*, 422 U.S. 806 (1974); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 99 (1995); FRANCIS HOWARD HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 98 (1951); JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL, A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 9-10 (2002).

the use of defense counsel at trial.<sup>3</sup> As John Langbein has conclusively shown, in the sixteenth and seventeenth centuries, the entirety of the criminal trial was a “lawyer-free contest of amateurs,” with neither prosecution nor defense represented by counsel.<sup>4</sup> In large part, this was due to the contemporary belief that lawyers had nothing to contribute to the fact-finding work of the court.<sup>5</sup>

The Anglo-American criminal trial of the seventeenth and early eighteenth centuries was a very different creature than that which we have today.<sup>6</sup> The standard English common-law felony<sup>7</sup> criminal trial was both brief and informal; usually, both the presentation of evidence and the return of a verdict lasted only a half-hour.<sup>8</sup> Private parties brought criminal charges against a defendant, and the victim or friend or relative of the victim often pursued the case personally.<sup>9</sup> This private prosecutor would personally testify and question witnesses, and the defendant was permitted to respond to the evidence and question witnesses on his or her own behalf.<sup>10</sup> In common-law felony criminal trials of that era, the judge served to referee the proceedings, although he could also examine witnesses and answer questions of law.<sup>11</sup>

Notwithstanding the appearance of balanced interests, the defendant in the English felony trial was at a severe disadvantage. Because the accused was normally confined until trial, he or she did not obtain a copy of the indictment pre-trial, was not informed of the evidence against him or her, and could not compel witnesses on his or her behalf.<sup>12</sup>

The trial did not much improve the defendant’s lot, as “accused felons had to speak in their own defense and to respond to prosecution

---

<sup>3</sup> See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 10 (2003).

<sup>4</sup> See *id.* at 11. Although the (private) prosecutor was permitted to engage counsel, he usually did not. This rule held true for all felonies excluding treason, although counsel was permitted for misdemeanor trials. See *id.* at 11-12, 36-37.

<sup>5</sup> See *id.* at 26. As Langbein points out, the belief that counsel had nothing to contribute to a criminal trial was fostered by the belief that “the accused’s proximity to the events gave him a special advantage in defending himself.” *Id.* at 34.

<sup>6</sup> See *id.* at 38.

<sup>7</sup> In the seventeenth and eighteenth centuries, felonies comprised of “murder, manslaughter, larceny, robbery, rape, treason or misprision of treason.” See TOMKOVICZ, *supra* note 2, at 3.

<sup>8</sup> See *id.* at 2.

<sup>9</sup> See *id.* at 3.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

evidence as it was given, and as they heard it for the first time.”<sup>13</sup> Moreover, the accused had to speak entirely for themselves—if they could not defend themselves, they would have no defense.<sup>14</sup>

Despite this power imbalance, several beliefs helped to maintain the status quo in England for almost two centuries. First, the belief persisted that counsel’s involvement on the defense side would prevent the truth from being discovered; the best way to get at this truth was to hear directly from the accused.<sup>15</sup> Additionally, many assumed that criminal proceedings were so simple that a defendant (presumably an innocent one) would be able to navigate the ordeal alone.<sup>16</sup> Finally, some scholars have posited that providing assistance of counsel on the defense side would have posed a threat to the survival of the English state, since there was a belief that the commission of felonies (and certainly treason) created “social unrest” and disharmony, thereby weakening the government.<sup>17</sup> Any assistance of counsel for the defense might help facilitate this governmental undermining, and was thus discouraged.

The custom barring defense counsel began to relax only slowly in England. In 1695, the Treason Act allowed a defendant the use of counsel for either treason or misprision of treason.<sup>18</sup> Defense counsel was permitted during the rare appeal, whether the charge was capital or not.<sup>19</sup> Formally, the rule barring defense counsel stopped being enforced around 1730, although defense counsel did not play a role in English criminal trials in any significant way until the end of the eighteenth

<sup>13</sup> J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 L. & HIST. REV. 221, 223 (1991).

<sup>14</sup> *See id.*

<sup>15</sup> *See* LANGBEIN, *supra* note 3, at 3. As Hawkin’s Pleas of Court argued: “It takes no matter of skill to make a plain and honest defense, which in Cases of this kind are always the Best; the Simplicity and Innocence, artless and ingenuous behavior of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in Cause not their own.” 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 564 (6th ed. 1787).

<sup>16</sup> *See* TOMKOVICZ, *supra* note 2, at 4.

<sup>17</sup> *See id.* In support of this theory, Tomkovicz notes that the British government, at that time, had “no standing army and no force of police. It was exposed to intrigues from without and sedition from within.” *Id.* at 3; *see also* Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 3, 7 (1954) (noting that in seventeenth-century England, any felony or treason was seen as more political than criminal).

<sup>18</sup> *See id.* at 6.

<sup>19</sup> *See* Rackow, *supra* note 17, at 6.



century.<sup>20</sup> The decision to allow defense representation lied in the individual judge's hands.<sup>21</sup> It was not until 1836 that Parliament formally gave criminal defendants the right to be represented through counsel.<sup>22</sup>

### B. Colonial Rights and Community Interests

Unlike their wholesale importation of the rest of the English common law, the American colonists did not impose any formal ban on the use of defense counsel during criminal trials.<sup>23</sup> Although the use of defense counsel was not widespread in the early settlement period, there were few rules forbidding their use, either written or oral. The question then remains: why did the colonists reject such a common and well-known measure, when they otherwise imported English law wholesale from the mother country? What prompted them to permit defense counsel from the very beginning, later crystallizing it in state constitutions and the Bill of Rights?

Many scholars and judges have posited that it was the rise of the adversary system and the emergence of the public prosecutor that prompted the allowance of defense counsel.<sup>24</sup> Under this theory, due to the rise of a professional prosecutor who knew the law, the judge, and the jury, the only way that colonial lawmakers could remedy this inequality of power was to allow the defendant to bring counsel to the trial.<sup>25</sup>

Although a convincing narrative to modern ears, this historical explanation imposes current beliefs about criminal justice and society onto colonial sensibilities. As others have noted, “[t]o stand a chance at recovering authentic history, one must attempt to see the world through the eyes of those who lived at the time.”<sup>26</sup>

---

<sup>20</sup> See LANGBEIN, *supra* note 3, at 168-70.

<sup>21</sup> See TOMKOVICZ, *supra* note 2, at 8.

<sup>22</sup> See Metzger, *supra* note 2, at 1638 n.6. The right to counsel was codified at 6 & 7 Will. 4, c. 114, §1, 2 (1836).

<sup>23</sup> See Metzger, *supra* note 2, at 1638.

<sup>24</sup> See, e.g., Metzger, *supra* note 2, passim; *Faretta v. California*, 42 U.S. 86 (1975); ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE* 4 (1992); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 99 (1995); HELLER, *supra* note 2, at 109-10; TOMKOVICZ, *supra* note 2, at 9-10.

<sup>25</sup> See Metzger, *supra* note 2, at 1638-39.

<sup>26</sup> George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 TEX. TECH L. REV. 199, 219 (2010).

It is true that some colonies rejected the English private prosecutions (where the victim would bring criminal suit against the accused), and instituted a public prosecutor who took over criminal accusations.<sup>27</sup> But, at the time of colonial establishment, providing a bulwark against prosecutorial privilege or governmental overreaching was certainly not the only reason why the accused were permitted to either speak on their own behalf or use private counsel at trial.

The question of why a right to counsel arose in the American colonies so early and so many years before England is a mystery that has never fully been explained. In part, this is because much of the workings of the colonial criminal courts are lost to us.<sup>28</sup> The common explanation—that the defendant’s right to counsel arose primarily as a protest against English heavy-handedness in the American colonial criminal justice arena—can only explain why counsel rights were protected in the late eighteenth century, with revolution fomenting and the various wrongs of England foremost in colonial minds. But the right to counsel—or, at least, the defendant’s ability to bring some sort of advocate to the bar—arose in the colonies before such beliefs and feelings against the English government became common.

Moreover, the colonial version of government does not map neatly onto our understanding of government.<sup>29</sup> While we now envision government as a complex bureaucratic apparatus, colonial government, particularly *early* colonial government, did not have “modern police forces, standing armies, or bureaucracies.”<sup>30</sup> Instead, judges, sheriffs, and a few other officials were the only major links between a colony’s central government and its residing communities.<sup>31</sup> These appointed officials had to meet and enforce the law under the sharp scrutiny of the community, and were extremely sensitive to community needs and

---

<sup>27</sup> See Metzger, *supra* note 2, at 1638-39; GARCIA, *supra* note 24, at 4.

<sup>28</sup> See George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony Of New Jersey 1749-57*, 1 N.Y.U. J. OF L. & LIBERTY 671, 671 (2005). As Thomas notes, “[w]hat research exists about ‘patterns of criminal justice’ in other colonies has focused largely on substantive criminal law—e.g., showing the number of indictments, convictions, and acquittals of various criminal offenses.” *Id.*

<sup>29</sup> As Bill Nelson has pointed out, “[t]he structure of eighteenth-century government was vastly different from the structure of government today.” See WILLIAM E. NELSON & ROBERT C. PALMER, *CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 19 (1987).

<sup>30</sup> See *id.*

<sup>31</sup> *Id.*

interests.<sup>32</sup> Aside from the courts, the local government primarily exercised its authority over the community through the institution of the town meeting.<sup>33</sup> In other words, for the American colonies, the community was all.

The idea that permitting defendants to have counsel was borne of a desire to assist accused colonists against the overarching government machine cannot be accurately applied to the reality of life in the thirteen colonies.<sup>34</sup> As William Nelson has argued in relation to Massachusetts, “[i]t is difficult to comprehend how greatly the legal system of prerevolutionary [colonies] differed from that of modern America.”<sup>35</sup>

So what can explain this rise of the right to counsel? Well, one clue to this mystery lies in the structure and interdependency of each colonial community in the seventeenth and eighteenth centuries. In other words, one major reason that colonial and, later, early state and federal governments allowed counsel for the defendant was based on the absolutely critical need to keep the community stable, functional and harmonious.<sup>36</sup> For colonial society, the community was all,<sup>37</sup> and providing the defendant with the right to bring an advocate to trial was a form of social insurance: it ensured that the community trusted the criminal justice system, strengthened its legitimacy, and helped bring the community back to a state of normalcy after a crime had been committed.

---

<sup>32</sup> See WILLIAM NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 15 (1975) [hereinafter “THE AMERICANIZATION OF THE COMMON LAW”].

<sup>33</sup> See generally PAUL WAINWRIGHT, *A SPACE FOR FAITH: THE COLONIAL MEETINGHOUSES OF NEW ENGLAND* (2011).

<sup>34</sup> Cf. Metzger, *supra* note 2, at 1639 (arguing that in 1660, Rhode Island permitted an attorney for defense in order to “empower citizens who faced the strength of public prosecutors”).

<sup>35</sup> THE AMERICANIZATION OF THE COMMON LAW, *supra* note 32, at 3. Nelson notes that although naturally the development of each colony/state was different, conclusions drawn from evidence on Massachusetts “can provide working hypotheses for studying how the legal system of prerevolutionary America was transformed into the legal system of today.” *Id.*

<sup>36</sup> The main function of the colonial judicial system was to “punish and restrain crime and to maintain a cooperative harmony in the community.” J. R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123, 132 (1993).

<sup>37</sup> See Warren M. Billings, *Law in Colonial America: The Reassessment of Early American Legal History*, 81 MICH. L. REV. 953, 956 (1983).

### 1. *Early Colonial Society*

William Nelson, in some of his historical work on the early American Republic, has explained that prior to the Revolution, “law, if it was to be effective, had to be derived from highly accepted moral principles or customary norms that had become rooted among those portions of the community which might be called upon to enforce those norms as jurors.”<sup>38</sup> So, too, worked the internal “law” of the individual colonial community. For these small microcosms of society to work, communal sanctions, or collective norms, had to be carefully and strictly imposed. By providing the right to either speak at trial or bring an advocate, the community was enforcing a number of important collective norms, including fairness, legitimacy, and expressive restorative retribution.

In major part, then, the rules of substantive law in pre-revolutionary colonial society focused on consensus and agreement.<sup>39</sup> “Consensus was promoted by the fact that nearly all members of society shared common ethical values and imposed those values on the occasional individual who refused to abide by them voluntarily.”<sup>40</sup> And this ethical unity was further strengthened by legal rules that enforced economic and social stability.<sup>41</sup>

Of course, in the very earliest days of colonial settlement, settlers themselves were sparse, as almost all of them lived in a rural, agrarian society.<sup>42</sup> Accordingly, there were few lawyers available except in the larger communities.<sup>43</sup> Most attorneys had not been formally trained in England, leading to an “amateur and semi-professional practice of law”<sup>44</sup> in most colonies. Although not all criminal cases had defense counsel,

---

<sup>38</sup> NELSON & PALMER, *supra* note 29, at 20.

<sup>39</sup> See THE AMERICANIZATION OF THE COMMON LAW, *supra* note 32, at 4.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

<sup>42</sup> See Thomas, *Colonial Criminal Law and Procedure*, *supra* note 28, at 673-74.

<sup>43</sup> See TOMKOVICZ, *supra* note 1, at 9. This was particularly true of Virginia, which remained one of the least “lawyered” of the colonies for quite a while. See KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 21-22 (1989).

<sup>44</sup> See Thomas, *Colonial Criminal Law and Procedure*, *supra* note 28, at 687. Thomas is referring specifically to New Jersey in his discussion, but the comment holds true for the rest of the colonies as well, possibly barring Massachusetts and Pennsylvania, which had the greatest number of trained lawyers.

preliminary research has shown that a surprising number of defendants did have some sort of assistance at trial.<sup>45</sup>

Sometimes, colonial criminal trials provided appointed counsel, where the judge would choose a bystander in the courtroom to sum up the case for the defendant.<sup>46</sup> When there was counsel for the defense, it was usually someone not formally trained, who was often part of the immediate society and was thus familiar with the case, the defendant, and the general community.<sup>47</sup>

Although only a court could coerce or punish an individual by imposing a sentence or a fine,<sup>48</sup> the legal system sought to “deprive judges of all discretion in administering their vast powers and of effective ability to bring those powers to bear on individuals.”<sup>49</sup> With this focus in mind, a potential reason *why* counsel was allowed for the defendant begins to emerge. Unlike England, where one of the stated reasons for not allowing defense counsel was because the judge was to referee and help run the trial, assisting with both the collection of evidence and answering

---

<sup>45</sup> Thomas shows that in between the period of 1749-57, defendants in twenty-six out of forty-eight cases, or fifty-four percent, had some sort of counsel at criminal trial. *See id.* at 689.

<sup>46</sup> *See id.* at 687-88. Thomas concludes from this that the colonies, or at least New Jersey, were still following the English rule barring all counsel from criminal cases except for a brief summing-up. *See id.* at 688. However, this may be due to the fact that New Jersey was famously the most pro-England of all the colonies. *See id.* at 710. Moreover, John Langbein concluded that defense counsel was generally excluded from criminal trials, barring treason or misprision of treason, until the end of the eighteenth century. *See LANGBEIN, supra* note 4. Accordingly, permitting any use of defense counsel in colonial criminal trials, even capital criminal trials, would have been a break away from the English common law tradition. Moreover, in some colonies, like Massachusetts, defense counsel was also permitted to argue the law to the jury. *See THE AMERICANIZATION OF THE COMMON LAW, supra* note 32, at 3.

<sup>47</sup> As Thomas notes, “[s]ome of these counsel might have been the defendant's friends or relatives, who either charged no fee or a small fee.” Thomas, *Colonial Criminal Law and Procedure, supra* note 28, at 689. Even if, as Thomas notes, some of the paid counsel in New Jersey came from different counties, and thus would not have been part of the immediate community, this does not cut against the theory that the permitting of defense counsel in the first place was a boon to the community, as it helped better determine the truth of the alleged crimes.

<sup>48</sup> NELSON & PALMER, *supra* note 29, at 19. As Nelson and Palmer further explain, in places like Virginia, “the judiciary was virtually the whole of local government.” *Id.*

<sup>49</sup> *See THE AMERICANIZATION OF THE COMMON LAW, supra* note 32, at 15.

questions of law,<sup>50</sup> colonial law left most of the decisions, for both the law and the facts, in the hands of the jury.<sup>51</sup> In other words, the community fully expected to retain full power over all criminal trials.

Thus, allowing the accused counsel was not an evil, but instead a positive good—the defendant’s attorney would provide the community with the fullest amount of information, so that it, represented by the jury, could properly decide on the defendant’s guilt or innocence. This rings true when you consider the low education level of the average colonist.<sup>52</sup> Although most colonial attorneys may have lacked formal training, their literacy and at least bare-bones understanding of the criminal law would have made a huge difference to the average jury, thereby better serving the community as a whole.<sup>53</sup>

The beneficial effect for the community of permitting defense counsel at criminal trial was neatly illustrated by John Adams’ work as defense counsel for the English soldiers after the Boston Massacre.<sup>54</sup> Adams was not only allowed to marshal the facts for the defendants at trial, but he was also permitted to argue the law to the jury.<sup>55</sup> This, in part, was due to the fact that both civil and criminal trials depended very heavily on (English) case law precedent, which rarely changed.<sup>56</sup>

Another reason that Adams was permitted to argue the law, however, was that despite some local resistance to the appointment of defense counsel to such unpopular defendants, it permitted the community (here, the town of Boston) to judge and pronounce sentence on the soldiers with the fullest belief that they had all the evidence necessary to convict or acquit. Put another way, the presence of defense counsel at the criminal trial provided the community with peace of mind

---

<sup>50</sup> See William Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904-17 (1978).

<sup>51</sup> See THE AMERICANIZATION OF THE COMMON LAW, *supra* note 32, at 18. As Nelson explains, “Americans of the prerevolutionary period expected their judges to be automatons who mechanically applied immutable rules of law to the facts of each case.” *Id.* at 19.

<sup>52</sup> See Thomas, *Colonial Criminal Law and Procedure*, *supra* note 28, at 691. Thomas also posits that, at least in mid-eighteenth-century New Jersey, many of the defendants accused for crimes of larceny, burglary, forgery, counterfeiting, or public order offenses were of the working classes, and thus less educated as a whole. *See id.*

<sup>53</sup> *See id.* at 691.

<sup>54</sup> I discuss Adams and his view of defense counsel in criminal cases below.

<sup>55</sup> See THE AMERICANIZATION OF THE COMMON LAW, *supra* note 32, at 19.

<sup>56</sup> *See id.*

in their collective judgment being upheld, both immediately and in the future, since it was based on the community's general self-interest.

The community that comprised pre-revolutionary colonial society had values that were quite different from our own. Notably, the colonial community maintained a conception of truth that modern society does not share.<sup>57</sup> Instead of viewing the truth as something to be arrived at after hearing both prosecution and defense counsel joust at each other and present differing versions of the facts, one to be selected over the other, colonial conceptions of truth were based on the sanctity of an oath.<sup>58</sup> The colonial version of the truth, then, did not “emerge . . . from a weighing of credibilities and probabilities,”<sup>59</sup> such as we now obtain from our current system of adversary trial.

Instead, theirs was a far more old-fashioned way of determining veracity, relying on a system where people put great weight on a man's oath.<sup>60</sup> Such truth-determining is reflected in the 1691 century charter for Massachusetts Bay, in which the King granted that “full power and Authority from time to time to Administer oathes for the better Discovery of Truth in any matter in Controversy or depending before them.”<sup>61</sup> This fits into the kind of society that existed in colonial times—one where a person's word was often enough, in a small community, to determine a matter of justice. Again, such a conception of truth and reliance on oaths does not square with the theory that the rise of the right to counsel was due to the implementation of the adversary system at trial. In other words, the truth, for colonial America, was not obtained by the jousting and arguments of an adversarial trial. Instead, truth was established primarily by a person's oath.

Likewise, colonial understanding of both crime and the criminal differed vastly from what we now believe. First, the criminal law, in the pre-revolutionary colonies, very much focused on protecting community religious and moral values,<sup>62</sup> unlike today's focus on safety and crime

---

<sup>57</sup> See *id.* at 25.

<sup>58</sup> See *id.*

<sup>59</sup> *Id.* at 26.

<sup>60</sup> See *id.*

<sup>61</sup> THE CHARTER OF MASSACHUSETTS BAY OF 1691, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1881 (1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS], available at [http://avalon.law.yale.edu/17th\\_century/mass07.asp](http://avalon.law.yale.edu/17th_century/mass07.asp).

<sup>62</sup> See THE AMERICANIZATION OF THE COMMON LAW, *supra* note 32, at 37.

prevention. The primary objective of pre-revolutionary criminal law was to punish those who breached the community's norms.<sup>63</sup> Such very different underlying purposes in both bringing and trying criminal offenses (whether traditional felonies or religious/sexual improprieties) meant that any reasons for permitting counsel for the accused would be deeply intertwined with upholding community values and enforcing collective beliefs. Thus, introducing aspects of an adversarial system would not have been appealing to colonial society because punishing wrongdoing was not about declaring a winner and a loser, but was focused on strengthening the shared mores of a small community.

More importantly, colonial perceptions of the criminal were also quite dissimilar from more contemporary ideas. Unlike today, the colonial view of a criminal was not a person who was an outcast from society, but instead "an ordinary member who had sinned. . . . crime could strike in any man's family or among any man's neighbors."<sup>64</sup> Although colonial society expected a sinner to repent and be punished for his or her actions, there were no prisons to send a convicted defendant to atone. Instead, the punishments were local and expressive—usually fines or mild corporal punishment.<sup>65</sup> As such, the point of punishing the criminal was not to exile him from society,<sup>66</sup> but to first exact retribution and then re-integrate him back into the community.

This collective, restorative view of the wrongdoer provides support for the theory that the tolerance of defense counsel in colonial criminal trial was in large part to ensure the smooth functioning of the community. By permitting the accused to have counsel during his trial, the jurors—the representatives of the community—as well as the community observers could be sure that the defendant had received a fair, legitimate, and democratic conviction. Once this was certain, the jury could impose, with untrammelled brow, appropriate punishment which functioned as expressive restorative retribution,<sup>67</sup> ultimately restoring the community back to its former status. In this way, the use of defense counsel was not only helpful to a defendant in marshaling his or her case, but also functioned as a critical tool for the community. The

---

<sup>63</sup> *See id.* at 37.

<sup>64</sup> *Id.* at 39.

<sup>65</sup> *See id.* at 40.

<sup>66</sup> *See id.*

<sup>67</sup> Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 404 (2008).



collective interest aspect of the right to counsel, although heretofore overlooked, was a crucial part of how the colonial criminal justice system worked to support the community and safeguard social stability.<sup>68</sup>

It seems reasonably clear, then, that the introduction of defense counsel into pre-revolutionary colonial criminal trials was not based on any interest or belief in the adversary system, although some interest in protecting the rights of the individual defendant may have also existed. What is difficult to determine is why the English common law tradition against allowing counsel for defense was relaxed at all, especially considering how the pre-revolutionary colonies venerated the unchanging nature of the common law and court precedent.<sup>69</sup>

Exploring the examples of where the right to counsel was provided in pre-revolutionary documents, including colonial charters and laws, may shed some light on why the right to counsel was permitted by the colonies. In these historical sources, counsel privileges are not always granted, but when they are, they primarily occur as a collective right.

## 2. Pre-Revolutionary Charters and Laws

The right to counsel was embedded very early in colonial society, as it was granted in several colonies' charters and laws. Although individual colonies had different approaches to the scope of counsel privileges, almost all addressed the right in some way.

### a. Friends as Advocates

Several colonies permitted self-representation as well as representation by defendants' friends, one of the earliest types of outside advocacy permitted for the colonial defendant. These colonies included Pennsylvania, West New Jersey, East New Jersey, and Rhode Island.

Pennsylvania's laws were typical of the counsel privileges allowed for defendants in the colonial criminal justice system. For example, the right to bring an advocate to trial was mentioned in the first Frame of Government of the Province of Pennsylvania, written by Governor

---

<sup>68</sup> As did so much else in the pre-revolutionary colonial period. As William Nelson details, not only the criminal justice system but also the legal regime regarding property focused on serving the needs of the community: "[P]eople could not use their property in a manner that was inconsistent with the community's ethical standards or its economic needs. This suggests strongly that private property served community needs first and individual convenience second." THE AMERICANIZATION OF THE COMMON LAW, *supra* note 32, at 52.

<sup>69</sup> See *id.* at 19.

William Penn.<sup>70</sup> In this charter of liberties, under a subheading entitled “Laws Agreed Upon in England & etc.,” Article VI granted that “in all courts all persons of all persuasions may freely appear in their own way, and according to their own manners and there personally plead their own cause themselves; or, if unable, by their friends.”<sup>71</sup> The great irony, of course, is that this particular law permitting the accused to bring this sort of proto-counsel to trial was not at all “agreed upon in England,” as discussed above.

The granted rights immediately surrounding Article VI may provide some possible reasons why Pennsylvania permitted the accused counsel at trial. Article V noted that “all courts shall be open, and justice shall neither be sold, denied nor delayed.”<sup>72</sup> Article VII held that “all pleadings, processes and records in courts, shall be short, and in English, and in an ordinary and plain character, that they may be understood, and justice speedily administered.” Taken together, all three laws or grants of rights point towards a collective concern about fairness, democratic clarity, expressive values, and community cohesiveness.

It is in this context that the reason why the right to counsel was granted so early on in American history begins to make sense. It was not to provide balance for the workings of an adversary system, since none existed at the end of the seventeenth century in the Pennsylvania province. Nor was it to assist in determining the truth, since truth was largely based on the validity of a man’s (or woman’s) oath. Instead, it seems the right of the accused to bring “counsel” to trial, whether in the form of a friend or a lawyer, was based on the need to allow both the defendant and the community the ability to participate in an open, public and legitimate justice system, thereby strengthening and empowering the society as a whole.

This theory gains credence when the other articles in Penn’s *Charter of Liberties* are reviewed. For example, Article XXX held that “all scandalous and malicious reporters, backbiters, defamers and spreaders of false news, whether against Magistrates, or private persons, shall be accordingly severely punished, as enemies to the peace and concord of

---

<sup>70</sup> See WILLIAM PENN, FRAME OF GOVERNMENT OF PENNSYLVANIA OF 1682, reprinted in FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 3060, available at [http://avalon.law.yale.edu/17th\\_century/pa04.asp](http://avalon.law.yale.edu/17th_century/pa04.asp).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

this province.”<sup>73</sup> Such strong words and promised punishment against gossip and rumor evidence a great concern for both a cohesive community and a calm, safe society. Similarly, Article XXXVII, which banned such pursuits as “prizes, stage-plays, cards, dice, May-games, gamesters, masques, revels, bull-battings, cock-fightings, bear-battings, and the like,”<sup>74</sup> was likely equally based on fear of disruption of a peaceful community as much as religious fervor. In the pre-Revolutionary colonies, every law, liberty, and right went to the ultimate goal of supporting and safeguarding the community. Individual rights and liberties were far down on the list.

The 1676 Charter or Fundamental Laws of West New Jersey provides another take on colonial counsel privileges.<sup>75</sup> In this listing of rights and liberties, Chapter XXII detailed that “no person or persons shall be compelled to fee any attorney or councillor to plead his cause, but that all persons have free liberty to plead his own cause, if he please.”<sup>76</sup> This very early version of self-representation relied on the old English common-law rule permitting the defendant to speak on his own account at his trial.

The West New Jersey Charter, however, added something new—that the accused would not be forced to pay for a lawyer to plead his case. This clause points to a profound distrust of attorneys, and contradicts the scholarly case made that the right to counsel was granted in pre-Revolutionary America to balance out the prosecutorial advantage.<sup>77</sup> A charter that took the time to articulate how its accused citizens were not to be forced to use an attorney was obviously not concerned with providing counsel rights in order to equalize the adversary system.<sup>78</sup>

Such a lack of interest in an adversary system in colonial society is underlined by looking at the rights granted in the preceding article. In

---

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> THE CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY OF 1676, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 2551, *available at* [http://avalon.law.yale.edu/17th\\_century/nj05.asp](http://avalon.law.yale.edu/17th_century/nj05.asp).

<sup>76</sup> *Id.*

<sup>77</sup> *See Metzger, supra* note 2, at 1639 (arguing that colonies such as Pennsylvania and Rhode Island provided a right to counsel to help “level the playing field”).

<sup>78</sup> Even by the mid-eighteenth century, New Jersey still had no public prosecution for most crimes. *See Thomas, Colonial Criminal Law and Procedure, supra* note 28, at 679 (noting that in 1749-56, citizens generally acted as prosecutors, except when the king was involved).

Chapter XXI, the West New Jersey Charter held that any person who brought a criminal suit “shall and may be master of his own process,” and specifically reserved to this “prosecutor” the power of reconciliation and forgiveness in lieu of punishment.<sup>79</sup> Instead of being concerned with balance in an adversary system, Chapter XXI tries to promote the victim’s impulses of restorative justice, something that was unquestionably a boon to the community.

By encouraging the person bringing the criminal suit to pardon the wrongdoer, the laws of West New Jersey subtly promoted a rehabilitative spirit. Recall that the main function of the colonial judicial system was not only to “punish and restrain crime [but also] to maintain a cooperative harmony in the community.”<sup>80</sup> This indirect encouragement to forgive wrongdoing was important because colonial communities were so small and tight-knit that the permanent loss of one member was a serious issue. These provisions in colonial charters were focused on helping the community by ensuring no one member, even a wrongdoer, was exiled for long— even if this meant the community would parcel out forgiveness instead of punishment.

What about the collective interest aspect in giving the accused a right to plead his case? Well, one indication that the lawgivers of West New Jersey had the community in mind when drafting their version of counsel rights was its placement. The defendant’s liberty to speak on his own account was not articulated in Chapter XX, which listed the rules of criminal evidence.<sup>81</sup> This type of placement would have made sense,

---

<sup>79</sup> THE CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY OF 1676, *supra* note 75. The only three types of crimes excepted from this general guarantee were treason, murder and felony. *See id.*

<sup>80</sup> Pole, *supra* note 36, at 132.

<sup>81</sup> *See* THE CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY OF 1676, *supra* note 75, at 2250-51. Chapter XX held: “That in all matters and causes, civil and criminal, proof is to be made by the solemn and plain averment, of at least two honest and reputable persons; and in case that any person or persons shall bear false witness, and bring in his or their evidence, contrary to the truth of the matter as shall be made plainly to appear, that then every such person or persons, shall in civil causes, suffer the penalty which would be due to the person or persons he or they bear witness against. And in case any witness or witnesses, on the behalf of any person or persons, indicted in a criminal cause, shall be found to have borne false witness for fear, gain, malice or favour, and thereby hinder the due execution of the law, and deprive the suffering person or persons of their due satisfaction, that then and in all other cases of false evidence, such person or persons, shall be first severely fined, and next that he or they

given how rights in the pre-Revolutionary colonial era were often divided into those belonging to the accused and those belonging to the community.

Instead, the West New Jersey early version of the right to counsel was granted in Chapter XXII, the same article that declared all trials, civil and criminal, must be heard by a jury of twelve men.<sup>82</sup> I have argued elsewhere that from the settling of this nation, the jury trial right was a right belonging primarily to the community.<sup>83</sup> With this assumption in mind, then the placement of the proto-counsel right alongside the jury trial right signals that the legislators of West New Jersey thought of the two rights similarly. This provides a stronger basis for the conclusion that the early right to counsel served community interests as well as the rights of the accused.

East New Jersey differed in some ways from its Western colonial cousin. For our purposes, the most important difference was its immense distrust of attorneys codified into the colonial charter. Of course, suspicion against attorneys existed in some form or another in virtually all of the colonial settlements, though this was most pronounced in the southern colonies.<sup>84</sup> The general suspicion against attorneys is illustrated in the 1683 East New Jersey Charter, which took care to state that “in all courts persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own causes themselves, or if unable, by their friends, no person being allowed to take money for pleading or advice in such cases.”<sup>85</sup>

The East New Jersey charter permitted the accused to plead their own case or bring a friend to do so, but prohibited the use of a licensed or paid attorney. This is important for two reasons. First, the fact that some sort of “counsel” was allowed at bar for the accused despite the

---

shall forever be disabled from being admitted in evidence, or into any public office, employment, or service within this Province.” *Id.*

<sup>82</sup> *See id.* at 2551. The first part of the Chapter provides that “the tryals of all causes, civil and criminal, shall be heard and decided by the virdict or judgment of twelve honest men of the neighborhood.” *Id.*

<sup>83</sup> *See* Appleman, *supra* note 67, at 405.

<sup>84</sup> *See* THE AMERICANIZATION OF THE COMMON LAW, *supra* note 32, *passim*. The southern colonies in particular tended to not use lawyers very frequently, both from general prejudice against them and from their relative scarcity. *See id.*

<sup>85</sup> THE FUNDAMENTAL CONSTITUTIONS FOR THE PROVINCE OF EAST NEW JERSEY IN AMERICA OF 1683, art. XIX, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 2581, *available at* [http://avalon.law.yale.edu/17th\\_century/nj10.asp](http://avalon.law.yale.edu/17th_century/nj10.asp).

strong dislike of lawyers shows how important the need for a fair, legitimate, and democratic criminal justice system was to the colonial community. Second, the bar on licensed or paid attorneys upends the theory that the colonies incorporated an individual right to counsel to counterbalance a public prosecutor as part of the adversary system. Although East New Jersey, like other colonies, may have had a public prosecutor, there was certainly no licensed or official counterpart allowed for the accused. Thus, the idea of an emerging right to counsel due to the adversary system is simply historically inaccurate.

Moreover, the placement of East New Jersey's strictures against using paid attorneys supports the theory that the privilege of assistance to plead one's case was seen as part of the collective rights of the community. The ability to plead one's own cause, or use a friend to do so, was not granted in a separate article, but placed in the middle of a long explanation of how a criminal was to be tried by a jury of twelve peers, fairly chosen.<sup>86</sup> This strongly indicates that this early version of a "right to counsel" was very much envisioned as part and parcel of the rights promulgated to support and strengthen the community. The gloss on the right to counsel being an individual right, belonging solely to the defendant, was one that would only arise much later.

In contrast to East and West New Jersey, Rhode Island was hospitable to attorneys from the beginning days of its charter, and one of its earliest laws permitted the use of them. The "1647 Code," under the subject heading of "Touching Pleadings," explicitly permitted anyone to utilize the services of an attorney: "[A]ny man may plead his own case in any court or before any jury . . . may make his attorney to plead for him. . . may use the attorney that belongs to the court."<sup>87</sup>

Granted, this law did not distinguish between civil and criminal cases, and likely did not include criminal defendants, since it refers to "Pleadings" and most criminal cases did not use that terminology. However, the law still contains a few important elements. First, unlike many of the other colonies, the Rhode Island law formally permitted use of a lawyer to *plead* during trial, not just to sum up the facts at the end. Second, the law mentions the possibility of court-appointed attorneys,

---

<sup>86</sup> See *id.* at 2580-81.

<sup>87</sup> THE EARLIEST ACTS AND LAWS OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 52 (1977).

something extremely rare on either the criminal or civil side this early in American colonial history.<sup>88</sup>

Rhode Island's tolerance for defense attorneys carried over to criminal cases as well. In 1669, the colony promulgated a statute that permitted counsel for criminal defendants. The law specifically granted a "lawful privilege of any person that is indicted, to procure an attorneye to plead any poynt of law that may make for the clearing of his innocencye."<sup>89</sup> This language seems to assign the counsel right solely to the defendant.

However, when read together with the preceding language, which noted that "the person that is soe [accused] may be innocent, and yett may not be accomplished with soe much wisdom and knowledge of the law as to plead his owne innocencye . . . ,"<sup>90</sup> the import is a little different. Taken as one, the two pieces of legislation evidence an overarching concern with ensuring that the innocent not be convicted, an event that would unsettle the community and undermine the foundations of the small Rhode Island society. Although the privilege of counsel is granted to the defendant, we can surmise that the reason for it was as much to protect the local community as it was to assist the innocent defendant. In small towns such as those that existed in the early days of Rhode Island, any benefit to the defendant also worked as a benefit to the community, since each community member was critical for the town's survival.

In a similar vein, the Rhode Island Assembly also decided that in order to remove "the greate oppression which the inhabitants of this Collony are grieved withal by the evill practice of some persons who . . . take liberty to indict persons for pretended wrongs done to other persons than themselves,"<sup>91</sup> it would require all indictments to be supported by two witnesses:

---

<sup>88</sup> As other scholars have noted, however, the mention of court-appointed attorneys in legislation did not guarantee that such attorneys actually existed and were used. See Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 YALE J.L. & HUMAN. 47, 60 (1999).

<sup>89</sup> 2 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 239 (1857), available at <http://www.archive.org/stream/recordsofcolonyo02rhod#page/238/mode/2up>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 209.

[N]oe Generall Officer shall, for the future, indict any person within this Collony, in any matter that relates to another persons' [sic] interest, except he have two positive witnesses or testimonys upon oath, under the hand of another General Assistant, whose names shall be indorsed on the back side of the sayd bill of indictment to prove the same, or else have the leave of the Courtt soe to do.<sup>92</sup>

This type of requirement for indictment had a two-fold import. First, of course, there was concern that innocent people were being falsely accused by individuals “stuffed in their minds with anger and revenge.”<sup>93</sup> In addition, however, the rare requirement that two witnesses be required to swear out an indictment illustrates the important role of the community in the criminal justice system. Even the most exalted of community members could not initiate a complaint against the most humble of community members without some local backup—here, the two witnesses.

That this measure was promulgated with both the defendant and the community in mind is supported by the introductory description of the rule, which read, “for removeinge the greate oppression which the inhabitants of this Collony are grieved . . . .”<sup>94</sup> If this measure focused only on the rights of the defendant, then the preamble would surely have read “for the benefit of the accused,” or some such wording. The fact that the phrasing specifically brought in the colony’s entire inhabitants signals that this was as much an issue of the community mediating the criminal justice system as it was a way to protect any future defendants. Again, the role of the community, especially in the early colonies, was critically embedded with the workings of the criminal justice system. One could not be separated out from the other. Thus, any benefit to the criminal defendant also benefited the community as a whole.

This aspect of criminal justice is further illustrated by how seventeenth-century Rhode Island, like in the rest of the American colonies, used the word “court” to refer to a collection of (local) jurymen overseen by a local magistrate.<sup>95</sup> In other words, the court *was* the community. Indeed, in Rhode Island, criminal trials were not only heard openly but performed so that most of the community could participate:

---

<sup>92</sup> *Id.* at 209-10.

<sup>93</sup> *Id.* at 209.

<sup>94</sup> *Id.*

<sup>95</sup> See Bilder, *supra* note 88, at 56 n.35.



The criminal side of the General Court of Trials operated in part as an oral culture in which women and men, literate and illiterate participated. Indictments were read to the parties and pleas were entered orally by the defendant who appeared at court. The jury verdict was orally reported to the court and the defendant's punishment and bonds were orally conveyed.<sup>96</sup>

#### b. Distrust of Lawyers

Many of the colonies harbored a profound distrust of lawyers or any person who argued at bar for a fee. How this distrust was articulated depended on the individual colony. The colonies of Carolina, Virginia, and Massachusetts were stronger in their dislike of attorneys, specifically articulating anti-lawyer sentiment into their founding documents. In these colonies, there was virtually no right to counsel as we now understand it. The only representation permitted was either self-representation or free representation from the community members, whether they were lawyers or not. The primary concern regarding a colonial lawyer's work as defense counsel seemed to be the issue of payment, perhaps to prevent any living being made.

The Carolina colony's suspicion of lawyers was directly stated in its 1669 Fundamental Constitutions of Carolina.<sup>97</sup> Article 70 held that: "It shall be a base and vile thing to plead for money or reward; nor shall any one . . . be permitted to plead another-man's cause, till, before the judge in open court, he hath taken an oath that he doth not plead for money or reward . . . ."<sup>98</sup> This version of the Carolina constitution, penned by John Locke, neatly articulated the strong aversion to lawyers that some colonials, particularly in the southern colonies, had. Although there was no issue in allowing a friend to speak one's cause, the concept of an attorney doing so, or any counselor who was presumably paid a fee, was forbidden.

---

<sup>96</sup> Bilder, *supra* note 88, at 57 n.38 (citing to 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, *supra* note 89).

<sup>97</sup> THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA OF 1669, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 2772, *available at* [http://avalon.law.yale.edu/17th\\_century/nc05.asp](http://avalon.law.yale.edu/17th_century/nc05.asp). This form of government was framed by John Locke and amended by the Earl of Shaftesbury, previously known as Anthony Ashley Cooper. *See id.*

<sup>98</sup> *Id.* at art. 70, 2781.

Interestingly, despite forbidding the use of attorneys, the 1669 Fundamental Constitution of Carolina did not scant on some of the critical rights and liberties we now enjoy in the area of criminal justice. For example, the Fundamental Constitution included a rule against double jeopardy, firmly specifying that “[n]o cause shall be twice tried in any one court, upon any reason or presence whatsoever.”<sup>99</sup> The document provided for the use of a grand jury<sup>100</sup> and a petit jury,<sup>101</sup> as well as grounds for appeal from convictions of treason, murder, and felonies.<sup>102</sup> So the bar against using actual lawyers at trial did not stem from a general disregard for rights.<sup>103</sup> Moreover, the 1730 statutory laws of the colony of South Carolina provided for counsel privileges for defendants charged with capital crimes such as treason, murder, or felony.<sup>104</sup>

Likewise, Virginia, from the early seventeenth century, strictly controlled who was permitted to practice as a county lawyer.<sup>105</sup> The first law-licensed lawyers did not come about until 1732 since trained lawyers were few and far between in the Virginia countryside.<sup>106</sup> In that same time period, however, Virginia, like Carolina, allowed those defendants charged with capital crimes the ability to hire counsel for use at trial.<sup>107</sup>

Carolina’s rule against using paid counsel to argue for the accused at bar was similar to the 1641 text of the Massachusetts Body of Liberties.<sup>108</sup> This very early charter held that “every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to

<sup>99</sup> *Id.* at art. 64, 2780.

<sup>100</sup> *Id.* at art. 66, 2780.

<sup>101</sup> *Id.* at art. 69, 2781.

<sup>102</sup> *Id.* at art. 65, 2780. Granted, the appeal would be heard only after a payment of fifty pounds, a considerable sum at that time. *Id.*

<sup>103</sup> Except for in regard to slaves. See THE FUNDAMENTAL CONSTITUTIONS OF CAROLINAA OF 1699, *supra* note 97, arts. 107, 110, at 2785.

<sup>104</sup> See Act of August 20, 1731, § XLIII, *reprinted in* JOHN FAUCHERAUD GRIMKE, THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA 130 (1790).

<sup>105</sup> See A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS 53 (1981) (noting that from 1690 to 1732 there was no law regulated the licensing of practitioners of the law, and pointing out that only a few were formally trained).

<sup>106</sup> See *id.* at 119.

<sup>107</sup> See *e.g.*, An Act for Better Regulating the Trial of Criminals, for Capital Offences § 3 (August 1734), *reprinted in* 4 HENING’S STATUTES AT LARGE 404 (1820).

<sup>108</sup> MASSACHUSETTS BODY OF LIBERTIES OF 1641, art. 26, *reprinted in* OLD SOUTH LEAFLETS 265 (Directors of the Old South Work), <http://history.hanover.edu/texts/masslib.html>.

employ any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines.”<sup>109</sup> Phrased like this, Massachusetts colony’s permission for the accused to have assistance at trial supports the theory that the community was greatly interested in fairness for both parties during the criminal trial, despite its intense wariness of paid attorneys.

This interpretation is bolstered by the next liberty listed in the Massachusetts Body of Liberty, which dealt with fairness and equality between the parties. Article 27 held that “if any plantife shall give into any Court a declaration of his cause in writeing, The defendat shall also have libertie and time to give in his answer in writeing, And so in all further proceedings betwene partie and partie, So it doth not further hinder the dispatch of Justice then the Court shall be willing unto.”<sup>110</sup> The document’s stated focus on the dispatch of justice is important, as it helps clarify the aim of many of these liberties—not only to privilege the individual, but to strengthen the community as well.

### c. Fading Prejudice Against Defense Counsel

Prejudice against attorneys had faded by the beginning of the eighteenth century. This much is illustrated in the 1701 charters of Delaware<sup>111</sup> and Pennsylvania,<sup>112</sup> both of which provided in Article V of their charters that “all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors.”<sup>113</sup> Some scholars have posited that this clause proves that the right to counsel in colonial America arose due to a desire to counter a formal adversary system and a regime of public prosecutors.<sup>114</sup>

But the Article Vs of the Delaware and Pennsylvania Charters have a much less complex interpretation, one that does not require the imposition of a more modern regime of criminal justice onto a colonial

<sup>109</sup> *Id.*

<sup>110</sup> MASSACHUSETTS BODY OF LIBERTIES OF 1641, *supra* note 108, art. 27, at 265.

<sup>111</sup> WILLIAM PENN, CHARTER OF DELAWARE OF 1701, art. V, *in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 560, *available at* [http://avalon.law.yale.edu/18th\\_century/de01.asp](http://avalon.law.yale.edu/18th_century/de01.asp).

<sup>112</sup> WILLIAM PENN, CHARTER OF PRIVILEGES GRANTED BY WILLIAM PENN, ESQ. TO THE INHABITANTS OF PENNSYLVANIA AND TERRITORIES OF 1701, art. V, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 3079, *available at* [http://avalon.law.yale.edu/18th\\_century/pa07.asp](http://avalon.law.yale.edu/18th_century/pa07.asp).

<sup>113</sup> *Id.*; PENN, CHARTER OF DELAWARE, *supra* note 111, art. V, at 560.

<sup>114</sup> *See Metzger, supra* note 2, at 1638-39.

one. It is equally likely that Article V was written to codify the necessary balance and fairness required in each criminal trial so that the community could function legitimately. This interpretation of the clause is supported by the fact that nowhere in Article V does it specify anything about a public prosecutor; it was far more likely in 1701 that Delaware and Pennsylvania still used a private prosecutorial system.

In fact, the phrasing of Article V makes the latter interpretation more believable. Note that the Delaware and Pennsylvania Charters allow the accused the same privilege of witness and counsel as “their Prosecutors.”<sup>115</sup> In early eighteenth-century Delaware and Pennsylvania, if there was a public prosecutor, there was likely to be only one. To grant witness and counsel rights to “prosecutors” implies that there would be many prosecutors, as would occur in a private prosecutorial system.

So, if not to counterweight the use of public prosecutors and the adversary process, why did Delaware and Pennsylvania grant a privilege of counsel? Drawing on our understanding of the colonial community at that time, it makes sense to assume that allowing the accused to have the ability to both question witnesses and bring some sort of advocate to the bar with them would strengthen the sense of legitimacy and stability of the community. In this way, each side, victim and accused, would be able to fully utilize their time in court, and the community could rest assured that fairness and justice had been served.

#### d. Counsel Privileges Not Written, but Assumed

A few colonies did not see fit to codify the rules for counsel privileges in their charters. New York, for example, promulgated a lengthy Charter of Liberties and Privileges in 1683, but despite articulating the right to bail, trial by jury, and a grand jury inquest, never mentioned the right to use counsel.<sup>116</sup> This, in part, may be due to the fact that the Governor of New York had to meld together a system of Puritan English law and Dutch legal systems in 1664, after the Dutch handed over New Amsterdam to the English.<sup>117</sup> Despite the failure to

---

<sup>115</sup> See PENN, CHARTER OF DELAWARE, *supra* note 111, art. V, at 560; PENN, CHARTER OF PRIVILEGES GRANTED BY WILLIAM PENN, ESQ. TO THE INHABITANTS OF PENNSYLVANIA AND TERRITORIES, *supra* note 112, art. V, at 3079.

<sup>116</sup> See NEW YORK CHARTER OF LIBERTIES AND PRIVILEGES OF 1683, <http://www.montauk.com/history/seeds/charter.htm> (last visited July 20, 2008).

<sup>117</sup> See William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664-1776*, 38 HOFSTRA L. REV. 69, 82 (2009).

enshrine counsel privileges into any charter or bill of rights, the community must have sensed a need for some sort of counsel, since New York allowed the use of counsel relatively early—possibly in the seventeenth century<sup>118</sup> and certainly by the turn of the eighteenth century.<sup>119</sup>

One example of the use of counsel in New York was the well-known theatrics of the 1735 Zenger trial in New York City. John Peter Zenger, the publisher of the *New-York Weekly Journal*,<sup>120</sup> was sued for criminal seditious libel after repeatedly printing criticisms of William Cosby, the deeply unpopular Governor of New York.<sup>121</sup> Zenger had a total of four defense attorneys to help him try his case, with James Alexander and William Smith representing him in the beginning.<sup>122</sup> Alexander and Smith planned to argue that the material Zenger printed could not be libel because it did not specifically impugn Cosby, but all Royal New York Governors; the newspaper was attacking the rule of men, not of law.<sup>123</sup> Before they could even introduce this argument, however, the Chief Justice of the Supreme Court disbarred both Alexander and Smith, despite their being “two of the most learned and accomplished lawyers” in the colony, because they challenged the circumstances of both the Chief Justice’s and another judge’s appointment to the bench.<sup>124</sup>

The Chief Justice, possibly realizing that such a high-profile case required counsel for the defense to placate the interested community,<sup>125</sup> then appointed new defense counsel for Zenger, John Chambers.<sup>126</sup> Because Chambers was so young and inexperienced, Zenger’s former counsel James Alexander secretly recruited Andrew Hamilton, a famous

---

<sup>118</sup> There is evidence that counsel was permitted in a misdemeanor trial in 1696. See Rackow, *supra* note 17, at 16-17.

<sup>119</sup> In the 1702 treason trial of Bayard and Hutchins, the trial court permitted defendants counsel. See Rackow, *supra* note 17, at 17.

<sup>120</sup> See JILL LEPORE, *NEW YORK BURNING: LIBERTY, SLAVERY AND CONSPIRACY IN EIGHTEENTH-CENTURY MANHATTAN* xiii (2005).

<sup>121</sup> See *id.* at 72-74.

<sup>122</sup> See *id.* at 74; Rackow, *supra* note 17, at 17.

<sup>123</sup> See LEPORE, *supra* note 120, at 74.

<sup>124</sup> *Id.* at 75.

<sup>125</sup> At this point in New York colonial politics, the residents of Manhattan were fiercely split between parties, one pro-Governor, one against. *Id.*

<sup>126</sup> *Id.*

Philadelphia lawyer, to represent Zenger at his criminal trial.<sup>127</sup> After Chambers gave his opening statement, Hamilton dramatically stood up from the back of the courtroom and introduced himself as Zenger's defense counsel.<sup>128</sup> Hamilton argued that Zenger's defense to the criminally seditious libel was its truth,<sup>129</sup> and that freedom of the press was especially necessary in the colonies.<sup>130</sup> Most importantly, by arguing that the jury could answer the question of Zenger's guilt, Hamilton was really arguing that the jury was not only free to decide the facts, but also the law.<sup>131</sup>

It is important to note that Hamilton chose his dramatic appearance and argument because he felt he had little chance of persuading the justices to follow the correct law. Instead, he turned his arguments directly towards the jury, the traditional arbiter of punishment in the community.<sup>132</sup> Ultimately, it was a successful tactic; the jury returned to acquit Zenger of all charges, and the first case supporting freedom of the press went down in history.

Importantly, Hamilton carefully framed Zenger's unjust imprisonment as not just a matter of freedom of press, but as an aspect of liberty that could only be granted to the community by its chosen representatives:

The Question before . . . you Gentlemen of the Jury . . . may . . . affect every Freeman that lives under a British Government on the main of America . . . It is the Cause of Liberty; and I make no Doubt but your upright Conduct this Day, will not only entitle you to the Love and Esteem of your Fellow-Citizens, but every Man who prefers Freedom to a Life of Slavery will bless and honour you, as Men who have baffled the Attempt of Tyranny.<sup>133</sup>

Thus, Hamilton was appealing not only to the jurors' concern and interest in their own community, but to their colonial pride.<sup>134</sup> By

---

<sup>127</sup> *Id.* at 75-76.

<sup>128</sup> *Id.* at 76.

<sup>129</sup> *Id.* Truth as a defense to criminal libel was a novel defense in the Anglo-American legal world. *Id.* at 117.

<sup>130</sup> *Id.* at 76.

<sup>131</sup> *Id.* at 117.

<sup>132</sup> *Id.* at 76.

<sup>133</sup> *See id.* at 76.

<sup>134</sup> *Id.* at 118.

freeing Zenger, the jurors could simultaneously reify freedom of speech, and strengthen the power of the community to stop tyrannical behavior.

Overall, it makes sense that one of the largest cities in the American colonies, New York, would permit the assistance of counsel to the defense at a criminal trial, since New York City was where so many lawyers congregated. Outside of the city, the more rural New York courts did not often have defense counsel present at criminal trial, as it was still commonly held that “the accused served his own interests best.”<sup>135</sup>

In a case such as the Zenger trial, however, where the entire community was watching and judging, even the hostile Chief Justice deemed the presence of a learned counselor and advisor important. New York was famously protective of its jury trial right, in large part to preserve the influence and power of the local community,<sup>136</sup> and the right to defense counsel, as a similar collective right, would have also been protected since it assisted the jurors in their truth-determining mission.

Ultimately, in colonial America, particularly early colonial America, criminal justice was a critical part of the societal public sphere. In other words, all justice, but especially criminal justice, was local, participatory justice.

### 3. *Legal and Political Theory*

The role of the community in mediating law and punishment, which included the use of counsel during trial, was given support by the legal writers and theorists before and during the Revolution. Moreover, legal practitioners in colonial America revised some of the standard texts written in England to better reflect colonial needs; these revised works are also illuminating.

#### a. Cesare Beccaria

Cesare Beccaria, an Italian political theorist, had considerable influence on both American colonial- and Founding-era thinkers and writers.<sup>137</sup> Beccaria was well known in Italy, England, and in the colonies. The American reprinting of his best-known work, *Dei Delitti e Delle*

---

<sup>135</sup> See *id.* at 84. As Lepore explains, “it remained a rare defendant who had a lawyer, especially because the whole point of a trial was to get the defendant to explain himself to a jury, so that jurors could tell whether or not he was lying.” *Id.*

<sup>136</sup> See Appleman, *supra* note 67, at 414.

<sup>137</sup> See John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL’Y 195, 207 (2009).

*Pene, or An Essay on Crimes and Punishments*, during the Revolution shows Beccaria's prominence in the colonies. Editions of Beccaria's *Essay* were also translated from the Italian to English and printed in Charleston, South Carolina in 1777<sup>138</sup> and in Philadelphia in 1778.<sup>139</sup> Beccaria had a critical influence on the Founding Fathers as well.<sup>140</sup>

Beccaria's *Essay* covered many topics, but most significant for this discussion was his examination of public trial and right to counsel. Comparing the rights of the accused in France to other countries, Beccaria pointed to Roman criminal procedure as a procedure to be emulated: "With them, the evidence was heard publicly in presence of the accused, who might answer or interrogate them, or employ counsel. This procedure was open and noble; it breathed Roman magnanimity."<sup>141</sup>

This passage is important for a number of reasons. First, and most obviously, it commends the use of counsel at trial, something that the legislators among the colonists may very well have taken into account when determining the rules of criminal procedure in the New World.

Equally important, however, is the discussion in which the use of counsel is embedded. Beccaria couples the assistance of counsel with another critical right of the people: the right to hear all the evidence in the public forum. In contrast to the criminal procedure used in France, where "[a]ll is conducted in secret,"<sup>142</sup> Beccaria tells us how the Romans held their trials in the open, so the community could see and judge. This helped ensure the fairness of the procedure, for both the accused and the public.

Beccaria goes on to criticize the practice, common in both England and France, of allowing the assistance of counsel to the civil plaintiff but not to the criminally accused:

<sup>138</sup> CESARE B. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (David Bruce 1777).

<sup>139</sup> CESARE B. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (R. Bell 1778).

<sup>140</sup> See Bessler, *supra* note 137, at 19 (noting that "early American jurists, as well as the Founders themselves, often turned to Beccaria for guidance"); see also Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 813 (1975).

<sup>141</sup> BECCARIA, *supra* note 138, at 151.

<sup>142</sup> *Id.* Beccaria goes on to explain that in France, "[a] single judge, only attended by his clerk, hears each witness separately." *Id.*



Do your laws then allow the privilege of counsel to an extortioner, or a fraudulent bankrupt, and refuse it to one who may possibly be a very honest and honourable man? If there ever were an instance of innocence being justified by means of counsel, the law, which deprives the accused of that benefit, is evidently unjust.<sup>143</sup>

Thus, although the common law of England barred the use of counsel for its accused in all but treason and capital cases, the idea of using counsel for all criminal defendants was not unknown. It is highly likely that colonial lawyers and judges consulted or remembered the lessons of Beccaria when envisioning the rights and liberties to be granted to the people.<sup>144</sup> Beccaria's writing was popular, and heavily consulted, by both European and Americans in the years following its publication.<sup>145</sup>

Beccaria's focus on community rights in the provision of defense counsel is supported by Beccaria's continual emphasis on the role of the community in all criminal justice. For example, Beccaria fervently espoused a *public* trial, which he saw as extremely important to strengthen collective rights: "All trials should be public; that opinion which is the best or, perhaps, the only cement of society, may curb the authority of the powerful, and the passions of the judge."<sup>146</sup> By emphasizing the importance of the public's *opinion*, as well as the openness of any trial, Beccaria underlined the importance of the people's involvement in the criminal justice process—"the only cement of society." Likewise, Beccaria viewed crime as a wrong "committed against the public," something that ought to be "publicly punished."

For many of the colonists, the life established in the virgin soil of the colonies was not only a place to prosper, but also to improve upon the government and society of the Old World. Reading Beccaria, among other legal and political theorists, offered one way to do so. If these men followed the work of Beccaria, as is highly likely, then we can surmise that their understanding of criminal justice was based on a vision that

---

<sup>143</sup> *Id.* at 153.

<sup>144</sup> Beccaria's work had influence in his native land, but some of his greatest influence resulted when his book was translated into English. See *Daye v. State*, 769 A.2d 630, 637 (Vt. 2000) (noting the influence of Cesare Beccaria on the Pennsylvania Constitution of 1776); George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1278 (1995) ("Beccaria was enormously influential in Britain.").

<sup>145</sup> See Bessler, *supra* note 137, at 201.

<sup>146</sup> BECCARIA, *supra* note 138, at 30.

highlighted the desires and requirements of the community over almost all else, including the needs of individual defendants, to ensure the fairest society. This focus on the collective, rather than the individual, permeated all aspects of the evolving criminal justice system, including the emerging right to counsel.

b. Matthew Hale

Matthew Hale's *History of the Common Law*,<sup>147</sup> published in 1713, also helped shape pre-Revolutionary American lawmaking and gave support for the allowance of counsel at trial. In his discussion of the importance of public evidentiary hearings, Hale did not distinguish between civil and criminal trials, and lauded the use of counsel during such unrestricted sessions:

[B]y this Course of personal and open Examination, there is Opportunity for all Persons concern'd, *viz.* The Judge, or any of the Jury, or Parties, or their Council or Attornies, to propound occasional Questions, which beats and boults out the Truth much better than when the Witness only delivers a formal Series of his Knowledge without being interrogated . . . .<sup>148</sup>

Tying back into the early eighteenth-century understanding about how to elicit truth, Hale's support for both public trial procedures and the use of counsel or attorneys supports two conclusions. First, that assistance of defense counsel at trial was the best way to get at the truth, which, as discussed above, was not determined through an adversary process but largely focused on the statements of witnesses, victims, and defendants.

Second, Hale focuses on the public nature of this discourse, assisted by counsel, and how its very openness helped to support and strengthen the community, which had a vested interest in the outcome:

The Excellency of this open Course of Evidence to the Jury in Presence of the Judge, Jury, Parties and Council, and even of the adverse Witnesses, appears in these Particulars: 1st, That it is openly; and not in private before a Commissioner or Two, and a couple of Clerks, where oftentimes Witnesses will deliver that which they

---

<sup>147</sup> See MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND, AND AN ANALYSIS OF THE CIVIL PART OF THE LAW (6th ed., 1820).

<sup>148</sup> *Id.* at 345.

will be ashamed to testify publickly. 2dly, That it is Ore  
Tenus personally, and not in Writing . . . .<sup>149</sup>

In this way, Hale's acceptance of counsel during a jury trial is predicated on the public nature of the entire proceeding. To best get at the truth, Hale argued, all actors should present their arguments and statements in a public forum. Put another way, for Hale, the eyes of the public helped improve the veracity of the proceeding, which naturally benefitted not only the defendant but the community as a whole.

In other words, permitting the defendant to have assistance at trial was critical to both the accused specifically, and the local community more generally. Assistance of defense counsel helped the local community by better illustrating the "very Quality, Carriage, Age, Condition, Education, and Place of Commorance of Witnesses . . . whereby the Judge and Jurors may have a full Information of them, and the Jurors, as they see Cause, may give the more or less Credit to their Testimony, for the Jurors are not only Judges of the Fact, but many Times of the Truth of Evidence."<sup>150</sup> Both in England and in the colonies, the community was represented by the jury, that bulwark of societal conscience, perfectly suited, in Hale's opinion, "for the preservation of liberty, life, and property."<sup>151</sup> When originally conceived, then, the right to counsel (whether civil or criminal) was envisioned as both an individual and, more diffusely, a collective right.

### c. Edward Coke

Sir Edward Coke was a highly-influential, widely-read theorist at the time of colonial settlement as well as during the Revolution and the writing of the American Constitution.<sup>152</sup> His *Institutes of the Laws of England*, originally published in the Elizabethan age, shaped the understanding of English law for generations, and was very familiar to the colonies' educated class.<sup>153</sup>

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 346.

<sup>151</sup> *Id.*

<sup>152</sup> See generally ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE (2003).

<sup>153</sup> See *id.*

Coke seemed to endorse a ban on defense counsel for felony defendants in matters of fact,<sup>154</sup> relying on the court to represent the defendant on all factual bases. Coke did, however, approve of the use of defense counsel for felony cases in matters of law:

Where any person is indicted of treason or felony, and pleadeth to the treason or felony, not guilty, which goeth to the fact best known to the party; it is holden that the party in that case shall have no councell 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 councell learned to utter the same in forme of law.<sup>155</sup>

Thus even Coke, in the sixteenth century, acknowledged the possibility for counsel to argue a defendant's legal case at trial "for every matter in law rising upon the fact, the prisoner shall have councell learned assigned to him."<sup>156</sup> This distinction is likely due to the importance that sixteenth-century jurists placed on fact-finding by the jury. In other words, all facts were to only be explained by the defendant himself, or by the court. Arguing the law was different, and, even for Coke, required some learning or skill.

Many colonial attorneys and judges were spread out over large distances and were not able to consult with each other on a regular basis. As a result, they relied heavily on English sources to shape their practice and help them decide relevant laws and practices. In this way, Coke may have been more influential to the American colonial jurist than to the average London attorney of the time, because the American colonial jurist had so many fewer sources of law to guide them.

---

<sup>154</sup> 3 EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 137 (E. and R. Brooke 1797), *available at* [http://www.constitution.org/18th/coke3rd1797/coke3rd1797\\_151-200.pdf](http://www.constitution.org/18th/coke3rd1797/coke3rd1797_151-200.pdf). As Coke explained, one reason for this ban on defense counsel in matters of fact was that "in the case of life, the evidence to convince him should be so manifest, as it should not be contradicted." *Id.*

<sup>155</sup> *Id.* at 137.

<sup>156</sup> *Id.* at 138.

#### d. William Blackstone

Similar to Coke, William Blackstone was foundational reading for those men who helped form the colonies into a united nation. More specifically, his *Commentaries on the Law of England*,<sup>157</sup> published in the late 1760's, were required reading on both sides of the Atlantic, and became a cornerstone for developing American jurisprudence.<sup>158</sup> Blackstone's masterpiece was repeatedly printed in the colonies, and was widely read before, during, and after the War of Independence.<sup>159</sup>

For our purposes, Blackstone's discourse on criminal trials is most important:

[I]t is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated. A rule, which . . . seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. 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? . . . 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.<sup>160</sup>

In this passage, Blackstone is objecting to the English laws that barred a prisoner from bringing any sort of counsel in front of the jury for a felony charge, even capital crimes, but allowed such counsel for misdemeanors. Blackstone was unquestionably absorbed by the learned

---

<sup>157</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1769), available at [http://avalon.law.yale.edu/subject\\_menus/blackstone.asp](http://avalon.law.yale.edu/subject_menus/blackstone.asp).

<sup>158</sup> See Pole, *supra* note 36, at 142-43.

<sup>159</sup> See Greg Bailey, *Blackstone in America*, THE EARLY AMERICA REVIEW, Spring 1997, available at <http://www.earlyamerica.com/review/spring97/blackstone.html>.

<sup>160</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK OF THE FOURTH, OF PUBLIC WRONGS, ch. 27, 854-56 (1898), available at [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk4ch27.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk4ch27.asp).

colonial men of power both pre- and post-Revolution, and is still a revered source today.<sup>161</sup>

Additionally, Blackstone's comment that English judges routinely turned a blind eye to this practice by allowing "stand-by" counsel at the bar, permitting the advocate to not only instruct the prisoner on how to question witnesses, but also to act in the prisoner's stead, could be read as an approving nod at the way the local community tailored the existing common law to fit its needs, and a not-so-subtle hint that assistance of counsel was necessary above and beyond the judge's impartiality. Support for the latter interpretation is provided by Blackstone's last statement on the subject, in which he commented that despite this informal loosening of the common law prohibition, "this is a matter of too much importance to be left to the good pleasure of any judge, and is worthy the interposition of the legislature."<sup>162</sup>

Accordingly, it is certainly possible that the leaders and jurists in the American colonies took Blackstone into account when considering whether to permit defense counsel to appear in a criminal trial. Although Blackstone admittedly does not comment specifically on any collective aspect of the right to counsel, his nod to the legislature, or representatives of the community, does indicate his belief that this was a serious matter, too critical to leave to the various decisions of individual judges.

#### e. Revising Colonial Legal Texts

Lawyers and legal practitioners in the colonies were not merely passive acceptors of the English common law, as seen in the early provisions in colonial charters and bills of rights granting some version of counsel rights at trial. The work of these early attorneys to revise English legal texts, including the ones mentioned above, and their influence on the creation of colonial American documents that best reflected new circumstances in a new world is important. As one legal historian has argued, legal practitioners in the colonies:

[A]cquired and used these law books to further their own litigation goals. They manipulated the ideas to adapt to colonial circumstances. In their choice, interpretation,

<sup>161</sup> See, e.g., DAVID ANDREW SCHULTZ, PROPERTY, POWER AND AMERICAN DEMOCRACY 20 (1992) ("[J]udges and lawyers (in addition to many of the founders, such as Jefferson, Hamilton and Adams) turned to [Blackstone] for reference as they sought to apply English . . . law to new American social and economic conditions.").

<sup>162</sup> 2 WILLIAM BLACKSTONE, *supra* note 160, at 349-50.

and adaptation of these texts, the Rhode Island practitioners became authors themselves and transformed the legal culture of England into a transatlantic legal culture.<sup>163</sup>

In the colony of Rhode Island, at least, seventeenth-century attorneys and legal practitioners did not statically parrot the English common law but instead “manipulated existing legal procedures to win their cases, and when existing procedures proved inadequate, developed new ones.”<sup>164</sup> In other words, the colony of Rhode Island used English legal literature and culture as the floor, but not the ceiling, for colonial law.<sup>165</sup>

With this in mind, it is easier to understand how colonial lawyers and legal literates<sup>166</sup> in Rhode Island and other colonies, were willing to move away from the strict construction and application of English common law and statutes to a more dynamic set of laws better suited to life in colonial America. That included permitting the use of defense counsel in criminal trials.

John Adams was a supporter of such dynamic practices of law, including the use of defense counsel. Before he rose to national and international renown as the Ambassador to the Court of St. James and second President of the United States, John Adams was a lawyer who practiced his trade in Boston and its surrounding environs.<sup>167</sup> Famously a

---

<sup>163</sup> Bilder, *supra* note 88, at 53-54. As Bilder explains, “books on book lists, a manuscript version of a colony’s laws, and letters and documents about a case can be understood as something more than ordinary physical objects containing stable sets of substantive ideas and ideologies.” *Id.* at 52.

<sup>164</sup> *Id.* at 55.

<sup>165</sup> *Id.* at 85.

<sup>166</sup> The phrase, as used by Bilder, “refers to the reading, writing, speaking, and thinking practices that relate to the conduct of litigation,” even if the men who did so were not formally trained as lawyers. *Id.* at 50.

<sup>167</sup> As Adams himself complained in a diary entry from 1768, his constant perambulations around Massachusetts to make a living were tiring both physically and mentally: “What Plan of Study Reading or Reflection, or Business can be pursued by a Man, who is now at Pownalborough, then at Marthas Vineyard, next at Boston, then at Taunton, presently at Barnstable, then at [*illegible*] [*illegible*] Concord, now at Salem, then at Cambridge, and afterwards at Worcester. Now at Sessions, then at Pleas, now in Admiralty, now at Superiour Court, then in the Gallery of the House.” *Diary of John Adams (January 30, 1768)*, in ADAMS FAMILY PAPERS: AN ELECTRONIC ARCHIVE (Massachusetts Historical Society), <http://ldc802.aus.us.siteprotect.com/digitaladams/aea/cfm/doc.cfm?id=D15>.

diary keeper and prolific correspondent for his entire adult life, Adams wrote down his thoughts and recollections on both his personal and professional life, including his views on lawyering, the use of defense counsel, and the proper function of trials. In one such instance, he bemoaned the failure to publish a criminal trial's full record:

I have been musing this evening upon a Report of the Case of the 4. Sailors, who were tryed last June . . . for killing Lt. Panton. A Publication only of the Record, I mean the Articles, Plea to the jurisdiction, Testimonies of Witnesses, &c. would be of great Utility. The Arguments which were used, are scarcely worth publishing. Those which might be used, would be well worth the Perusal of the Public.<sup>168</sup>

Adams's musings on the murder trial tell us a good bit about criminal trial practice in the mid-to-late eighteenth century. First, his references to the pleas to the jurisdiction and testimony of witnesses illustrate the use of counsel on the defense side, as the average sailor would not be able to represent himself at a trial of such great complexity.<sup>169</sup> Second, Adams's desire to have the entire record published (despite his disdain for counsel's arguments) for the edification of the people speaks to the continuing public role of any criminal trial, even in a community as large and dispersed as greater colonial Boston. Adams's wish to have every aspect of the case in the public realm also hints at how all aspects of criminal trials in the eighteenth century were viewed as useful instructional tools for the public good. In an era where all aspects of the criminal justice system were for and by the community—where criminal justice was public justice—Adams understood that the better educated the community, the better the criminal justice would be.

One of the best-known instances of criminal defense counsel in colonial times was John Adams' representation of English soldiers accused of murder following the events of the Boston massacre in

---

<sup>168</sup> Diary of John Adams (December 23, 1769), in ADAMS FAMILY PAPERS: AN ELECTRONIC ARCHIVE, *supra* note 167.

<sup>169</sup> This is also supported by a later diary entry that noted how Adams was appointed defense counsel for a man who was charged with rape "years ago." See Diary of John Adams (June 28, 1770), in ADAMS FAMILY PAPERS: AN ELECTRONIC ARCHIVE, *supra* note 167.



1770.<sup>170</sup> Adams, along with Josiah Quincy, represented the English captain, Thomas Preston, and his men.<sup>171</sup> Ultimately, Preston and six of his men were acquitted; two others were found guilty of manslaughter, punished, and discharged from the army. The process of the criminal justice system and the rule of law prevented the furious colonists from punishing the English soldiers individually and with savage retribution.

Adams was a reluctant counsel to the defense. As Adams later noted in his diary, “[t]he Part I took in Defense of Captn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough.”<sup>172</sup> In his recollections of the incident and subsequent trial written thirty years after the event, Adams articulated his view of the uses of counsel at criminal trials:

[C]ounsel ought to be the very last thing an accused person should want in a free country . . . the bar ought, in my opinion, to be independent and impartial at all times, and in every circumstance, and that persons whose lives were at stake ought to have the counsel they preferred. . . every lawyer must hold himself responsible to not only his country but to the highest and most infallible of all tribunals for the part he should act.<sup>173</sup>

Although somewhat elliptical, Adams’ statement as a whole reflected the two critical roles that defense counsel played in the American colonies. First, that no matter who the client, the local bar needed to keep itself relatively unbiased and provide counsel for everyone who needed it. Second, that part of the role of the defense lawyer (or any

---

<sup>170</sup> On the night of March 5, 1770, there was a fight between some British soldiers and inhabitants of Boston, which eventually degenerated into a battle. The British soldiers shot into the crowd of unarmed colonists, killing five men. The clash was the “culmination of tensions in the American colonies that had been growing since Royal troops first appeared in Massachusetts in October 1768 to” enforce the heavy tax burden imposed by the Townshend Acts. See *Detailed Description*, BOSTON MASSACRE HISTORICAL SOCIETY, <http://www.bostonmassacre.net/plot/detailed1.htm> (last visited Aug. 5, 2010).

<sup>171</sup> See *The Summary of the Boston Massacre Trial*, BOSTON MASSACRE HISTORICAL SOCIETY, <http://www.bostonmassacre.net/trial/trial-summary1.htm> (last visited Dec. 19, 2011).

<sup>172</sup> Autobiography of John Adams, part 1 (The Year 1770), in ADAMS FAMILY PAPERS: AN ELECTRONIC ARCHIVE (Massachusetts Historical Society), [http://ldc802.aus.us.siteprotect.com/digitaladams/aea/cfm/doc.cfm?id=A1\\_12](http://ldc802.aus.us.siteprotect.com/digitaladams/aea/cfm/doc.cfm?id=A1_12).

<sup>173</sup> FREDERIC KIDDER, HISTORY OF THE BOSTON MASSACRE, MARCH 5, 1770, at 19 (1870).

lawyer) was to act not only for himself and his client, but also for the larger community. In this way, we can understand Adams' role as defender of the English soldiers as one that fits into the larger context of the criminal trial counsel right. The colonial criminal defense attorney had to consider both the needs of his local community as well as his client. The right to counsel, in other words, was not only a personal, individual right, but redounded to the community as well.

Adams reiterated this understanding of the right to counsel in his autobiography, written many years after the events in question. In reflecting upon the events, Adams concluded that although he garnered much opprobrium from defending the English soldiers and their Lieutenant, he had always tried to stick to the dictates of the law, and did it all for the general populace: "It appeared to me, that the greatest Service which could be rendered to the People of the Town, was to lay before them, the Law as it stood that [they] might be fully apprized of the Dangers of various kinds, which must arise from intemperate heats and irregular commotions."<sup>174</sup>

In other words, after much time to reflect had gone by,<sup>175</sup> Adams believed that the most important aspect of his representation as defense counsel in the Boston massacre trial was to educate and edify "the People of the Town." Upon reflection roughly thirty years later, Adams's focus and greatest sense of pride was for the help he provided for the local community, not the soldiers themselves. Adams did not primarily represent the British soldiers to ensure that their individual rights were vindicated; nor did he accept the role as defense counsel to battle the truth out of the prosecution in an adversarial contest. Instead, Adams took on this unpopular role in large part to protect his community, to remind it to follow the proper procedures for its own good, and to educate them in how criminal justice should be done.

### C. The Right to Counsel in the Sights of the Revolution

When it came time to draw up both the state and federal constitutions, the right to counsel did not occupy much space or interest. Those states that did mention the privilege or right to counsel often tended to categorize it as part of the general bundle of privileges

---

<sup>174</sup> Autobiography of John Adams, in ADAMS FAMILY PAPERS: AN ELECTRONIC ARCHIVE, *supra* note 172.

<sup>175</sup> Adams wrote his autobiography between 1802 and 1807. *Id.*

belonging to those charged with a crime. However, many of these same state constitutions frequently phrased the ability to retain counsel quite broadly, as if to indicate that the primary use of defense counsel was a voice *in addition* to the defendant's, instead of our more modern understanding of counsel acting in the stead of the defendant. Put another way, the ability to retain and use counsel was seen less as a replacement for the defendant than as his or her assistant, traditionally utilized on the public stage of a trial. Defense counsel's main use, then, was probably to allow the jury to hear the full ramifications of the case, and not be hindered by whatever defects in presentation the defendant, on his or her own, might possess.

### 1. State Constitutions and Declarations of Rights

This interpretation of permitting the privilege of counsel is borne out by the wording of many state constitutions. For example, in Pennsylvania, Article IX of its Declaration of Rights held “[t]hat in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council . . . .”<sup>176</sup> This type of phrasing, as discussed above, can be interpreted as permitting defense counsel to speak at trial in addition to the defendant, to best uncover the truth for the community. Vermont phrased counsel privileges in its 1777 Constitution similarly.<sup>177</sup> Massachusetts reached for a similar meaning, its 1789 Constitution permitting the defendant “to be fully heard in his defence by himself, or his counsel at his election.”<sup>178</sup>

Likewise, the 1777 New York Constitution held that “the party impeached or indicted shall be allowed counsel, as in civil actions.”<sup>179</sup> This grant of counsel was deemed so important to New Yorkers it was included not in a declaration of rights or listed with other criminal

<sup>176</sup> PA. CONST. OF 1776, art. IX, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 3083, *available at* [http://avalon.law.yale.edu/18th\\_century/pa08.asp](http://avalon.law.yale.edu/18th_century/pa08.asp).

<sup>177</sup> “That, in all prosecutions for criminal offences, a man hath a right to be heard, by himself and his counsel . . . .” VT. CONST. OF 1777, art. X, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 3741, *available at* [http://avalon.law.yale.edu/18th\\_century/vt01.asp](http://avalon.law.yale.edu/18th_century/vt01.asp).

<sup>178</sup> CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS, art. XII (1780), *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 1891, *available at* <http://www.nhinet.org/ccs/docs/ma-1780.htm>.

<sup>179</sup> N.Y. CONST. OF 1777, art. XXXIV, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 2635, *available at* [http://avalon.law.yale.edu/18th\\_century/ny01.asp](http://avalon.law.yale.edu/18th_century/ny01.asp).

procedural privileges, but added as its own item to a long list of articles found critical to the proper operation of the new state.

Finally, New Jersey's 1776 Constitution permitted an equal level of counsel and access to witnesses as the prosecution, likely in order to best assist the jury with the easiest way of ferreting out the truth.<sup>180</sup>

On the other hand, Maryland simply granted its defendants the right "to be allowed counsel,"<sup>181</sup> as did Delaware in its 1776 Bill of Rights.<sup>182</sup> Similarly, New Hampshire's 1784 Bill of Rights allowed the accused "to be fully heard in his defense by himself, and counsel."<sup>183</sup>

Unsurprisingly, given the Carolina province's distaste for attorneys, there was no "privilege of counsel" clause in either North<sup>184</sup> or South Carolina's<sup>185</sup> Constitution. In the same vein, neither Virginia's Constitution<sup>186</sup> or its Bill of Rights<sup>187</sup> mentioned counsel at all.

Georgia's 1777 Constitution went so far as to prohibit any pleading in any court unless the attorney was licensed by its house of assembly, thereby neatly barring the practice of non-local lawyers.<sup>188</sup>

<sup>180</sup> Article XVI of the New Jersey Constitution held "[t]hat all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to." N.J. CONST. OF 1776, art. XVI, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 2597, *available at* [http://avalon.law.yale.edu/18th\\_century/nj15.asp](http://avalon.law.yale.edu/18th_century/nj15.asp).

<sup>181</sup> MD. CONST. OF 1776, art. XIX, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 1688, *available at* [http://avalon.law.yale.edu/17th\\_century/ma02.asp](http://avalon.law.yale.edu/17th_century/ma02.asp).

<sup>182</sup> DEL. DECLARATION OF RIGHTS OF 1776, § 14, *reprinted in* SOURCES OF OUR LIBERTIES 338-40 (Richard L. Perry ed., 1952), *available at* [http://press-pubs.uchicago.edu/founders/documents/bill\\_of\\_rightss4.html](http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss4.html).

<sup>183</sup> N.H. CONST., art. XV, <http://www.nh.gov/constitution/billofrights.html>.

<sup>184</sup> *See* N.C. CONST. OF 1776, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 2787-94, *available at* [http://avalon.law.yale.edu/18th\\_century/nc07.asp](http://avalon.law.yale.edu/18th_century/nc07.asp).

<sup>185</sup> *See* S.C. CONST. OF 1778, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 3248-57, *available at* [http://avalon.law.yale.edu/18th\\_century/sc02.asp](http://avalon.law.yale.edu/18th_century/sc02.asp).

<sup>186</sup> *See* VA. CONST. OF 1776, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 3814-19, *available at* [http://avalon.law.yale.edu/18th\\_century/jeffcons.asp](http://avalon.law.yale.edu/18th_century/jeffcons.asp).

<sup>187</sup> *See* VA. DECLARATION OF RIGHTS OF 1776, *reprinted in* 7 REVOLUTIONARY VIRGINIA THE ROAD TO INDEPENDENCE 449-50 (Brent Tarter ed., 1983), *available at* [http://avalon.law.yale.edu/18th\\_century/virginia.asp](http://avalon.law.yale.edu/18th_century/virginia.asp).

<sup>188</sup> GA. CONST. OF 1777, art. LVIII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 61, at 785, *available at* [http://avalon.law.yale.edu/18th\\_century/ga02.asp](http://avalon.law.yale.edu/18th_century/ga02.asp). "No person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the house of assembly; and if any person so authorized shall be found guilty of malpractice before the house of assembly, they shall have power to suspend them. This is not intended to

Article LVIII, however, made a point in encouraging both defendants and plaintiffs to plead their own cause.<sup>189</sup> Considering how few lawyers there were in the more southern states, this rule was likely based on both a distaste for attorneys, and a concomitant desire to keep determinations of truth and justice local.

This lack of counsel privileges does somewhat weaken the case for a collective right to counsel. But given the lack of lawyers during this time period, and the general suspicion in which they were held during the seventeenth and eighteenth century, the fact that there were any right to counsel clauses is impressive.

## 2. Federal Constitution/Bill of Rights

As Akhil Amar has argued, the right to counsel is part of a cluster of rights focused on the public aspect of a trial: “Counsel, confrontation, and compulsory process are designed as great engines by which an innocent man can make the truth of his innocence visible to the jury and the public.”<sup>190</sup>

Five state conventions sent proposals to the Framers for rights to be included in the Bill of Rights, which included some kind of privilege of counsel.<sup>191</sup> Virginia,<sup>192</sup> Rhode Island,<sup>193</sup> and North Carolina<sup>194</sup> had identical phrasing, requesting an amendment be promulgated that

---

exclude any person from that inherent privilege of every *freeman*, the liberty to plead his own cause.” *Id.*

<sup>189</sup> *See id.*

<sup>190</sup> AKHIL AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 90 (1997).

<sup>191</sup> *See* George Thomas, *History’s Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 571 (2004).

<sup>192</sup> Ratification of the Constitution by the State of Virginia, 8th Proposed Right of the People (1778), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1029 (Charles C. Tansill ed., Government Printing Office 1927), *available at* [http://avalon.law.yale.edu/18th\\_century/ratva.asp](http://avalon.law.yale.edu/18th_century/ratva.asp).

<sup>193</sup> Ratification of the Constitution, by the Convention of the State of Rhode-Island and Providence Plantations, 8th Proposed Right of the People (1790), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 312 (Department of State 1894), *available at* <http://teachingamericanhistory.org/ratification/tansill/ratification-rhodeisland.html>.

<sup>194</sup> Ratification of the Constitution by the State of North Carolina (1788), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 202, at 267-68, *available at* <http://teachingamericanhistory.org/ratification/tansill/ratification-northcarolina.html>.

“allowed counsel in [defendant’s] favour.”<sup>195</sup> The minority proposal of Pennsylvania sought a right “to be heard by himself or his counsel.”<sup>196</sup> The New York proposal requested that the defendant be permitted to obtain “the assistance of Council for his defense.”<sup>197</sup>

There was no discussion of the right to counsel in the First Congress. However, as other scholars have argued, perhaps this means that the Framers saw the essential right as one of receiving assistance, while the defendant personally pled the case.<sup>198</sup>

At least one Framer of the Constitution definitely felt that the right to counsel was an important aspect of colonial rights. Thomas Jefferson, in his *Bill for proportioning [sic] Crime and Punishment, in cases [sic] heretofore Capital*, stated that “[t]he Aid of Counsel, and examination of their witnesses on oath, shall be allowed to defendants in criminal prosecutions.”<sup>199</sup> Note particularly how this privilege of counsel was phrased; not that the defendant had a right, but instead that the assistance of counsel would be permitted. Moreover, in his 1774 screed *A Summary View on the Rights of British America*, Jefferson complained about the fact that American colonists were being tried for crimes in England “without money, without counsel, without friends, without exculpatory proof, [and] tried before judges predetermined to condemn.”<sup>200</sup>

<sup>195</sup> For example, Rhode Island’s 1790 ratification of the Constitution stated: “That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favour . . . .” Ratification of the Constitution, by the Convention of the State of Rhode-Island and Providence Plantations, *supra* note 193.

<sup>196</sup> Thomas, *supra* note 191, at 571 (internal citation omitted).

<sup>197</sup> Ratification of the Constitution by the State of New York (1788), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 202, at 267-68, *available at* <http://www.teachingamericanhistory.org/ratification/tansill/ratification-newyork.html>.

<sup>198</sup> Thomas, *History’s Lesson for the Right to Counsel*, *supra* note 191, at 571.

<sup>199</sup> THOMAS JEFFERSON, BILL FOR PROPORTIONING CRIME AND PUNISHMENT, IN CASES HERETOFORE CAPITAL, *reprinted in* THE WRITINGS OF THOMAS JEFFERSON 239 (A.A. Lipscomb and A.E. Bergh, eds., 1904).

<sup>200</sup> THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA, *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 28 (Jack Rakove ed., 2006).

Likewise, some of the letters written by the Federal Farmer (often attributed to Melancton Smith<sup>201</sup>) hint at why the privilege of counsel was deemed necessary for inclusion in the Bill of Rights. In the Federal Farmer's letter of October 12, 1787, he links the need for the assistance of counsel with the need for the local community to hear a criminal case. The Federal Farmer argued that locating the trial in the neighborhood was of great importance because "[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of fact in question."<sup>202</sup> Although the Federal Farmer does not mention defense counsel by name, it is a logical implication. The very idea of cross-examining witnesses requires a level of legal competence unlikely to be found in the average citizen of the time, although of course it was possible.

More critically, the Federal Farmer's letter illustrates how tightly the assistance of counsel was intertwined with the community's right to adjudicate criminal matters. The writer went on to note that the "common people can establish facts with much more ease with oral than written evidence."<sup>203</sup> In other words, the value of having someone—whether defense counsel, a friend, or the defendant himself—cross-examine witnesses was primarily for the utility of the community, to lead them to "the discovery of truth."<sup>204</sup>

Ultimately, the original right to counsel was, at least in part, about the early colonial community's desire to have a democratic, legitimate, and stable public forum for criminal justice. Although the accused certainly benefited from the granting of counsel privileges, the reasons underlying it were not entirely focused on the individual needs or rights of the defendant. Instead, counsel rights were also permitted to ensure that the local, participatory justice of these small communities would be obeyed and supported, thereby ensuring their survival. Collectively, the community tried, judged, and punished the offender. The right to counsel was likewise collective.

## II. THE SUPREME COURT AND MISUNDERSTANDING

---

<sup>201</sup> See LETTERS FROM THE FEDERAL FARMER (Oct. 12, 1787) (attributed to Melancton Smith), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS, *supra* note 198, at 435.

<sup>202</sup> See *id.* at 467.

<sup>203</sup> See *id.*

<sup>204</sup> See *id.*

### A. The Historical Right to Counsel

The Supreme Court has repeatedly misunderstood the history of the right to counsel. In large part, this is due to the confusion over why the right to counsel originally emerged. In relying so heavily on an inaccurate narrative of the adversary system instead of the actual history of collective rights, the Court has created confusion and uncertainty in interpreting the boundaries of the Sixth Amendment right to counsel. This mangled and misunderstood history provided by the Supreme Court is one of the reasons that the history of the right to counsel is relevant and should be reconsidered.

Below, I discuss three representative opinions which illustrate how the Court has mistakenly described the historical right to counsel and how that affected their modern understanding of the right, artificially limiting its boundaries.

#### 1. *Powell v. Alabama*

In *Powell*, the Supreme Court set out a version of the history of the right to counsel that was not entirely correct. *Powell* involved the arrest, indictment, and conviction of three young black men who were denied the right to counsel by the trial court's failure to appoint counsel for them prior to their trials for allegedly raping a white woman.<sup>205</sup> In discussing whether the defendants had a constitutional right to counsel before trial, the Court posited a history of the right to counsel that was inaccurate in its brevity.

After correctly noting that the common-law of England did not provide any right to counsel at the time the Constitution was adopted,<sup>206</sup> the Court went on to locate the genesis of the right to counsel only a few years before the federal Constitution was ratified,<sup>207</sup> despite acknowledging documentary evidence that counsel privileges existed well before that. Although the *Powell* Court acknowledged that, at least in Connecticut, the English common-law rule forbidding counsel was

---

<sup>205</sup> See *Powell v. Alabama*, 287 U.S. 45, 50, 52-53 (1932).

<sup>206</sup> See *id.* at 60.

<sup>207</sup> See *id.* at 61-62 (discussing the emergence of counsel privileges for the criminal defendant in state constitutions around 1776). Granted, the *Powell* court did mention the few instances where a right to counsel seemed to be indicated in earlier colonial texts, but fixed the genesis of the right around the Revolutionary period. *Id.* at 61.



honored more in the breach than in the practice,<sup>208</sup> and noted that the use of defense counsel was also allowed in Rhode Island,<sup>209</sup> it pinpointed the practice generally around the Revolutionary period, with a few exceptions.<sup>210</sup> The documentary evidence that I have provided above at minimum proves this contention false, as some version of counsel privileges were granted in the American colonies as early as the mid-seventeenth century.

Moreover, *Powell* propagates the historical misconception that it was the adversarial system that instigated the rise of the use of defense counsel, something I have refuted above. In making its argument that a criminal defendant requires defense counsel in a hearing, the *Powell* Court argued that the accused needed the assistance of counsel to function at the proceeding, since “[l]eft without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.”<sup>211</sup> This sort of phrasing indicates that the need for counsel was and is necessary to combat the thrusts and parries of the prosecution in an adversarial system. And while the adversarial legal arena certainly exists in the modern legal world, using the history of the right to counsel to bolster that existence is misleading.

Thus, from virtually the beginning of the Supreme Court’s discussion of historical counsel rights, the basis of its platform for expanding the right to counsel was infirm. As I will show, this historical inaccuracy has unnaturally limited the boundaries of the right.

## 2. *Faretta v. California*

*Faretta v. California*<sup>212</sup> also relied on a mistaken understanding of the historical right to counsel to expand counsel privileges for defendants.

---

<sup>208</sup> See *id.* at 62-64 (noting that Connecticut permitted use of counsel in felony cases well before 1796).

<sup>209</sup> See *id.* at 64 (pointing out reference to a Rhode Island statute permitting defense counsel for indicted defendant in historical text).

<sup>210</sup> See *id.* at 64-65.

<sup>211</sup> *Id.* at 68-69. As the Court continued, “[h]e lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.” *Id.* Although the Court never mentions the word “adversarial,” its meaning is unmistakable.

<sup>212</sup> *Faretta v. California*, 422 U.S. 806 (1974).

*Faretta* granted the right of self-representation to a capable defendant when he voluntarily and intelligently relinquished the right to appointed counsel.<sup>213</sup> Although correctly emphasizing that the assistance of counsel was originally an addition to the defense of the criminally accused, *Faretta* incorrectly focused on the adversary relationship between prosecutor and defense to bolster the right of self-representation, imagining a history of the right to counsel that never existed.

*Faretta* did get part of the history right. In tracing the right of self-representation back through English and colonial history, the *Faretta* Court accurately noted that originally the counsel for defendant consisted of the accused's friends, "brought into court by him so that he might 'take 'counsel' with them' before pleading."<sup>214</sup> The *Faretta* Court also correctly pointed out that England only allowed the accused himself to act as defense counsel for many decades until the Treason Act of 1695.<sup>215</sup>

When the *Faretta* Court got to the colonial era, however, its historical accuracy faltered. Relying in part on the same lean references as did *Powell* for its historical sourcing,<sup>216</sup> *Faretta* accurately acknowledged the colonial ability to represent oneself at criminal trials, but then cited primarily post-Independence documents, state constitutions, and statutes to prove its case.<sup>217</sup>

Additionally, *Faretta* incorrectly framed both counsel rights and the right to self-representation as critical parts of the criminal adversary system. This is evinced by the very language arguing for the right to self-representation, casting the role of the defense counsel as adversarial to the prosecution, scrambling for advantage, and engaged in verbal battle: "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance . . . [b]ut where the defendant will not

---

<sup>213</sup> See *Faretta*, 422 U.S. at 807.

<sup>214</sup> *Id.* at 821 n.16.

<sup>215</sup> See *id.* at 825-26.

<sup>216</sup> Both *Powell* and *Faretta* relied upon Zephiah Swift's post-Revolutionary treatise on the laws and statutes of Connecticut for support that there was a right to counsel in colonial times, and that right to counsel was similar to modern-day counsel rights. See *Faretta*, 422 U.S. at 828 n.35 (citing to 2 ZEPHIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 398-399 (1796)); *Powell*, 287 U.S. at 62).

<sup>217</sup> See *Faretta*, 422 U.S. at 828-32. *Faretta* did cite some early eighteenth-century colonial statutes—those of Delaware, Pennsylvania, and South Carolina—but like *Powell*, focused overwhelmingly on post-1776 state constitutions and statutes, as well as on the creation of the Sixth Amendment. All important historical evidence, but hardly evincing *early* colonial, pre-Revolutionary intent.

voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly.”<sup>218</sup>

This description does accurately elicit today's criminal courtroom experience. But this vision cannot be premised on the colonial history that *Faretta* earlier trots out for airing.

*Faretta* correctly noted that the Sixth Amendment implied a right to representation by the defendant himself, which makes sense when the true history of counsel rights is acknowledged.<sup>219</sup> And the majority is accurate in discussing the complete lack of counsel rights in England until the mid-nineteenth century as well.<sup>220</sup>

*Faretta*'s history begins to falter, however, when it focuses on self-representation to the exclusion of all other counsel rights, including that of the community. Arguing that the “colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers,”<sup>221</sup> the Court then relied upon the colonial permission of self-representation and the dislike of lawyers without equally acknowledging the important role that either counsel or friends played at trial for the benefit of the community.

Moreover, *Faretta* relied upon somewhat questionable documents for its conclusion that self-representation was the predominant form of counsel rights for defendants in the pre-constitutional and Founding eras. Although the Court did cite to the 1641 version of the *Massachusetts Body of Liberties* to illustrate the ban on paid counsel,<sup>222</sup> the majority of its support for its assertions came from general historical texts, vaguely attributed sources, or documents dating from the post-Revolutionary period.<sup>223</sup> These documents provided a thin base for the sweeping historical conclusions that the *Faretta* Court made—namely, that the

---

<sup>218</sup> *Id.* at 834.

<sup>219</sup> *Id.* at 821.

<sup>220</sup> *Id.* at 822-826.

<sup>221</sup> *Id.* at 826.

<sup>222</sup> *Id.* at 827 n.32.

<sup>223</sup> See *Faretta*, 422 U.S. at 826 n.30 (citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 7 (1911)); *id.* at 827 n.31 (citing DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 197 (1958)); *id.* at 828 n.35 (citing 2 ZEPHIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 398-399 (1796)); *id.* at 828 n.35 (citing HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 67, 89 (1965)).

right to counsel, in the form of self-representation, belonged entirely to the defendant,<sup>224</sup> with no regard for any rights of the community.

Although the *Faretta* Court was correct in concluding that self-representation played a large part in colonial criminal trials, in its zeal to establish a right to self-representation, it completely ignored the historical evidence of community counsel privileges in the colonial and pre-Revolutionary era. This oversight led to a complete assignment of the right to counsel to the defendant, denying any other potential claimant or sharer to the right.

### 3. Rothgery v. Gillespie County

More recently, a dissenting faction of the Court explored part of the history of the Sixth Amendment right to counsel clause. In 2008, the Court decided *Rothgery v. Gillespie County*,<sup>225</sup> holding that the constitutional right to counsel attaches when the first significant adversarial proceedings commence.<sup>226</sup> Although the majority opinion did not lay claim to any historical evidence to buttress its conclusions, Justice Thomas' dissent waded into the historical waters of the right to counsel clause, exploring the meaning of "criminal prosecution" at the time of the Founding.<sup>227</sup>

In his argument that the phrase "criminal prosecution" meant only a formal criminal proceeding in the colonial era, Justice Thomas relied exclusively on a text from William Blackstone, along with a citation from an 1828 dictionary<sup>228</sup> agreeing with Blackstone on the meaning of the term "criminal prosecution." He did not look to any colonial practices or statutes, nor to any cases before 1898. Similar to much of the Supreme Court's use of history to support its claims, this is thin material with which to support an argument on the original meaning of the right to counsel.<sup>229</sup> Although the *Rothgery* dissent's historical exploration is cursory, it is emblematic of the type of historical research the Supreme Court tends to utilize.

---

<sup>224</sup> See *Faretta*, 422 U.S. at 830.

<sup>225</sup> *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

<sup>226</sup> See *id.* at 203-204.

<sup>227</sup> See *id.* at 219.

<sup>228</sup> See *id.* at 221 (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

<sup>229</sup> See *infra* parts B and C; see also Appleman, *supra* note 68 (discussing historical misunderstandings of the right to jury trial in Supreme Court opinions old and new).

In contrast, the historical practices that I discussed above give a stronger basis upon which to base both law and policy. When discussing original meanings of rights and privileges enshrined in the Bill of Rights, as the Supreme Court frequently does, it is important to determine whether the practice that existed during colonial times or “at the time of the Founding was . . . constitutionally required.”<sup>230</sup> One way to do this is by using an external “frame of reference,” one which situates the particular original right or privilege in the time and place in which it was used.<sup>231</sup> One particularly useful external frame of reference exploration is consulting the original purposes of the constitutional provision.<sup>232</sup>

To put it another way, to best understand the meaning of any constitutional provision, including the right to counsel, it is not enough to look at the simple text or the common practices of any particular right or privilege at the time the Constitution was drafted or ratified; it is important to examine something besides counsel rights at the time of the Founding “to discern which features of [the privilege of counsel] in 1791 were thought to be constitutionally required from those that were not.”<sup>233</sup> Thus, to be able to fully interpret the meaning of the Sixth Amendment “right to counsel” provision, it is necessary to undergo a thorough examination of some of the aforementioned indicia of the original understanding of the privilege itself,<sup>234</sup> as I do above.

Of course, concluding that the historical right to counsel has a strong collective dimension raises many questions regarding modern-day interpretation and application of the right. Accordingly, in Part III I focus on ineffective assistance of counsel as a test case for how it might look to apply a collective right to counsel to our modern-day criminal procedures.

### III. IMPLICATIONS AND APPLICATIONS

---

<sup>230</sup> See Brian T. Fitzpatrick, *Originalism and Summary Judgment*, 71 OHIO ST. L. J. 919, 925 (2011).

<sup>231</sup> See *id.* at 925. As Fitzpatrick explains, “I would think an originalist would need some sort of frame of reference external to the practices at the Founding themselves in order to separate those practices that were constitutionally important from those that were not.” *Id.*

<sup>232</sup> See *id.*; see also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303 (2007) (advocating an originalist approach that looks to “what the people who drafted the text were trying to achieve [and] . . . what principles they sought to endorse”).

<sup>233</sup> See Fitzpatrick, *supra* note 228, at 925.

<sup>234</sup> See *id.* at 926.

The Law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become . . . .<sup>235</sup>

The original intent of the right to counsel, as promulgated in colonial charters, state constitutions, and ultimately the Sixth Amendment, will naturally be of interest to legal historians and constitutional scholars. But outside of these two audiences, what is the import of this new collective understanding of the right to counsel? The ramifications of a collective right to counsel become far greater if we ponder its application to modern-day criminal procedures.

Returning some of the right to counsel back to the community would serve a variety of purposes. First, and most obviously, restoring some measure of the right to counsel back to the local community would follow the original meaning, both as understood in the seventeenth and eighteenth century and as formalized into the Bill of Rights. More broadly, however, a collective right to counsel has important implications in three major areas: self-representation, appointed counsel, and ineffective assistance of counsel.

The boundaries of the right to counsel are regularly debated in federal and state courts and on the Supreme Court docket. Yet interpretation of the Sixth Amendment right to counsel has been disputed since *Faretta*. In part, this is because the Sixth Amendment has too often been reduced to only its plain meaning, without reference to the "deeper principles" that lurk behind the rules.<sup>236</sup> In regards to the right to counsel, the deeper principle that supports it is the rights of the public and populace at large,<sup>237</sup> a theme that runs through the entirety of the Sixth Amendment.

This theme of the rights of the public, as well as the rights of the defendant, has also repeatedly appeared and re-appeared in the Supreme Court's understanding of the right to counsel. For example, in *Polk County v. Dodson*, the Court explained how a defense lawyer helps

---

<sup>235</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (Harvard University Press 2009).

<sup>236</sup> See AMAR, *supra* note 190, at 94. As Amar argues, "Though the rules of the [Sixth] Amendment make sense as rules, deeper principles lurk beneath the rules." *Id.*

<sup>237</sup> See *id.* at 95.

vindicate “the public interest in truth and fairness”<sup>238</sup> in her representation of a client, serving the public by serving the defendant.<sup>239</sup>

Our new knowledge and understanding of the history of the right to counsel can be used to better help scope the contours of counsel rights both today, and in the future. Currently, we have limited the right to counsel to only apply in adversarial situations, in large part due to the misunderstanding that the right to counsel arose in response to an adversary process in criminal law.

Although the Supreme Court has extended an accused’s right to counsel to certain “critical” pretrial proceedings,<sup>240</sup> it has done so recognizing that at those proceedings, “the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both,”<sup>241</sup> in a situation where the results of the confrontation “might well settle the accused’s fate and reduce the trial itself to a mere formality.”<sup>242</sup> As the Court in *Strickland v. Washington* stated almost 27 years ago, “[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”<sup>243</sup>

As we have seen above, however, the historical evidence points in a path other than the adversarial process: that the right or privilege of counsel arose as part of the essential community right to have a stable criminal justice process. Accordingly, perhaps the modern-day right to counsel should not be limited merely to instances where the adversarial process is initiated, but instead expanded to places and times where it would be good for the community to have a defendant fully assisted by counsel to best support its needs for fairness, inclusion, and even-handedness within criminal adjudication.

But what does it mean for a right to be a community right? Arguably, all rights are themselves “community rights,” since every individual right serves the public interest. For example, the right to free speech, an individual right embodied in the First Amendment, has positive externalities for the entire society since we are all more free when

---

<sup>238</sup> *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981).

<sup>239</sup> *See Dodson*, 454 U.S. at 318-319.

<sup>240</sup> *See United States v. Wade*, 388 U.S. 218, 225 (1967).

<sup>241</sup> *United States v. Ash*, 413 U.S. 300, 310 (1973).

<sup>242</sup> *Wade*, 388 U.S. at 224.

<sup>243</sup> *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

any person may express his or her thoughts. More generally, the Supreme Court, in discussing early due process/incorporation cases such as *Duncan v. Louisiana*,<sup>244</sup> has suggested that community interests are often part of the incorporation process. Put another way, rights are incorporated through the Fourteenth Amendment when they are central to the public legitimacy of the legal system.<sup>245</sup> This general use of the community interest has been used to support incorporation of the right to state compensation for property;<sup>246</sup> First Amendment rights to speech, press, and religion;<sup>247</sup> Fourth Amendment rights to be free from unreasonable searches and seizures, as well as excluding illegally seized evidence;<sup>248</sup> a Fifth Amendment right to avoid compelled self-incrimination;<sup>249</sup> and the Sixth Amendment rights to counsel,<sup>250</sup> to a speedy<sup>251</sup> and public<sup>252</sup> trial, and to confrontation of opposing witnesses,<sup>253</sup> among others.

But the community right to counsel is stronger than just the community interests necessary to incorporate the Sixth Amendment right to counsel through the Fourteenth Amendment. I contend that the community itself has a right to counsel in a defendant's criminal case. I do not argue that the community, or anyone representing the community, would have a right to actually waive an individual defendant's right to counsel. But thinking about the right to counsel as a collective right, as well as a defendant's right, is important when analyzing when the right can be invoked, or should not be waived.

Moreover, analyzing the right to counsel in this way, through a communal lens, can help clarify how counsel rights should be applied.

<sup>244</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the Sixth Amendment right to a criminal jury trial to a state defendant).

<sup>245</sup> For example, in *Duncan v. Louisiana*, the Court explained how extending a right to a specific defendant could help all defendants: "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *See id.* at 157-58. Thanks to Alice Ristroph for this point.

<sup>246</sup> *See B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

<sup>247</sup> *See Fiske v. Kansas*, 274 U.S. 380 (1927).

<sup>248</sup> *See Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>249</sup> *See Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>250</sup> *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>251</sup> *See Klopfer v. North Carolina*, 386 U.S. 213 (1967).

<sup>252</sup> *See In re Oliver*, 333 U.S. 257 (1948).

<sup>253</sup> *See Pointer v. Texas*, 380 U.S. 400 (1965).



The importance of a collective, community right in the criminal context was underlined by the Court in *Schneckloth v. Bustamonte*.<sup>254</sup> *Schneckloth* held that a suspect need not know he has a right to refuse a search when he waives said right in consenting to a search.<sup>255</sup> The Court noted that under the *Johnson v. Zerbst*<sup>256</sup> standard, a suspect can only waive the right to counsel if he or she does so knowing and intentionally, with full knowledge of the right.<sup>257</sup> The *Schneckloth* Court, however, made a specific point of distinguishing waiver of procedural due process from the waiver of criminal trial rights,<sup>258</sup> rejecting the “uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection.”<sup>259</sup>

In other words, waiver of Sixth Amendment-based criminal trial rights, such as the right to counsel—rights that have a strong community aspect—are very different than an individual defendant’s waiver of his right to be free from searches. Since trial-related rights, such as the right to counsel, are distinctively communal, we want to make it harder for an individual defendant to undermine the community’s interests by waiving these rights.<sup>260</sup> In contrast, procedural due process rights, based on the Fourth Amendment, are largely individual, based as they are in privacy of home, property, and personhood, and thus easier to waive, since they have no collective aspect about them. In this way, the Court has acknowledged the special dimensions of the right to counsel, which is difficult to waive because of this collective aspect of the right.

There are a number of ways in which the collective right to counsel could be invoked into today’s criminal procedures. None of these ways would require much, if any, diminution of the individual right to counsel, and all would likely improve the defendant’s outcome in the criminal justice system.

### A. Self-Representation

One way that the collective right to counsel could be invoked is during a defendant’s request to go *pro se* at their trial or guilty plea.

---

<sup>254</sup> *Schneckloth v. Bustamante*, 412 U.S. 218 (1973).

<sup>255</sup> *Schneckloth*, 412 U.S. at 227.

<sup>256</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>257</sup> *See id.*

<sup>258</sup> *See Schneckloth*, 412 U.S. at 235.

<sup>259</sup> *Id.*

<sup>260</sup> Thanks to Alice Ristroph for making this point.

Criminal defendants wishing to waive their right to counsel are currently given great leeway, far too often to their own detriment.<sup>261</sup> Even the Supreme Court has recently questioned the wisdom of allowing too great a rein on self-representation.<sup>262</sup> Invoking the collective right to counsel is one way to ensure that the self-representation provided is truly competent, since the defendant could not waive the community's right to counsel without careful scrutiny.

Thus, invoking a collective right to counsel in the *pro se* context might require, among other measures, the trial court holding a much more exacting hearing and cross-examination of the defendant. Invoking the collective right to counsel would likely impose a far stricter standard in determining the competency of the accused to represent herself in the complexities of a criminal trial. Finally, the existence of a collective right to counsel would probably require standby or hybrid counsel for every *pro se* defendant. Ironically, invoking the collective right to counsel in the self-representation context would very likely provide the individual defendant a better fate in his or her criminal prosecution.

### B. Appointed Counsel

As interpreted by the Supreme Court, one aspect of the right to counsel is the right to have appointed counsel provided when the defendant cannot afford to pay.<sup>263</sup> This basic right of counsel, however, has recently been diminished due to the current fiscal crisis. Currently, in thirteen states, indigent criminal defendants are now required to pay for

---

<sup>261</sup> See, e.g., Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 628 (2005) (“*Faretta* . . . empower[ed] the self-destructive impulses of criminal defendants . . . turn[ing] trials into circuses through the device of self-representation.”); Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 165 (2000); but cf. Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007) (calling into question the assumption that felony criminal defendants are ill-served by proceeding *pro se*).

<sup>262</sup> See *Martinez v. Court of Appeals*, 528 U.S. 152, 163 (2000) (holding that defendant did not have a federal constitutional right to represent himself on direct appeal from his conviction).

<sup>263</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (holding that effective assistance of counsel encompassed the provision of counsel for indigent defendants by the State).

some fees associated with their cases.<sup>264</sup> Increasingly, states are turning to so-called “user fees” and surcharges to underwrite criminal justice costs and close budget gaps.<sup>265</sup> There are few, if any, exemptions for the indigent.<sup>266</sup> Many of these states do not allow the fees to be waived, while many of the states that do offer waivers often fail to utilize them.<sup>267</sup>

Here, the invocation of the collective right to counsel would, at minimum, require the waiver of those fees when the indigent defendants could not procure them. This is because the community’s interest in the stability and legitimacy of the criminal justice system is harmed by the inability of indigent defendants to obtain counsel due to fee imposition. Moreover, as one study of these fees noted, the “push for revenue has also undermined the integrity of the court system,”<sup>268</sup> as courts must harass poor defendants before they can hear their cases. This, too, injures the community’s strong interest in a workable, democratic criminal process. Accordingly, the collective right to counsel provides protection for the individual defendant where the individual right to counsel cannot.

One last way that the collective right to counsel might be invoked is through its application in analyzing ineffective assistance of counsel. This, too, would result in a better fate for an individual defendant.

### C. Ineffective Assistance of Counsel

The expanded notion of the right to counsel, based on a historical, collective understanding of the privilege, is useful when applied to the “ineffective assistance of counsel” line of cases. As many scholars have noted, the effective assistance of counsel standard is a weak one, met by almost the lowest level of competence.<sup>269</sup> Although

---

<sup>264</sup> See Kevin Johnson, *Some States Charge Poor for Public Defenders*, USA TODAY, October 23, 2010, [http://www.usatoday.com/news/nation/2010-10-03-feesforjustice\\_N.htm?loc=interstitialskip](http://www.usatoday.com/news/nation/2010-10-03-feesforjustice_N.htm?loc=interstitialskip).

<sup>265</sup> See, e.g., REBEKAH DILLER, BRENNAN CENTER FOR JUSTICE, *THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES 1* (March 23, 2010), <http://www.brennancenter.org/page/-/Justice/FloridaF%26F.pdf?nocdn=1>.

<sup>266</sup> See *id.* at 1.

<sup>267</sup> See *id.*

<sup>268</sup> ACLU, *IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR PRISONS 9* (October 2010), [http://www.aclu.org/files/assets/InForAPenny\\_web.pdf#page=6](http://www.aclu.org/files/assets/InForAPenny_web.pdf#page=6).

<sup>269</sup> See, e.g., William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995) (arguing that the two-pronged test Strickland test “effectively discarded Gideon’s noble trumpet call to justice in favor of a weak tin horn”); Richard L. Gabriel, *The*

*Strickland v. Washington*<sup>270</sup> held that the Sixth Amendment right to counsel encompassed the effective assistance of counsel,<sup>271</sup> this requirement has not been applied in a rigorous manner.<sup>272</sup> “Deficient trial attorney performance is pervasive in criminal cases,”<sup>273</sup> and given the difficulties of meeting the *Strickland* requirements for ineffective assistance of counsel,<sup>274</sup> having a Sixth Amendment right to counsel does not always translate into a meaningful right to counsel.

The collective right to counsel helps fix this problem. By requiring that not only the defendant but also the community possess an effective right to counsel, this would require another layer of attentiveness paid to the quality and ability of counsel, whether at trial, during the negotiations of a guilty plea, or at sentencing. Considering the Supreme Court’s recent interest in both the right to counsel and the effectiveness of that counsel, this is a timely issue that is both important and complex.

In *Padilla v. Kentucky*,<sup>275</sup> the Court held that defendant’s counsel was constitutionally ineffective because he did not counsel him that pleading guilty to a drug conviction would make him subject to automatic deportation.<sup>276</sup> The decision came as a surprise to many,<sup>277</sup>

---

*Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999) (noting the *Strickland* standard requires “little more than a warm body with a law degree”); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

<sup>270</sup> 466 U.S. 668 (1984).

<sup>271</sup> See *Strickland*, 466 U.S. at 686.

<sup>272</sup> See, e.g., Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 680 (2007) (“[T]here is no effective remedy for defendants whose attorneys are constitutionally deficient at trial.”).

<sup>273</sup> *Id.* at 682.

<sup>274</sup> In order to prevail on an ineffective assistance of counsel claim, *Strickland* requires a defendant to prove: (1) counsel’s performance was deficient, meaning that the attorney performed unreasonably given prevailing norms of practice, and (2) this deficient performance prejudiced the defense, meaning that counsel’s errors were serious enough to undermine confidence in the outcome of the trial. See *Strickland*, 466 U.S. at 687-88.

<sup>275</sup> *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

<sup>276</sup> See *Padilla*, 130 S.Ct. at 1478.

<sup>277</sup> See, e.g., Margaret Colgate Love, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction*, NACDL THE CHAMPION, May 2010, at 18,

since the *Padilla* Court's decision seemed to rely on an all-but-useless standard, the *Strickland* ineffective assistance of counsel. Indeed, *Padilla* marked the first time that that the Court applied the *Strickland* standard to a lawyer's failure to advise a client about a consequence of a conviction that is not part of the sentence imposed by the court.<sup>278</sup>

Applying the community right to counsel, however, helps make sense of the *Padilla* decision. Deportation, or removal, has an immense effect on both the defendant herself and her community because it is in effect a form of banishment—once the defendant is removed, it is usually illegal for her to ever return. Thus, requiring counsel to inform the defendant that a conviction comes with collateral consequences, such as deportation, is important to the interests of both the defendant and the community. The *Padilla* Court acknowledges as much when it points out that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.”<sup>279</sup> If, as in our system, the State is supposed to represent the people, then the community right to counsel helps explain the *Padilla* Court's decision to require more information shared with the defendant and the community. As *Padilla* noted, “long-standing Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”<sup>280</sup>

This decision also ties nicely into the original meaning of the right to counsel because the initial reason that the colonies granted the privilege of defense counsel at all in criminal trials was to help the jury better reach the truth, thereby making a more reliable criminal verdict and reaffirming trust in the criminal justice system. Similarly, it is important in *Padilla*, and in other cases, for the defense counsel to advise the defendant of collateral consequences that result in death, life imprisonment, or deportation. This is for two reasons. First, of course, is for the obvious benefit of the defendant, who has the right to know what kind of consequences follow his or her choices. Second, however, is to enable the public to rely on defense counsel's role as the voice of, and for, the defendant. To be a reliable representative, counsel must convey, at

---

available at <http://www.nacdl.org/champion.aspx?id=14611> (“*Padilla v. Kentucky* . . . surpris[ed] even those who had been following the case closely.”).

<sup>278</sup> See *id.*

<sup>279</sup> *Padilla*, 130 S.Ct. at 1486.

<sup>280</sup> *Id.*

least adequately, all relevant information. Embracing the original and pre-constitutional meaning of the right to counsel helps improve the workings of the criminal justice system as well as hewing back to original meanings and attributes.

Finally, when originally practiced, banishment was a community decision, imposed primarily on those who would not follow community rules or violated the primary religion.<sup>281</sup> Banishment was often used as a form of punishment in colonial society—sometimes convicted defendants were banished from the community for a certain amount of time, and then allowed to return. Since banishment, essentially an early form of deportation, was a kind of sentencing used in early America, the right to counsel would have been applied in those trials. Likewise, any crime with a possible consequence of deportation would also require the assistance of counsel, a natural derivation of the original right to counsel, particularly when we are no longer solely wed to the requirements of adversarial process.

#### IV. CONCLUSION

This new understanding of the original meaning of the right to counsel raises a host of questions. First, how can counsel rights be potentially shared with the community without diminishing the rights assigned to the accused? Does the community's right or strong interest to counsel mean that this would limit the defendant's waiver rights? Might this affect the way we judge the ineffective assistance of counsel? Finally, should we continue to limit the right to counsel to adversarial proceedings only, when we now know that the right well predated them?

If correct, this Article calls into question our standard understanding of the original meaning of the right to a counsel. It also suggests that the invocation of a collective right to counsel would dramatically affect—and improve—the doctrine of self-representation, the right to appointed counsel, and the standard for ineffective assistance of counsel. The collective right to counsel has been hidden and misinterpreted for several centuries. It is time to welcome it back to the twenty-first.

---

<sup>281</sup> For example, the Puritans banished Quakers from their midst, which was a community-based decision even in a heavily religious society.