Abstract

Title: Old Words, New Pages: Milton, Bracton, and the "Century of Revolution"

Thesis: While the influence of natural law theorizing on Milton's polemical tracts is evident, historical sources also loomed large in his work. To date, no scholar has focused serious attention on the uses made of the foremost medieval legal treatise, Henry de Bracton's thirteenth-century *On the Laws and Customs of England*, in English Civil War and Interregnum discourse. However, his treatise constituted an essential pillar of revolutionary political thought in general and Milton's political thought in particular. This paper will focus on how Milton, the great classicist, put Bracton's treatise to such radical use.

This paper was written during the Spring Term of 2005 as part of an independent study project under the guidance of Professor Janelle Greenberg. The impetus for the paper, which is part of a much larger work cataloging the uses of Bracton from 1642-1660, came from our private discussions of the general topic in addition to the course material assigned in two of her classes: English Origins of American Law (HIST 1191) and Medieval Government and Society (HIST 1190).

In addition to secondary sources and Samuel Thorne's edition of Bracton, this work relies heavily on three of Milton's pamphlets: *The Tenure of Kings and Magistrates*, *Eikonoklastes*, and his first *Defence of the People of England.* These tracts were examined using Early English Books Online, which afforded me the opportunity to read Milton's words as they were originally published, rather than in a modern edition.

While John Milton made great use of continental, classical, and biblical sources in his polemical writings, he turned to English history – Bracton in particular – to justify vital tenets of his political thought and practice. Until recently, however, scholars have overlooked the radical uses of the past by Milton and others, in large measure because of their unfamiliarity with the historical materials themselves. The goal of this work is to demonstrate the importance of Bracton, the great legal treatise utilized by the Long Parliament to "bridle" King Charles I and justify regicide, to Milton's political thought specifically and early modern political thought more broadly.

The execution of Charles I in January 1649 saw the end of a long series of battles, but not the end of the war. Even after the kingship, along with the House of Lords, was abolished in 1649, radical parliamentarians still waged war – at least on paper – against Stuart loyalists. The newly-formed Commonwealth government sought the rhetorical aid of many writers, most notably John Milton. In *The Tenure of Kings and Magistrates* (1649), *Eikonoklastes* (1649), and the infamous *Defence of the English People* (1651), Milton made his radical message very clear. His "unflinchingly public justification of Charles's execution, along with the clarity of his presentation, rendered his works especially dangerous" (Greenberg 237). Indeed, as Christopher Hill notes, "short of signing the death warrant, Milton could hardly have done more" (Hill 207).

Many historians believe that such revolutionary actions were typically defended by theories of natural law and natural right (100), in particular the argument that nature and God endowed men with inalienable rights. While the influence of such theorizing on Milton's polemical tracts is evident, historical sources, in the form of the Ancient Constitution, also loomed large in his work. Until recently, however, scholars have overlooked the radical uses of the past, in large measure because of their unfamiliarity with the historical materials themselves. One way of tracing the influence of historical sources during the "century of revolution" is to examine how the foremost medieval legal treatise, Henry de Bracton's thirteenth-century *On the Laws and Customs of England*,[1] was deployed to justify civil war and regicide.

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[1] Though seventeenth-century theorizers had no reason to doubt its authorship, it is now known that *On the Laws and Customs of England* was in fact written by Bracton's predecessor, William Ralegh, and only edited by Bracton (Bracton 3: *xiii-lii*). In the current work, references to "Bracton" should be interpreted as referring to the text itself rather than the individual; F.W. Maitland settled all dispute of the matter when he declared, "Bracton he has been for centuries, and so let him be to the end" (Maitland 14).

No scholar, however, has focused serious attention on the uses made of Bracton in Civil War (1642-1649) and Interregnum (1649-1660) discourse, despite the fact that his treatise, known as "the crown and flower of English medieval jurisprudence" (Brand 65), constituted an essential pillar of revolutionary political thought in general and Milton's political thought in particular. This paper will focus on how Milton, the great classicist, put Bracton's treatise to such radical use.

In order to appreciate Bracton's impact on Milton's political thought, we must first examine the famous text associated with Bracton, focusing in particular on those sections that lent themselves to radical interpretation. Though Bracton's entire treatise is important to the development of the common law of England, seventeenth-century theorists, Milton included, typically cited three folios: 5, 34, and 107.

The fifth folio ends with a small section entitled "The king has no equal," which reads in part as follows:

> The king has no equal within his realm…nor *a fortiori* a superior, because he would then be subject to those subjected to him. The king must not be under man but under God and under the law, because the law makes the king…for there is no *rex* where will rules rather than *lex* (Bracton 2: 33).

This particular folio suited the political needs of Stuart royalists, since it tells the reader that the king has no equal, much less a superior, in the realm. But the second half of f. 5 served the needs of the enemies of Charles I. Here Bracton suggests that, although the king is above all men, he is not above the law. Further, in a thread running throughout the treatise, he hints at the distinction between a just king and a tyrant. While the former adheres to the law, the latter uses his personal desire as a substitute for law. Bracton is very clear about the legitimacy of lawless kings: a lawless king is no king at all.

While f. 5 provides convincing arguments for both sides, f. 34, the so-called *addicio de cartis* (i.e., the addition) gave the defenders of Parliament an even more lethal weapon to employ against God's anointed. Perhaps the most frequently cited passage in the treatise, f. 34 contains language that not only supported the notion that the two houses of Parliament were superior to the king, but also that errant kings could be called to account. Says Bracton in the *addicio de cartis*:

> The king has a superior, namely, God. Also the law by which he is made king. Also his *curia*, namely, the earls and barons, because if he is without bridle...they ought to put a bridle on him. *[That is why the earls are called the partners, so to speak, of the king; he who has a partner has a master.]* (2: 110).

As F. W. Maitland, the greatest of all English legal historians, notes, "seldom have more momentous words been written in a lawyer's text, for this is the famous passage about the king so often quoted in the political trials of the seventeenth century, quoted by the President of a High Court of Justice when an English king [Charles I] was to be sent to the scaffold, repeated over and over again by legal theorists and historians as giving the opinion of the great mediaeval judge" (Maitland 29).

Though Stuart parliamentarians had no reason to doubt the legitimacy of f. 34, the recent research of scholars such as Samuel Thorne and Paul Brand suggests that portions of the folio, most notably the *addicio de cartis*, were added to Bracton's treatise by another hand (Bracton 1: 333). However, it does not matter if the *addicio* was actually Bracton's. To radical parliamentarians, as well as later generations, its inclusion into so many extant manuscripts provided sufficient "proof" that Bracton saw Parliaments as bridles to lawless kings.

Along with the *addicio de cartis*, portions of f. 107 also enjoyed widespread usage throughout the struggles and debates in Stuart England. Bracton begins by telling

the reader that the king has ordinary jurisdiction and furthermore that "it is clear that...the king himself...is held bound by virtue of his oath." In his coronation oath, the king must swear, among other things, to "cause all judgments to be given with equity and mercy...in order that by his justice all men may enjoy unbroken peace" (Bracton 2: 304). Despite the innocuous ring of these words, a turn of the page reveals a significant blow to royalist arguments, because Bracton now states flatly that "to this end is a king *made* and *chosen*, that he do justice to all men" (2: 305, emphasis added). To dissidents like Milton who needed to show that the kings of England had always been chosen by the people, Bracton's words came as great comfort.

The "radical" voice of Bracton continues with language reminiscent of f. 34. "Nevertheless," he writes, "since the heart of a king ought to be in the hand of God, let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest...he be drawn toward injustice". Two sentences later, Bracton includes the words most damaging to errant kings. Of the king, he writes that

> His power is that of *jus*, not *injuria*...as vicar and minister of God on earth, for that power only is from God, *[*the power of *injuria* however, is from the devil...and the king will be the minister of him whose work he performs,*]*...Therefore as long as he does justice he is the vicar of the Eternal King, but the devil's minister when he deviates into injustice, For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws (2: 306).

From these words, many anti-royalists concluded that a king who did not rule well lost the very name of king. If a just king was considered God's vicar and an unjust king (a tyrant) the devil's vicar, and if subjects owed allegiance to God and not Satan, then allegiance was due to a king and not to a tyrant.

In the battle for the ideological high ground in Stuart England, Bracton proved to be a useful resource for Parliamentarians and Royalists alike. Both political camps frequently cited him – both *could* cite the famous jurist's words – to further their respective theories of legitimacy. The aforementioned folios, in addition to a few others, figured crucially in the great debates of the Civil War and Interregnum. Certainly Bracton's treatise proved to be a formidable weapon in the hands of John Milton.

Milton was born on 9 December 1608 to a wealthy family from London. That Milton was a highly-educated man is unmistakable; during the course of his youth, he studied at St. Paul's School and Christ's College, Cambridge, in addition to eight years of further private study in the decade preceding the Civil War. Milton stepped unobtrusively onto the national stage in May of 1641 as a pamphleteer: in no less than five pamphlets published in under a year, he fiercely attacked the episcopacy, calling for a reformation of religion. These anti-prelatic tracts sharply juxtaposed Milton's four divorce tracts, published between August 1643 and March 1645. Apparently fueled at least in part by his own failed marriage to Mary Powell, the divorce tracts illuminate "a decisive breakthrough in Milton's development as a radical and rebel" (Zagorin 39-40). While part of the "mainstream" in his attacks on the episcopacy, Milton's radical approach to the institution of marriage was not echoed by his contemporaries; on the subject Milton stood alone. The divorce tracts are key in understanding Milton's future work; "for the first time a new set of ideas such as contract, equity, the law of nature, and liberty…made its appearance in his work" (40).

It was in republican England (1649-1660) that Milton made his political reputation. After Charles' execution, he "seized the high ground with the claim that the

English people, whom God had invested with original power, were legally superior to the king" (Greenberg 237). With *The Tenure of Kings and Magistrates*, most likely conceived in the weeks prior to the king's execution and published a month afterwards, Milton laid out the framework that would dominate his most important polemical tracts justifying regicide. A rather short work of no more than sixty pages, *Tenure* used a variety of ancient constitutionalist, that is, medieval, sources, Bracton among them, to justify regicide and securely establish the people's right to revolt against and remove their rulers should they become tyrants.

Bractonian language can be found throughout *Tenure*. Milton furthered the claim that "since the King or Magistrate holds his authoritie of the people, both originally and naturally...then may the people as oft as they shall judge it for the best, either choose him or reject him, retaine him or depose him" (Image 9). The allusion to Bracton's f. 107, which states that the king is both made and chosen by the people, is recognizable.

Milton clearly saw the radical implications of Bracton's treatise, and sought to use Bractonian language in all of his tracts. He reminded the reader of the case of "Claudius Sesell a French Statesman, [who said that] *The Parliament was set as a bridle to the King*; which I instance rather, not because our English Lawyers have not said the same long before, but because that French Monarchy is granted by all to be a farr more absolute then ours" (Image 7). While Milton overtly spoke of France, he also surely had in mind Bracton's infamous *addicio de cartis*, which states that Parliament is not only the equal of the king, but also his master, and is invested with power – both from the people and from God – to bridle lawless and errant rulers. In Milton's view, King Charles violated Bracton's fifth folio "through the contempt of all Laws and Parlaments, the

onely tie of our obedience to him, for his own wills sake, and a boasted prerogative unaccountable, after sev'n years warring and destroying of his best Subjects" (Image 12). The king's will, according to both Bracton and Milton, could not substitute for law.

Throughout *Tenure*, Milton reiterated the same claim found in f. 5 of Bracton's *chef d'oeuvre*: that without law, there can be no king. What Bracton subtly suggested in f. 34 Milton adamantly stressed and, indeed, demanded of the people of England: "if the Law be not present, or too weake, what doth it warrant us to less then single defence, or civil warr?" (Image 13). This is the most radical interpretation of the *addicio* possible. From it Milton drew much to justify both civil war and regicide. That justification is most evident when Milton informed the reader that "it is also affirmed from diligent search made in our ancient books of Law, that the Peers and Barons of England had a legal right to *judge* the king…they were called his *Peers* or *equals*" (Image 15, emphasis added).

An instant success, *The Tenure of Kings and Magistrates* was reprinted with several additional pages and lines of argument in 1650. The work, which would continue to influence political theorizing for the remainder of the century, would be eclipsed only by two other prominent works dealing with kingship and regicide, *Eikonoklastes* and the incendiary *Defence of the English People*.

Even though the Commonwealth abolished the monarchy, the kingship continued to have its vocal supporters. In the years immediately following the king's execution, no other Royalist tracts gained more attention – and, subsequently, more attacks from Parliamentarians – than the *Eikon Basilike* and the French author Salmasius' *Defence of the King*. Milton's *Eikonoklastes* and *Defence of the English People* answered these

blatantly royalist apologies. *Eikon Basilike*, published a mere ten days after Charles' public execution, was an unequivocal success for the royalist cause; in 1649 alone the book went through thirty-five English editions and several translations. The tract, meaning "The King's Image," succeeded in elevating the deceased Stuart king to martyrdom. In October of the same year, Milton answered with *Eikonoklastes*.

Eikonoklastes – literally "The Image Broken" – refuted the work in praise of the king. In the style that would become notorious in his first *Defence*, Milton hammered back at the author of the *Eikon Basilike* to refute any claims of Charles I's martyrdom. In doing so, Milton called upon the English past in general and Bracton in particular to defend regicide and regime change. Early in *Eikonoklastes*, Milton referred to the troubles between the *curia* and the Crown in Bracton's time, telling the story of "those faithful and courageous Barons, who lost thir lives in the Field, making glorious Warr against Tyrants for the common Liberty; as *Simon de Momfort* Earl of *Leicester*, against *Henry* the third" (Image 5). As Milton knew, Bracton probably found inspiration for the damning words of f. 34 within the context of the struggle between Henry III and his Barons. In discussing the king versus Parliament, Milton took aim at the royal veto power, asserting that "the Kings negative voice was never any Law." He added that it was Parliament, by which he meant the two houses, and not the king who represented the Kingdom. Further, "a King without his Kingdom be in a civil sense nothing" (Image 33). This line of argument suggested that, by law, Parliament acted on behalf of the kingdom, and that the king was merely the steward of his own "negative voice." The king's voice – his will – was not the law, and, according to Bracton's fifth folio, there was no king where will ruled instead of the law.

Milton refuted the *Basilike* with a clear reference to the *addicio de cartis*, stating that "*the King hath two Superiours, the Law and his Court of Parlament*" (Image 36). By vouching Bracton, Milton furthered the claim that original power rested in Parliament and bolstered the legitimacy of the court which tried Charles. Milton also found Bracton's message apt when discussing a just king. If, he contended, "the King of England can doe no wrong, so neither can he doe right but in his Courts and by his Courts" (Image 58). This statement set the stage for f. 107 of Bracton and the discussion of the difference between a just king and a tyrant: "If therefore he obtrude upon us any public mischief…he must doe it as a Tyrant, not as a King of England, by the known Maxims of our Law" (Image 58). This "known maxim" was clearly f. 107, which states that the power of injustice (which is the work of the Devil) is done by a tyrant and not a king, for a just king cannot be a tyrant.

Not until the very end of *Eikonoklastes* did Milton link Bracton's name with these ideas. In closing his discussion of the powers and limitations of the kingship, Milton states that "ancient Books tell us, *Bracton*, *Fleta*, and others, that the King is under Law, and inferiour to his Court of *Parlament*; that although his place *to doe Justice* be highest, yet that he stands as liable *to receave Justice*" (Image 124). But there can be absolutely no doubt that Milton associated his earlier references with Bracton, and that he knew exactly where the ideas and even the precise words came from. After all, too many parliamentarian pamphlets had given the widest publicity to Bracton for any educated English person to miss the connection. Milton's overt reference to the *addicio* shows that he understood how to deploy Bracton for polemical ends.

Bracton's utility becomes even more apparent in Milton's *Defence of the English People*. Milton's radical voice becomes unmistakably clear in the *Defence*, where he sought to "relate…by what Right, especially according to our Law, this Judgment [the execution of Charles I] was given, and all these Matters transacted" (Image 5). The tract appeared in February 1651 to answer the work of French scholar Salmasius. His work, *Defence of Charles I*, appeared in November of 1649 and was dedicated to Charles II, for whom it was written. Salmasius asserted the divine right of kings, arguing that God's anointed could not be held accountable to those over whom he ruled. Milton's answer in *Defence of the English People* mattered for several reasons. It first appeared in Latin, indicating that Milton sought a wide audience for his response, both in England and on the Continent. Also, it marked Milton's first work, as an advocate of the commonwealth, to bear his name. Previous works such as *Tenure*, *Eikonoklastes*, and those tracts written at the outset of the Civil War bore only his initials. Finally, unlike the occasional reference to Bractonian language in the two earlier tracts, throughout the *Defence* Milton cited Bracton relentlessly, using the jurist's words to construct his arguments against the monarchy.

In the *Defence*, Milton refuted Salmasius' claims, often line by line, with a ferocity not seen in either of his previous works. Early on he exhorted Salmasius to "forbear your bawling, don't spit your Venom, till going along with you through every Chapter, I show, whether you will or no, *by what law, by what Right and Justice*, all that was done" (Image 12). Often, his arguments turned to personal attacks on the celebrated continental scholar; Milton held that "I do not know whether I had best call you a Knave, or a Fool, or ignorant, unlearned Barbarian. You show your self a vile wretch, by

propagating a Doctorine so destructive and pernicious; and y'are a Fool for backing it with such silly arguments" (Image 57).

Milton used Bracton throughout his work to illustrate how the common law was used "to throw down proud and unruly Kings" (Image 5), no doubt a reference to Bracton's discussion of king-bridling in f. 34. By both alluding to and citing outright the *addicio de cartis*, Milton constructed his argument against the monarchy. By turning the Frenchman's words against him, Milton showed that to "give Princes such Partners in the Government, *as in whom*, to use your own words, *the Government always resides*, do at the same time make others Colleagues with them, and equal to them; nay, and consequently you settle a power in those Colleagues of publishing, and of deposing them" (Image 74). In this particular passage, it is easy to see Milton's radicalism channeled and focused via the *addicio*; the reference to bridling errant rulers is unmistakable.

He used a direct quotation of f. 34 in order to pave the way for the argument that the two Houses of Parliament, specifically, the Commons, did indeed have the jurisdiction to try and execute Charles I. Bracton's use of the word "Barons," according to Milton, actually meant the Commons (Image 113). The deadly message inherent in the *addicio* was nowhere more prominent in the *Defence* than in Milton's answer to Salmasius' claim that Parliament belonged to the king. Here, Salmasius had a point, for, historically, the two Houses were referred to as "the King's Parliament." The French scholar took this to mean literally that the monarch controlled Parliament. Milton countered this "grammarian" argument, as he dismissively called it, with a wonderfully-constructed analogy. "Make the same inference," he told Salmasius, "from the

Parliament's being called the *King's Parliament*; for it is called the king's bridle too...an therefore the King is no more Lord or Master of his Parliament, than a Horse is of his Bridle" (Image 106). With this, Milton bolstered his argument that the King was subject to the jurisdiction of Parliament with the medieval jurist's now ominous words.

In addition to the *addicio*, Milton employed other passages from Bracton in his answer to Salmasius. Milton found f. 107 particularly beneficial. In laying out the groundwork for the rest of his tract, Milton called upon f. 107, reminding the reader that "a Tyrant is but like a King upon a stage a man in a Vizor, and acting the part of a King in a Play; he is not really a King" (Image 8). The readers of *Defence*, had they not been familiar with Bracton's passages, might have missed the earlier allusion to f. 107, but as Milton progressed through the rest of his work, he cited the folio outright. He wrote that

> Hence our Ancient and Famous Lawyer *Bracton*...in his Third Book, Chap. 9. *A King is a King so long as he Rules well; he becomes a Tyrant when he oppresses the People committed to his Charge.* And in the same Chapter, *The King ought to use the Power of Law and Right, as God's Minister and Vice-gerent; the Power of wrong is the Devils, and not Gods; when the King turns aside to do Injustice, he is the Minister of the Devil* (Image 113).

These words were especially damning to Salmasius' line of argument, since, through Bracton, Milton linked Charles I with Satan. As Bracton writes in another line of f. 107, which Milton chose not to cite, "the king will be the minister of him whose work he performs" (Bracton 2: 306). A just king does the work of God, while an unjust king does exactly the opposite, for he has now become an agent of God's enemy, the Devil. As the two houses did during the Civil Wars, Milton viewed Charles' actions as unjust. Therefore, the people of England, whose allegiance stood with God, were bound by their religion to oppose a tyrant.

Along with this well-known portion of Bracton's treatise, Milton found that other parts of f. 107 easily lent themselves to radical constitutionalist interpretation. Building on the existing argument juxtaposing a just king and a tyrant, Milton noted that "if we are bound to obey a King, and a Minister of God; by the very same Reason, and the very same Law, we ought to resist a Tyrant, and a Minister of the Devil" (*Defence*, Image 113). Royalists, Salmasius included, asked the same question after the execution of Charles as the monarch did during his trial, namely, by what authority can the people of the realm depose and execute errant rulers? Milton anticipated this argument and chose Bracton's words as a response. As f. 107 notes, "*No Man ought to be greater than the King in the Administration of Justice; but he himself ought to be as little as the least in receiving Justice…if he offend*'" (Image 113). Bracton's own words openly allow for the trial and removal (or execution) of an unjust ruler.

In the same vein as contemporaries who claimed that the people freely chose their king, Milton deployed f. 107 to argue against the divine right of kings. A king "is created and chosen for this very end and purpose, to do Justice to all, as *Bracton* says…that is to do Justice according to such Laws, 'as the people agree upon'" (Image 116). The people are represented by Parliament, granting the two houses jurisdiction over the king via the law.

Finally, Milton also found f. 5 of Bracton appropriate to his cause. Milton wrote: "Hence our Ancient and Famous Lawyer *Bracton*, in his first Book, Chapter 8. *There is no King in the case*, says he, where Will rules…and Law does not take place'" (Image 113). Parliamentarians such as Milton could point to the personal rule of Charles I in the decade leading up to civil war as a clear example of what Bracton meant by the rule of

will versus rule by law. Milton drove home the point made during the monarch's trial, namely that "The law is your master, the acts of Parliament" (Howell 4: 1010).

In sum, while John Milton made great use of continental, classical, and biblical sources, he turned to English history, and Bracton in particular, to justify vital tenets of his political thought and practice. By vouching the celebrated thirteenth-century justice, he cloaked the most radical actions of the seventeenth century – regicide and the destruction of the established government – in a veil of legitimacy. It is not an exaggeration to say that Bracton, who wrote as an employee of a king, found a new and radically different life in the "century of revolution."

The continued use of Bracton's treatise throughout the rest of the Stuart era, including, most notably, the Glorious Revolution, gives testament to the timelessness of his arguments. His message reverberated throughout the centuries, across time and across geography. Indeed, *On the Laws and Customs of England* became one of the most significant conduits through which the notion of limited government was transferred down to the modern age.

Works Cited

Bracton, Henry de. *On the Laws and Customs of England.* Ed. Samuel Thorne. Buffalo: William S. Hein & Co., 1997.

Brand, Paul. "The Age of Bracton." *The History of English Law: Centenary Essays on "Pollock and Maitland."* Ed. John Hudson. Oxford: Oxford UP, 1996.

Greenberg, Janelle. *The Radical Face of the Ancient Constitution: St. Edward's 'Laws' in Early Modern Political Thought.* Cambridge: Cambridge UP, 2001.

Hill, Christopher. *Milton and the English Revolution.* New York: Penguin Books, 1977.

Howell, T. B. *A Complete Collection of State Trials and proceedings for High Treasons and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783.* Vol 4. London: T. C. Hansard, 1816.

Maitland, F. W. *Bracton's Note Book.* London: C. J. Clay & Sons, 1887.

Milton, John. *Eikonoklastes.* London: Matthew Simmons, 1649.

---. *First Defence of the People of England.* London, 1692.

---. *The Tenure of Kings and Magistrates.* London: Matthew Simmons, 1649.

Zagorin, Perez. *Milton Aristocrat & Rebel: The Poet and his Politics.* Rochester: D. S. Brewer, 1992.