

# A Living Library of the Law Revived

by Stephen B. Presser

*“It is best that laws should be so constructed as to leave as little as possible to the decision of those who judge.”*

—Aristotle

The Selected Writings of  
Sir Edward Coke  
edited by Steve Sheppard  
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Here Lies Edward Coke, Knight of Gold, of Imperishable Fame, Spirit, Interpreter, and Inerrant Oracle of the Law, Discloser of its Secrets — Concealer of its Mysteries, Thanks Almost Alone to Whose Good Office, Our Lawyers Are Learned in the Law. A River, Torrent, and Flood of Eloquence, Singular Priest of Persuasion. Divine Master. In Courts, He Spoke In Such a Way That One Would Believe Him to Have Studied Only the Secular, But He Lived as One Who Had Studied Nothing but the Divine. Most Devoted Investigator of Profound Faithfulness. Integrity Itself, Always the Most Constant Advocate of the Cause of Truth Corrupted Neither by Favor Nor By Gifts. Exceptionally Merciful, the Defendant was Dearer to Him than he was to Himself (Which is a Miracle). He Often Heard Sentence Pronounced Against Himself with Dry Eyes Though Sentence Was Never Pronounced by the

Man without Tears. An Ocean of Knowledge Who Alive was a Living Library, Deceased, Deserves the Name of Father of a Library, Father of Twelve Children and Thirteen Books. These Monuments May Crumble, The Marble Decay, (Except that they Show that his Children were Pious). He is His Own Monument to Himself. More Lasting than Marble He Himself Is His Own Immortality.

That, nicely translated from the Latin by the editor of these three volumes, is the epitaph of Sir Edward Coke (1552-1634), the greatest of all the English lawyers. His life was almost as impressive as the epitaph makes it out to have been. At one time or another, he held virtually every important office a commoner could, including high steward of Cambridge University (1575), solicitor-general (1592), speaker of the House

of Commons (1593), attorney general (1594), and chief justice of both the Court of Common Pleas (1606) and King's Bench (1613). He faced down lords and kings, got tossed into prison because of it, and single-handedly did more to circumscribe the Stuarts' prerogative than dozens of his colleagues did.

His epitaph notwithstanding, Coke was still merely human. He was not above stretching legal authorities beyond the breaking point when he felt it necessary, and some of his opinions rely on very dubious authority. As a prosecutor, he could be particularly brutal and heartless. For example, as Elizabeth's attorney general, he brought an action for treason against Sir Walter Raleigh (whom he called, among other things, "a spider of hell") in which he used "disgraceful invective and unfair tactics, which later contribute[d] to the stay of Raleigh's execution."

Coke's connubial existence was the stuff of soap opera. At age 50, he married Lady Elizabeth, a woman 30 years his junior, in what was regarded by contemporaries as "a strange match, and which seemed to afford more amusement to bystanders than comfort to the parties concerned." Coke and Lady Elizabeth had a turbulent life together, including a "prolonged, very public fight over the control of their properties." Coke determined to marry their daughter off to a man twice her age (possibly the triumph of hope over experience, possibly something darker). His designated son-in-law was "Sir John Villiers, the penniless brother of Buckingham, the royal favorite," and the marriage, intended to buttress

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Coke's standing at court, was strongly resisted by his wife. Determined to make the alliance anyway, Coke kidnapped his daughter; at the instigation of his wife, he was then prosecuted for the kidnapping. Lady Elizabeth afterward proceeded to snatch their daughter back and was herself prosecuted for the same crime. Coke prevailed in his kidnapping case, got the king to approve of the marriage, and thus favorably disposed of his daughter; meanwhile, his wife languished in jail. His daughter, likely possessed of the fiery character of her mother, later eloped with "Sir Robert Howard, fleeing the country in man's clothing, [then gave] birth to a bastard son, and [finally died] abroad." In the meantime, Mrs. Coke, "Lady Elizabeth[; was] released from her imprisonment (in a London alderman's house) and renew[ed] a life dedicated to ridiculing her husband."

Whatever the mess his personal life may have been, his professional accomplishments were the stuff of immortality. As England's greatest legal historian, William Holdsworth, observed, Coke's writings are to the common law (English customs, judicial decisions, and acts of Parliament taken collectively) "what Shakespeare has been to literature, and the King James Bible to religion." Those writings—in particular Coke's four-volume *Institutes*, in which he summarized all of the English law regarding property, statutes, criminal law and procedure (what we now call "constitutional law"—for Coke, it was the jurisdiction of the various English courts, including the High Court of Parliament), and his 13 volumes of reports (two published posthumously and all containing decisions previously uncollected in any set of materials)—became the foundation of 18th- and 19th-century jurisprudence in England and America. As Steve Sheppard, the editor of these books, indicates in his Introduction:

From Coke, Americans took not abstract notions of government but the tools of law, among them tools of substance—citizens' rights against the state, common law supremacy over local law, legal protections of property from state invasion, limits on monopoly and restraints of trade, the right to *habeas corpus*, and the right to limit the burdens of taxes and criminal sanctions to those that are enact-

ed only by the people's representatives—and tools of process—judicial independence, judicial review of statutes, judicial review of administrative officials, and judicial impeachment for favoritism or bribery. Americans also acquired the habit of case reporting, treatise writing and statutory inventory, eventually building a vast body of written and accessible law.

Aristotle's government of laws rather than men was given a practical foundation by Coke's writings and by a career in which, as [the English legal historian Frederick William] Maitland said, "The Common Law took flesh."

Use of Coke as the primary American legal authority probably gave way in the 19th century to Sir William Blackstone's *Commentaries on the Law of England* (1765-1769), but Blackstone relied extensively on Coke, much as Galileo did on Copernicus, and some Americans, most notably Thomas Jefferson, preferred Coke to Blackstone, because the former seemed more republican than the latter.

For all of Coke's fame and authority, however, it has always been—pardon the expression—a trial to read him. All of his books included much material in Latin and Law French, which every law student or lawyer was presumed to be able to translate for himself. Getting the useful nuggets out of Coke was difficult enough to make many strong men weep. One who famously did so was Joseph Story, probably the greatest justice of the U.S. Supreme Court, who wrote almost as much as Coke did; when, however, during his apprenticeship as a lawyer, he was made to read the first of Coke's *Institutes*, "I took it up, and after trying it day after day with very little success, I sat myself down and wept bitterly. My tears dropped upon the book, and stained its pages."

Story got over his early dismay at Coke by sheer force of will and went on to use the *Institutes* and *Reports* perhaps to excess in his own work. As Sheppard quotes him, capturing the eventual epiphany, "when I had completed the reading of this most formidable work, I felt I breathed a purer air, and that I had acquired a new power." The same could be said of Jefferson, who, though he "would later despair when Blackstone [was] taught in lieu of Coke in the law school at the University of Virginia, had

early encounters with Coke like those of Story's." Of his required reading of the first volume of Coke's *Institutes*, Jefferson wrote, "I do wish the Devil had old Coke, for I am sure I never was so tired of an old dull scoundrel in my life."

Thanks to Mr. Sheppard's efforts, the next few generations of American lawyers will never have to suffer in the manner of Story or Jefferson. Mr. Sheppard, the author of several splendid law-review articles on Coke, is a law professor at the University of Arkansas. Along the way, he picked up a master's in literature from Oxford University, which shows in these three volumes. Not only is his Introduction a fine piece all on its own, he has elegantly translated all the Latin and Law French, culled the 17 major volumes of Coke to find the most influential passages and cases, and provided hundreds of helpful footnotes and introductions to each of the excerpts. Volume I contains a detailed chronology of the events in Coke's life; 58 of Coke's most famous cases from *The Reports*; and Coke's prefaces from each volume of these (which give a splendid sense of the then-current basic principles of legal education and jurisprudence). Volume II contains the prefaces to all four volumes of Coke's *Institutes*; the most important passages from those volumes; the text of Magna Carta; a famous and possibly spurious jury charge Coke gave at the Norwich Assizes (in which he railed against the Pope and his adherents—Coke was fiercely Protestant, as was English law in his time); and excerpts from some of Coke's lesser works, called the "Small Treatises." Volume III contains excerpts from Coke's speeches in Parliament, many uttered in defense of the 1628 *Petition of Right*, the great parliamentary circumscription of the King's prerogative and the model for the American Declaration of Independence, as well as Coke's epitaph, a fine index to all three volumes, and a fulsome bibliography of writings about Coke and his influence.

As is its custom, the Liberty Fund has made these books available at an astonishingly low price, allowing any lawyer or law student who seeks to recover his legal heritage to own copies. Coke's world was one in which timeless legal truths were routinely dispensed by way of Latin maxims, and these three volumes collectively serve as the sort of "book of maxims" that was indispensable to lawyers as recently as 50 years ago. Consider just a sampling: *Justitia in sese virtutes continent omnes* ("Justice contains all the virtues in it-

self”); *Lex orta est cum mente divina* (“Law arose by the divine will”); *Videte Iudices quid faciatis, non enim hominis exercetis iudicium sed Domini, & quodcumq; iudicaveritis in vos redundabit* (“Judges, take heed what you do, for you do not exercise the judgment of man but of God and whatever you adjudge will redound upon you”); *Ipse autem Rex; non debet esse sub homine, sed sub Deo & Lege, quia Lex facit Regem; attribuat igitur Rex legi, quod Lex attribuit ei, videlicet dominationem & imperium: Non est enim Rex ubi dominator voluntas & non Lex* (“For the King himself ought to be under no man, but under God and the Law, for it is the Law that makes him King; therefore let the King attribute to the law what the Law attributes to him, namely lordship and power; for where arbitrary whim rules, and not Law, there is no king”); *maleficia non debent remanere impunita et impunitas continuum affectum tribuit delinquendi, et minatur innocentes qui parcit nocentibus* (“Misconduct ought not to remain unpunished, for impunity gives continuous encouragement to offenders and threatens the innocent who suffer harm”).

Perhaps not every lawyer these days gets a thrill from reading Latin (at least where translations are instantly available); some of us still do, however, and taking all of Coke’s maxims interspersed in these volumes, one gets a marvelous sense of connection with the ancients. More to the point, the reader of Shep-

pard’s version of Coke is startled to see that the basic problems of jurisprudence—the conflict between efficiency and equity; the mystifying nature of the legal doctrines that try to allow for multiple human purposes; the difficulty of separating public and private, secular and spiritual, freedom and responsibility—were essentially the same in Coke’s day as they are in ours. Coke himself was not a particularly modest man, and he occasionally got slapped down when he put on airs. (He liked, apparently, to style himself “Lord Chief Justice of England,” though he was never elevated to the upper house by the monarch.) And yet, the basic theme in all his writing is that one ought to be somewhat humble before the majesty of the law itself: a law divine in inspiration and, in application, supremely wise. Whatever he was like in person, a certain humility (admittedly, some of it a bit forced) emanates from his treatises, reports, and speeches. He understood, as did Burke, that, individually, men are foolish, selfish, and irrational; the species (or at least its great judges, lawyers, and treatise writers of the common law) collectively is wise, however, and ignored at one’s peril.

A reading of these volumes shows the strong debt we owe to Coke for the basic principles of American constitutionalism: a government of laws, not men; the necessity for strong reasons even for legislators to depart from preexisting rules, while courts never should; the responsibility of

the courts truly to limit legislatures and of executives to act only in accordance with the fundamental law (for Coke “the common law”; for us, the Constitution); reservation of the power to tax to the people’s representatives; and the indispensability (as our Framers understood and as Alexander Hamilton, George Washington, and others frequently expressed) of law to order, morality to law, and religion to morality. Coke’s world, of course, was not ours—no longer do we have the monarch or the hereditary aristocracy he sought to accommodate as well as to contain. Even so, the need for the courts and other governmental actors to be bound by the rule of law—the need to avoid the acts of arbitrary power—is as profound in our day as it was in Coke’s. Professor Sheppard, in his Introduction, offers a nice definition of the rule of law:

[T]he rule of law can be thought of as the idea that no person or group controls the state but that laws are applied to everyone equally and fairly by impartial and independent people who are themselves bound by the laws to do so.

His selections from Coke strongly suggest that the need to maintain the rule of law was, in large part, what drove the great jurist throughout his long life. What Coke had to say in the Preface to Volume III of his *Reports*, writing of other legal works and suggesting what he tried to avoid, applies as well to what has been accomplished in the editing of these three volumes:

Certainly the faire outsides of enameled words and sentences, doe sometimes so bedazzill the eye of the Readers minde with their glittering shew, as they cause them not to see or not to pierce into the inside of the matter; And he that busily hunteth after affected words, and followeth the strong scent of great swelling phrases, is many times (in winding of them in to shew a little verbal pride) at a dead losse of the matter it selfe, and so *Projicit ampullas & sequipedalia verba* (“He throws out bombast and inordinately long words”). To speake effectually, plainly, and shortly, it becometh the gravities of this [legal] profession: And of these things this little taste shall suffice.

## Closing Tolkien by Andrew Huntley

“And Rose drew him in, and set him  
in his chair, and put little Elanor upon his lap.  
“He drew a deep breath. ‘Well, I’m back,’ he said.”

My time seemed flowing there—re-burgeoning—  
I never knew how strongly years might stay:  
Once more the final pages,—I could say  
With Samwise, well, I’m back. Yet, in my spring  
There was no loving Rosie—none to bring  
Her promise that all the years would glide away,  
Bearing a couple on their wedding day  
That death alone could part . . . come anything!  
My Middle-earth, little but breaking’s been,  
And scattered flowerings of sadness sown;  
With autumn silent now in loneliness:  
Where haven has withdrawn from every scene,  
And, on and on, mere roads to madness shown—  
And time is past; and only God may bless.