Why Good Lawyers are such Bad Historians: the Case of Sir Edward Coke

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Sir Edward Coke, 1552-1634, is sometimes compared to his shorter-lived contemporary William Shakespeare, 1564-1616. Coke's importance in the history of English common law, it is asserted, is commensurate with Shakespeare's in that English literature; and, it might plausibly be contended, the common law and English literature are England's two greatest contributions to civilization. If so, this particular Inner Templar would be a figure of world importance, head and shoulders above any other member of any Inn of Court.

If the claims made for the respective significance of Coke and Shakespeare are justified – and I think they are – Shakespeare's role has long been recognised in the most extensive and intensive scholarship, based upon the creation of definitive editions of texts of his plays. In scale and detail this scholarship rivals the study of Homer or Virgil or the Bible. By contrast, Coke's most substantial and influential works – his thirteen volumes of *Reports* of court cases from the 1570s to the early years of the seventeenth century, and his later and even more substantial *Institutes*, in four huge volumes, dealing respectively with land law, statute law, criminal law, and the various courts – have never been properly edited. We still rely on early nineteenth-century printings of both works. These printings made no attempt to differentiate variants between the many seventeenth-century editions. Moreover, in Coke's case, unlike Shakespeare's, we have a wealth of surviving manuscripts in his own hand, on some of which – currently being edited by John Baker – the *Reports* were based, and we also have much of his library, both manuscripts and printed books, which happily remains largely intact in the house built by his descendants in the estate he acquired at Holkham in Norfolk. If this much material were available for Shakespeare, it is easy to imagine what literary scholars would have done with it. Yet nothing of the sort has happened in Coke's case, despite the importance accorded to his jurisprudence in his own lifetime and ever since, and despite the fact that the *Reports* and *Institutes* are so authoritative that they are conventionally cited simply as such, without any need to identify the author. Moreover Coke, unlike Shakespeare, was, or became, a major public figure in his own day, as successively Solicitor-General (1592), Attorney-General (1594), Chief Justice of the Common Pleas (1606), and Chief Justice of the King's Bench, before becoming, after his sacking in 1616, the main legal brain behind the burgeoning parliamentary opposition to Stuart innovation. He was (and still is) widely recognised as having set the terms of debate in the constitutional convulsions of the seventeenth century. In that respect at least, he embodied the Ciceronian ideal of politically-engaged *negotium* and scholarly *otium*, with each informing the other. The absence of scholarly editions of his works, and even of any comprehensive modern biography or assessment of his jurisprudence as a whole, therefore seems all the more surprising.

But as has often been remarked, most epigrammatically by Maitland (also a brilliant lawyer, if a less epoch making one, but of course a member of another Inn), lawyers are not much interested in unearthing or establishing original texts; what they want are authoritative texts. Once a doctrine has been established, there is no point in overturning the successive layers of textual foundation on which it is built, and undermining the whole, however jerry built it

might turn out be if one did undertake such an exercise. The early nineteenth century editions of Coke's works are perfectly adequate for the purposes to which Coke might be put in subsequent jurisprudence. They are authoritative, and therefore definitive. And in this respect, as Maitland also observed, the logic of the historian is antithetical to that of the lawyer, because historians, in this regard like textual scholars, want to unearth the original text, to establish its original meaning, before going on to track the subsequent course of its interpretation, or distortion. Unlike many later lawyers, Coke made a lot of use of history; indeed he can be credited with formulating the doctrine subsequently labelled the ancient constitution, which has been so influential in legal and political thinking, especially in this country and in the United States. But the point of this lecture is to suggest that his extensive use of history is, unsurprisingly, very lawyerly, which is to say, it is very unhistorical history; and further, that it is necessarily very unhistorical history.

That is not the impression Coke sought to give in the catalogue of his library which was compiled under his close supervision in 1634, the year of his death. A deed in the archives at Holkham, dated 1630, had already established the library as an heirloom. The catalogue arranges his books by subject. 'Approved Histories' are the fourth category, prefaced thus: 'And forasmuch as approved Histories are necessary for a iurisconsult – for hee that hath red them seemed to have lived in those former ages, Histories shall followe in the next place'. Given the closeness of Coke's supervision of the catalogue, we can attribute this impeccably humanist sentiment to him. But those of the books listed which remain at Holkham prove that, contrary to the sentiment, he had not read them with any care, whether they were recent historical works, or history books written in whatever period he was investigating. Coke was a vigorous reader, who scrawled all over the books he chose to gut intensively. His history books are pristine. He acquired them for ornamentation, not for use. Rather than immersing himself in history books, he turned, for evidence of the common law in earlier periods, to *Bracton*, which he was well aware was a thirteenth century law book, or *Glanvill*, which he correctly dated to Henry II's reign, or to manuscript copies of the as yet unpublished *Mirror of Justices* and *Modus tenendi parliamentum*. The *Mirror* and the *Modus* were both works of the early fourteenth century, but they purported to date from the pre-Conquest period – in the case of the *Mirror*, allegedly from the reign of King Arthur – and Coke was determined to take this pretence at face value. All these works he categorized under the heading 'Lawes of England' in his library catalogue, not under 'Approved Histories', because even if they contained snippets of historical material, they were not history books. Rather, they were legal treatises, written by lawyers. Indeed, in the preface to the third volume of his *Reports* – in effect a preface to the whole series – he counselled his readers to 'beware of Chronicle Law reported in our Annals, for that will undoubtedly lead thee to error', because 'never any abbot, monk or churchman, that wrote any of our annals' was capable of understanding the simplest legal document. Only 'Reports & records of laws doth conteine the faithful and true histories of successive times'. So, far from reading history in order to understand life in former ages, as advocated by that conventionally humanist heading in his library catalogue, it was in Coke's view essential to avoid history and to read law. His advice to historians was that 'they meddle not with any point or secret of any art or science, especially with the laws of this realm, before they confer with some learned in that profession'. Someone like himself, for instance.

The most revealing category of legal 'reports and records' was not *Bracton*, or *Glanvill*, or the pseudo antiquarian jurisprudence of the early fourteenth century, illuminating though they might all be, but the records of proceedings in court – specifically the series of late medieval and early sixteenth-century Year Books, which had been extinct for almost a century. The

final sentence of the preface to *First Reports* (1600) counsels the reader not to neglect 'the reading of ould Bookes of yeeres Reported in former ages, for assuredly out of the ould fields must spring and growe the new Corne'. Coke's *Reports* of important cases of the last 30 or 40 years were intended to fill the gap left by the demise of the Year Books, to record in writing, and thereby preserve, the new corn which had been propagated in otherwise evanescent oral proceedings in court. He is emphatic that such new corn is rooted in the old fields of the Year Books, in the records of court proceedings which first survived from the later middle ages. In his view forensic argument was the most authoritative source of law, to which statutes merely gave occasional tweaks. By his own account he had in his judicial capacity declared that 'the common law' would 'controul… and adjudge… [a statute] to be void' if it were 'against common right or reason, or repugnant [self-contradictory], or impossible to be performed'. In other words, the judges could, in the name of the law, strike down parliamentary statute.

What all this means may be illustrated by the use he makes of what had long been a favourite Year Book entry, dating from 1352. In it, the abbot of Bury St Edmunds was recorded as claiming jurisdiction over a case of novel disseisin, on the grounds that his predecessors had enjoyed such jurisdiction 'by prescription, time out of mind of man, in the days of St Edmund, and St Edward the Confessor, Kings of this realm before the Conquest'. Coke observed that the standard writ of novel disseisin was addressed to the sheriff, and specified trial by the oath of twelve men. It followed, according to Coke, that 'time out of minde of man before the Conquest there had been sheriffs'; and it also followed that trial by the oath of twelve men was immemorially old. Moreover, because all writs are issued by the court of chancery, it could further be inferred that the court of chancery was immemorially old. And finally, because writs constituted, in the quoted words of the early sixteenth-century jurist Anthony Fitzherbert, 'the rules and principles' of the law, or its 'verie bodie', it followed that 'the common law of England had been time out of mind of man before the Conquest, and was not altered or changed by the Conqueror'. No earlier evidence cast any doubt on the abbot's claim, recorded as having been made in 1352, about the legal practice of Anglo-Saxon England. And the claim was recorded in that uniquely authoritative category of source, a Year Book, a record of forensic proceedings. The claim was therefore true. Because English common law was a coherent system, defined by interlocking procedures initiated by writ, evidence in a legal source for the existence of any element of that system could be used to infer the existence of the whole, even in the absence of any other explicit evidence to that effect. Coke was a very proud owner of his manuscript copies of genuine and apocryphal Anglo-Saxon law codes, and of his copy of the first attempt at a printed edition. He used them heavily, and scrawled his name, rather egotistically, in the front. But he recognised that they were lacunose in the extreme. They did not present a rounded picture of English law at the time. 'In effect the verie bodie of the common laws before the conquest are omitted' from the Anglo-Saxon codes. In the absence of contemporary evidence of court proceedings, it was necessary to extrapolate back from later records of later court proceedings, in order to fill in the gaps. That was what he did with the 1352 Year Book entry.

This exemplifies Coke's mode of reasoning. Legal sources were to be privileged over all others, and the most reliable legal sources are the Year Books, and, supplementing them, law books, such as Fitzherbert's *Novel Natura Brevium*, first published in 1534, which were roughly contemporaneous with the Year Books. Coke cites Fitzherbert's dating of Domesday Book – categorised by him as a legal record, because it was relied on in court cases – as proof that Domesday 'was made in the raigne of Saint Edward the Confessor'. Thus dated, it could be used as evidence for the pre-Conquest status quo; this was far more useful to Coke than its true post-Conquest date, of which he was well aware, because it was recorded in history

books. Domesday's records of the jurisdictional privileges of several Anglo-Saxon churches served to corroborate the claims made by the abbot of Bury about his church in 1352. Moreover Domesday Book was still decisive in court cases involving ancient demesne, because tenants on the king's lands in Domesday were deemed to have been ancient demesne tenants. We don't need to bother about the complexities of ancient demesne. Suffice to say that ancient demesne status was coveted in the early modern period because it brought with it exemption from serving as an MP or contributing to the expenses of MPs. It followed, for Coke, that these privileges must have been enjoyed by ancient demesne tenants in Edward the Confessor's day. Therefore, by inference, Parliament had existed in the reign of Edward the Confessor, much as it was described as doing in the *Modus tenendi parliamentum*, that fourteenth-century juristic account of parliament which purported to have been written in Edward the Confessor's reign.

With all this established on the basis of sound legal authorities, it was possible to turn to history books to flesh out the picture of the history of the common law prior to the period in which there were any records of what had been said in court. Indeed, given the paucity of the legal evidence, the use of historians could scarcely be avoided. They could be exploited to push the history of the law back prior to King Arthur, as in the *Mirror of Justices*, prior even to the Romans. But Coke continued not to take them very seriously. He drew on Geoffrey on Monmouth, the twelfth-century Welsh fantasist, to assert that Brutus, the mythical Trojan refugee who supposedly became the first king of Britain, had compiled a book of laws in Greek. Claims based on Geoffrey of Monmouth's very popular and entirely fictional book had occasionally been made in the past by lawyers, but by the end of the sixteenth century few lawyers took these tall tales seriously. Maitland accused Coke of being credulous in invoking them. He could not have been more wrong. Coke was being playful, as he insinuated by adding 'I will not examine these things in a Quo warranto, the ground thereof I thinke was best knowne to the Authors and writers of them'.

His whimsy then took wing: 'it is plaine and evident by proofs luculent and uncontrolable' that law in pre-Roman Britain had first been transacted in Greek. For Julius Caesar, in his *Gallic War*, had argued that the druids who had ministered both religion and justice amongst the Gauls had used Greek, and that their rule of life had been imported into Gaul from Britain. Tongue in cheek, Coke implied that this confirmed what Geoffrey of Monmouth had written: primordial English law had been pronounced and written down in Greek. The facts had to be shown or at least proclaimed to have been what the law required them to have been, and the facts could only be drawn from works of history. I have chosen this instance because it is a blatant example of his tendentiousness, and, I suspect, deliberately and teasingly so. Elsewhere the tendentiousness is more subtle and nuanced, but it is, nevertheless, tendentiousness. Yet if he failed to take history very seriously, why did he devote so much attention to it? Differently expressed, why was this very unhistorical history so necessary to his jurisprudence? Why his apparent obsession with demonstrating English law's immemorial antiquity? Why his desire to show English law's uninterrupted continuity from a source so ancient that it could no longer be identified, other than by invoking mythical Trojan origins?

One answer is that English law had for many centuries been grounded in specific antecedents. Most influentially, a doctrine of legal continuity uninterrupted by any conquest was what had prompted the fabrication of the 'law of King Edward' in the aftermath of the Norman Conquest, in order to deny that the Conquest had been a conquest. Continuity was therefore already intrinsic to English law when the new procedures which constituted the original elements of what became English common law were devised in the late twelfth century.

Immemoriality had come later, as an imprecise yet logical implication of continuity, and one which contradicted the developing doctrine that legal memory began at the accession of Richard the Lionheart in 1189. Coke simply ignored the contradiction. Immemoriality was too important to allow inconvenient legal details to undermine it.

In stressing continuity and immemoriality Coke was, as so often, expressing conventional English legal assumptions. But of course he expressed them with novel force and authority. These two themes dominate the prefaces to the *Reports*, the prefaces being the element in the *Reports* which was evidently and successfully intended for an audience much wider than the legal profession. The pretence at historical grounding was not only essential, given the historical perspective which was intrinsic to them, it also rendered these conventions easily accessible to a lay audience. But a desire to render long-standing learned tradition widely comprehensible is not in itself a sufficient explanation for the effort which Coke devoted to expounding and elaborating these particular elements in that tradition.

The explanation for Coke's elaboration of the traditional historical colouring of English law lies, of course, in current concerns. The more subtle, legal aspect is Coke's desire to renew the tradition of law reporting which had fallen into desuetude with the cessation of the Year Books. He was well aware that English law had been transformed since the early sixteenth century, that many (though not of course all) of these changes and developments had happened in the court room rather than in statute, and that all of them were grounded in the authority above all of the case law recorded in the Year Books. He wanted to sum up these changes, while re-establishing in writing the connection with the past. Hence that statement about 'the ould fields', which was actually a quotation from Chaucer, a poet contemporaneous with what in Coke's view was the high point of English legal culture. And hence his subsequent and even more ambitious project, the *Institutes*, which was the most systematic statement of English law since *Bracton*, almost 400 years before. Although he was well aware of how much had changed over the course of the sixteenth century, he of course was concerned to stress that nothing had changed, that what he was doing was impeccably traditional. He had evidently been preparing himself for this project since his first years at this Inn in the 1570s.

But there was a more urgent and pressing aspect to Coke's deployment of history in the service of law: the immediate prospect, and then the reality, of James VI of Scotland's succession to Elizabeth. As the author of *The True Law of Free Monarchies*, James already had disquieting form as a divine right theorist prior to his accession to the English throne. His behaviour on becoming king of England did nothing to allay the resulting anxiety on the part of much of the English political nation. His plans for Union, in particular, aroused widespread alarm, primarily because the Union he envisaged would include a Union of the laws of the two kingdoms. This was seen by Coke and many others as in effect an abolition of English common law, and its replacement by a bastardised, Romanised, amalgam. The new kingdom would have a new name and a new law, a new law stripped of the protections afforded to English liberties by the common law. The kingdom of England and its law would have been extinguished in a single act. For Coke and many others Union would be tantamount to a conquest, a conquest such as there had never been before, because English tradition confirmed that William the Conqueror had simply endorsed the laws of his predecessor, Edward the Confessor. Coke was unfailingly loyal to his sovereign, but on his own terms. He was determined to establish that James was bound by the law, as his subjects were. The scene was set for one of the most remarkable incidents in the history of the English judiciary.

On 13 November 1608, Coke, by then Chief Justice of the Common Pleas, ventured to tell James that the law 'protected his majesty in safety and peace', and pleaded with him 'to have respect to the Common Lawes of his land, etc.' The king was enraged: 'looking and speaking fiercely with bended fist' he tried to punch the Chief Justice, 'which the lo. Cooke perceaving fell flatt on all fower.' When Coke wrote up the incident, he did not mention this surely unique attempt by an English monarch to punch one of his senior judges, or his adroit if undignified response. Instead he said that when James had denounced his comments as tantamount to asserting that the king 'was under the law, which was treason', Coke had replied 'that Bracton saith that the king should not be under man, but under God and the law'. In other words, he wanted posterity to know that he had bearded his sovereign with the great thirteenth-century law book, which to his mind established that the king's prerogative, like the king's other powers, was trammelled by the law. To point this out by reference to the most substantial authoritative written statement of the law then in existence was not treasonable, but on the contrary loyally to remind the king of the source of both his title and his powers.

This is the context which explains Coke's turn to history. James, in the *True Law of Free Monarchies*, had suggested that William the Conqueror, as a conqueror, had imposed new laws on the conquered English. I have already mentioned that James's accession in England was interpreted as a conquest, which would result in the abolition of English law. Coke sought to show, in accordance with long established English legal tradition, that the Norman Conquest, like all earlier conquests, including the Roman conquest, had not disrupted the continuous existence of English law. And because the law was immemorial, it was prior to and therefore superior to that of the Romans (and, by implication, any degenerate version of Roman law, such as that practised in Scotland). It was also prior to and therefore superior to any king. The king was made by the law, which had existed prior to any king. The threat of the law's imminent termination required that its beginning be so ancient as to be indeterminate. Only if it could be shown to be both literally immemorial and continuous would it be safe from the new monarch, James.

Maitland, who always seems to have had a revealing blind spot where Coke was concerned, alleged that Coke's 'habit' was to devour his sources 'with uncritical voracity'; and that he 'shovelled out his learning in vast disorderly heaps'. I have said enough to show that nothing could have been further from the truth, both in terms of Coke's use of legal sources, and his deployment of historical material to fill the gaps left by the fragmentary surviving legal records. He cultivates an air of whimsy, but is in truth artfully and often archly selective. Robert Parsons the Jesuit was a far more perceptive critic of Coke than Maitland would be, and he was one to whom Coke was obliged to reply. Parsons attacked Coke's attempt to demonstrate that the Royal Supremacy had always existed in England. He did so by meticulously dissecting Coke's historical authorities, and demonstrating that the Norman Conquest had transformed the relationship between the king and the church. The law prior to the Conquest had been quite different from the law after the Conquest, and Coke's interpretation of pre-Conquest historical evidence as revealing a Royal Supremacy over clerics and churches was shown to be untenable. In response, Coke tried to demonstrate in more detail than ever before, again on the basis of historical evidence, that the Conqueror had done nothing more than endorse existing, indeed immemorial, English law. By reference to thirteenth and fourteenth century chronicles, he showed that the Conqueror had sworn to observe this law, after it had been summarised for him by an assembly of the English nobility. He did not restrict himself to the question of Royal Supremacy, but broadened the

matter out. This was partly because his position on the antiquity of the royal supremacy was untenable, but also because he had not only had Robert Parsons in his sights, but King James too. The summary of English laws was compiled at William the Conqueror's instigation 'into a Magna Carta (the ground work for all those that after followed)'. Of course Henry III's Magna Carta of 1225 was the first item in the Statute Book, and was regarded by Coke, like everyone else, as the first extant statute, the foundation for all the rest. It was the earliest surviving detailed written summary of immemorial English law in statutory form. Provoked by Parsons, Coke had now identified a precursor to it – indeed, its post-Conquest foundation – by drawing both on thirteenth and fourteenth-century chronicle evidence and an apocryphal law code of William I, which he accepted as genuine. In 1100 William's son Henry I had, on his accession, repeated the exercise, as in turn had Stephen in 1135, Henry II in 1154, and John in 1215, before Henry III in 1225. Thus was it possible to establish that the first extant statute was in fact the culmination of a succession of post-Conquest Magnae Cartae, all of which had successively reaffirmed the continuity of English law from time immemorial. This, Coke later averred, was 'a historie in my opinion worthy the reading', because it was history written by a lawyer – and not just any lawyer.

In 1616 Coke was sacked for a series of offences which culminated in his refusal, unlike his judicial colleagues, to defer to the king on the issue of whether a case should be stayed and the king consulted if the king were involved. It is unusual for senior judges to wage war against the government, but Coke was sufficiently outraged and sufficiently self-confident (or arrogant) to have done precisely that for several years past. By this point he had learned not to provoke James by invoking ancient authorities. All he would say was that in such a case he would do only 'what should be fitt for a Judge to doe'; and James had by now learned not to respond to provocation from Coke with physical violence. Coke's *Reports* had already aroused official hostility, and were subject to detailed official inquiry. Coke was ordered to revise them. After many months, he came up with four tiny proposed emendations to over 500 reports. This was just intended to irritate.

Then he turned from publishing law reports to producing his *Institutes*, the first attempt since *Bracton* at a systematic survey of English law. The *First Institutes*, on land law, was published in 1628, the year of the Petition of Right, in the framing of which Coke was centrally involved. In the preface to the *First Institutes* he needled the authorities by revealing that he had already written a commentary on Magna Carta, which was 'declaratory of the principal grounds of the fundamental laws of England'. Magna Carta was the main precedent invoked for the Petition of Right. The authorities became very jittery. Coke's books and papers were searched repeatedly. As he lay on his deathbed, the king's agents were ransacking his newly catalogued library below. Shortly after his death, his rooms here – in Fuller's Rents, on the site of which Mitre Court is now built – were searched and sealed. King Charles I ordered that all confiscated items should be brought to him in person, at Bagshot, so that he could rummage through them himself. He did not trust his lawyers to go through them for him. Inside the trunk he found a smaller box, and in that box was contained the manuscript draft of Coke's *Second Institutes*, which began with the longest ever commentary on Magna Carta. All the confiscated drafts of this and the other parts of the *Institutes* remained in official hands until 1641, when the House of Commons ordered that they should be released and published forthwith. It was no coincidence that the vote was taken on the very day of the earl of Strafford's execution. The choreography acknowledged the shibbolithic status which Coke's writings had by then attained. When Richard Overton the Leveller was dragged 'as if I had been a dead Dog' to Newgate Gaol in 1646 he had a copy of the *Second Institutes*, newly published by order of parliament, 'clapped in my

Armes, and I laid myself on my belly, but by force, they violently turned me upon my back… And thus by an assault they got the great Charter of *Englands Liberties and Freedoms* from me.' Coke's message had evidently had a profound impact far beyond the legal profession. One reason why it had been so successful was that it dressed up a legal argument in historical garb, which was readily accessible to a lay audience. As I have tried to show, this did not lead to any tension in Coke's jurisprudence between what Maitland characterised as the antithetical logics, of authority in law, and of evidence in history. There was no tension, because for Coke history was always ruthlessly subordinated to the law. In 1628, in one of the debates prior to the Petition of Right, Coke had told the House of Commons, 'It is not I Edward Coke that speaketh it. I shall say nothing. But the records shall speake.' This was artfully disingenuous, because of course he allowed only the records he chose to speak, and to say only what he wanted them to say. Perhaps it was the absence of that tension between the logics of authority and of evidence in Coke's thought which helps to explain why Maitland, the supreme English legal historian, could never get a handle on Coke. Occasionally he spoke of Coke with the reverence common amongst lawyers. Coke was 'an incarnate national dogmatism tenacious of continuous life'; 'the common law took flesh in the person of Sir Edward Coke'. But these were just conventional pieties. In truth it was, paradoxically, Coke's highly legalistic use of history which rendered him incomprehensible to England's pre-eminent legal historian, and which made Coke all the things Maitland nevertheless pronounced him to be. He was the Shakespeare of the common law, and the most influential Inner Templar, at least to date.

And just in case you think lawyers nowadays are more sophisticated and nuanced in their appreciation of history than Coke was, I want to show you a photograph, taken for me by an Inner Templar spy, in the new law library of the City University – a venue which will be familiar to many of you. It says something different from what Coke said, indeed the opposite; but its history is if possible even more implausible. What you cannot see on this photograph is that the final event in the timeline is the opening of the new law library at the City University in 2013 – as if that were the culmination of the process 'initiated' by William the Conqueror in 1066.