Sir Edward Coke's Third Institutes: A Primer for Treason Defendants
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and policy recommending as well as complaint settlement, I am not deterred by the fact that ombudsmen achieve their greatest success where they can compare an activity against an accepted norm.[146]

The most important thing to remember is that the agency suggested above should not be seen as a panacea. Its creation must be paralleled by reforms in all areas of criminal justice administration. '[Ombudsmen] no matter how accomplished they may be, cannot replace all other mechanisms that make for governmental justice and wisdom.'[147]

146. *Ibid.*, at 44. See also his discussion of the paradox that an ombudsman is most effective where least needed. *Ibid.*, at 192. Here is where the past practice of the PAB lends some hope. For a discussion of the controversy over the question whether or not an ombudsman should review discretionary decisions see Rowat, 'An Ombudsman Scheme for Canada,' 28 *Can.J.Econ. & Pol. Sci.* 543, at 551 (1962) and see Christensen, 'The Danish Ombudsman,' 109 *P.Pa.L.Rev.* 1100, at 1122 (1961).

147. Gellhorn, *supra* note 84, at 255. See also Weiler, *supra* note 5, at 433.

Gerald P. Bodet*

SIR EDWARD COKE'S *Third Institutes*: A PRIMER FOR TREASON DEFENDANTS

Sir Edward Coke, in a career which spanned three reigns, served bar, bench, and parliament. Beginning as the loyal attorney general of Elizabeth I, he became a recalcitrant anti-court judge under James I, and concluded his life as intellectual leader of the House of Commons in its bitter struggle with Charles I. Coke is remembered for having told James I that only professional lawyers, not lay princes, could interpret the law, and for rejecting royal interference in court proceedings with the words, 'he would do that should be fit for a Judge to do.'[1] As a member of parliament during the tumultuous decade of the 1620s, Coke guided the lower house toward the first modern impeachments of royal officials and used Magna Carta as the basis for that startling rebuff to the crown, the Petition of Right.[2]

Coke not only participated in political battles, he shaped political theory by showing with persuasive erudition that parliament and the common law coexisted in an ancient constitution long before the Norman conquest and strong monarchy.[3] The theory was historically false, but so effectively was it propagandized by Coke and the common lawyers that it became the accepted tradition of triumphant Whig politics and historiography in the seventeenth century.[4]

Coke's reputation in the field of constitutional law was insured by his exten-

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1. James Spedding, *The Life and Letters of Francis Bacon*, quoted by Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* (1956), at 374.

2. Wallace Notestein, *The Winning of the Initiative of the House of Commons* (1924); John D. Eusden, *Puritans, Lawyers, and Politics in Early Seventeenth Century England* (1958), at 42–3.

3. J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (1957), at 30–55.

4. Quentin Skinner, 'History and Ideology in the English Revolution,' 8 Hist. J., 151–78 (1965). The various interpretations of parliamentary origins, beginning with Bishop Stubbs and F. W. Maitland, may be found in G. Bodet, *Early English Parliaments: High Courts, Royal Councils, or Representative Assemblies?* (1967). Sir William Holdsworth, in 5 *History of English Law* (1922–38), at 472–3, noted that 'compared with the work of true historians, like Selden or Bacon, [Coke's] historical work is almost contemptible.'

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sive writings, particularly the *Institutes of the Laws of England* and the *Reports*.[5] To his contemporaries, Coke was the 'oracle of the law,' and to later generations, 'the greatest master of English law that had ever appeared.'[6] Percy H. Winfield, writing in 1925, said that Coke's influence on the law exceeded that of Littleton, Fortescue, and Hale, because he virtually codified existing law at a time when it 'stood in peril of declining into a stagnant marsh of detail.'[7]

But the achievements of the staunch judge and fearless parliament man have failed to erase memories of Coke the state prosecutor, who in his early career showed an arrogance and a brutality toward treason trial defendants that one historian has called 'unparalleled.'[8] In the trial of Sir Walter Raleigh, the attorney general's verbal assaults were so prolonged that a court commissioner, in an unprecedented move, urged him to allow Raleigh to speak.[9] At the Gunpowder trial, Coke summed up the case against the accused by describing at length the symbolic meaning of the execution ritual of drawing, hanging, and quartering traitors.[10] Indeed, Coke's performances in these trials and in the trial of Essex were such a *tour de force* of evil that they have left an impression that here was the quintessence of the man. Henry Hallam, writing in 1828, called Coke 'odious to the nation for the brutal manner in which ... he had behaved toward ... Raleigh ...' and Lord Campbell, Hallam's contemporary, added that Coke's 'habit of insulting his victims ... brought permanent disgrace upon himself and upon the English bar.'[11] In the twentieth century, Sir William Holdsworth gave a similar verdict,[12] and Catherine Drinker Bowen, in an admirable study of the man and his times, recorded the words toward Raleigh 'which are held forever to [Coke's] shame ... "Thou art the most vile and execrable traitor that ever lived!" '[13]

Without doubt, Coke showed 'rancorous ferocity' toward the defendants he prosecuted; unquestionably he was bitter and contemptuous in the courtroom.[14] Yet in a change of attitude that historians have often glossed over,[15] he came

5. Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton* (1628); *The Second Part of the Institutes of the Laws of England, Containing the Exposition of Many Ancient and other Statutes* (1642); *The Third Part of the Institutes of the Laws of England, Concerning High Treason, and other Pleas of the Crown and Criminal Causes* (1644); *The Fourth Part of the Institutes of the Laws of England, Concerning the Jurisdiction of the Courts* (1644); *The Reports of Sir Edward Coke in Thirteen Parts* (1600–15, 1656, 1659).

6. Henry Hallam, *The Constitutional History of England* (5th ed., 1847), at 193.

7. Percy H. Winfield, *The Chief Sources of English Legal History* (1925), at 334.

8. John, Lord Campbell, 1 *The Lives of the Chief Justices of England* (1849), at 268. Campbell charged that Coke, while attorney general, 'perverted the criminal law to the oppression of many individuals ...'

9. Thomas B. Howell and Thomas J. Howell, eds., *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors* (5th ed. 1816–28), hereinafter *State Trials*; the immediate reference is to 2 *State Trials*, at 26.

10. *Ibid.*, at 184.

11. Hallam, *supra* note 6, at 193; Campbell, *supra* note 8, at 258, 263. T. B. Macaulay, in his essay, 'Lord Bacon,' 2 *Critical and Historical Essays* (1907, 1951), at 337, made the unfair judgment that 'Coke's opposition to the Court, we fear, was the effect not of good principles, but of a bad temper.'

12. Holdsworth, *supra* note 4, at 427.

13. Bowen, *supra* note 1, at 211.

14. Sir James F. Stephen, *A History of the Criminal Law in England*, quoted by Holdsworth, *supra* note 4, at 427, n1.

15. John M. Gest, 'The Writings of Sir Edward Coke,' 18 *Yale L. Rev.* 504 (1909) did scan the *Third Institutes* in search of liberal pronouncements on criminal law, and Samuel Rezneck, 'The Trial of Treason in Tudor England,' *Essays in History and Political Theory in Honor of Charles Howard McIlwain,* Carl Wittke, ed. (1936), at

at the end of his life to understand and even to sympathize with defendants on trial for treason. It will be the aim of this paper to present Coke's views on treason and the state trial as he set them down and to show how beneficial his writings were to the Essexes and Raleighs who faced other government attorneys in Stuart England.

Coke's *Third Institutes ... Concerning High Treason and other Pleas of the Crown and Criminal Causes* has been called the first 'really adequate discussion' of treason, a work which 'went far toward offering the remedy of a humanized common law' to the injustices of trial procedures.[16] It put into every man's hands a manual of the law which explained what treason was and how a state trial ought to proceed, and dispelled deep mysteries of the law hitherto known only to professionals. Laymen were enabled to take up their own case in the courtroom instead of abjectly confessing their guilt; ironically, the very men Coke had vilified now began to quote his works in their defence. And so Coke had intended: 'Some doth object ...' he wrote 'that [the laws] are darke and hard to be understood, [so] we have specially in these ... Institutes opened such windowes, and made them so lightsome, and easie to be understood, as he that hath but the light of nature ... may easily discerne the same.'[17]

Such statements of concern for a prisoner's plight scarcely related to the prevailing courtroom attitudes which Coke as prosecutor had so vividly demonstrated. In the seventeenth century prosecuting attorneys customarily baited the defendant and his witnesses and were more often joined than restrained by the presiding judge.[18] Custom further demanded that the accused traitor be left to his own wits in framing a defence. He was denied counsel except on points of law, refused copies of the indictment, and prevented from swearing his own witnesses or cross-examining witnesses for the prosecution.[19] Arbitrary constructions of the meaning of treason and arbitrary legislation, particularly in the Tudor period, had so widened the meaning of the crime that few could escape conviction; whether guilty or not, the accused were expected to confess their crime, pray for forgiveness, and exalt the goodness of the sovereign.[20] 'It is downright tying a man's hands behind his back, and baiting him to death,' wrote legal reformer Sir John Hawles in 1689.[21]

Coke began the *Third Institutes* by praising that 'blessed act,' the statute of 1352 (25 Edward III), the fundamental statement of treason in English law: 'For except it be Magna Charta, no other act of parliament hath more honour given unto it ... then this act concerning treason ...'[22] The purpose of the 1352 statute, Coke noted, was to mark clearly the limits of treason and to prevent arbitrary extension of the crime either by loose interpretation or by construction. To this end parliament had specifically prohibited royal justices from pronouncing any crime to be treason until it had been so declared in parlia-

258–88, referred directly to Coke's changed attitudes and their weight in the reform movement.

16. Samuel Rezneck, 'The History of the Law of Treason in England, 1352–1603' (unpublished doctoral dissertation, Harvard University, 1927), 448, and *supra* note 15, at 288.

17. *Third Institutes*, 'A Proeme to the Third Part of the Institutes.' The edition of the *Third Institutes* published in London, 1809, was used in the preparation of this paper.

18. Holdsworth, *supra* note 4, at 426–7.

19. Rezneck, *supra* note 15, at 258–88.

20. Lacey Baldwin Smith, 'English Treason Trials and Confessions in the Sixteenth Century,' 15 *J. Hist. Ideas*, at 471–98 (1954).

21. 8 *State Trials*, at 733.

22. *Ibid.*, at 2.

ment.[23] Seven heads or classes of treason were enumerated in 1352,[24] and, wrote Coke, 'if the offence be not within one of these ... it is no treason.'[25]

Two points need to be emphasized in Coke's interpretation of 25 Edward III: (1) each head of treason had to be proved by an individual overt act, or rather, no single action could be used to prove two different treasons;[26] (2) each treason charge had to be kept separate and distinct from others so that no one species of treason could serve as proof of another.[27] To use as examples the two most prominent classes of treason – compassing the king's death and levying war against the king in his realm – the first could be proved by the gathering of fire arms, powder, poison, sending letters to confederates, or imprisoning the king,[28] while the second had to be proved by the actual levying of war.[29] In the seventeenth century judges felt these stipulations were excessively strict and made two significant interpretations of their own: (1) a conspiracy to levy war, not the actual levying of it, was held sufficient proof of treason; (2) a conspiracy to levy war was called sufficient proof of compassing the death of the king.

To be sure, the governments of the turbulent Commonwealth and Restoration eras had good reason to feel that 25 Edward III inadequately protected them against the danger of revolt; they justified these new treason constructions by appealing to self-defence. Nevertheless, individuals accused and tried in the years after 1640 remained unconvinced of the legality of proceedings against them and they appealed over and over to Coke's interpretation of 25 Edward III. Eusebius Andrews, a royalist lawyer accused in 1650 of plotting to overthrow the government, claimed that 'a bare intention ... to levy a war is not treason. I refer myself to my lord Coke, 3 Inst., fol 14 and 38, who tells us (and he is a man of credit) in his book (printed and allowed for law by the houses, when they were two) that a conspiracy ... to raise a war ... is no treason by the act of Edw. 3, until the war levied ...'[30] Unimpressed, Chief Justice Bradshaw accepted the prosecution contention that 'an affection to act, though nothing acted, was sufficient treason ...'[31] In the trial of Christopher Love in 1651 for plotting, through correspondence with Charles Stuart, to violently overthrow the government, the defence again insisted that a conspiracy to levy war was not treason within the statute of 1352. Love managed to engage young Matthew Hale[32] to argue this point of law, and Hale, quoting Coke, charged that the indictment against Love was falsely laid, because a conspiracy to levy war was not sufficient proof of that treason.[33] 'The law is very plain,' Hale insisted, 'that the [overt] act must be mentioned in the indict-

23. *Ibid.*, at 20–1. 'And if that the construction ... had been left to judges, the mischiefs before this statute would have remained, viz., diversity of opinions, what ought to be adjudged treason, which this statute had taken away by expresse words.' Coke could not know that parliamentary, not royal, treason constructions would become the fashion after 1640, most notably the construction used against Strafford, Laud, and Charles I, 'subverting the fundamental laws.'

24. 25 Edward III, c. 2. Other heads of treason included violating the king's immediate female relations, adhering to his enemies, counterfeiting the privy seal, or the money of the realm, and slaying major officials of the king's government.

25. *Third Institutes*, *supra*, note 5, at 3.

26. *Ibid.*, at 11.

27. *Ibid.*, at 13–14.

28. *Ibid.*, at 11–12.

29. *Ibid.*, at 9.

30. 5 *State Trials*, at 34–5.

31. *Ibid.*, at 31.

32. *Ibid.*, at 135, 203–11. After considerable wrangling, Attorney General Prideaux reluctantly told Love, 'Counsel may come to you, if they will.' Only Matthew Hale accepted the challenge to confront Prideaux, who had earlier earned a rebuke from Lilburne: 'For Mr. Prideaux, and others of you, so often to call me a notorious Traitor ... blemish me not ... till the law ... do blemish me ...' 4 *State Trials*, at 1310.

33. *Third Institutes*, *supra* note 5, at 9.

ment.'[34] Hale continued to hammer at the need for an overt act in support of each charge but succeeded only in exasperating the court. 'I take not myself to be so strictly tied to the forms of indictments in letters and syllables,' declared Attorney General Prideaux, 'but [only] to express the substance,' and the court agreed.[35]

After the Restoration legal opinion hardened against Coke's interpretation of 25 Edward III and both of the above constructions were called good law. In 1662 a new statute (13 Charles II) specifically declared that a conspiracy to levy war was an overt act of treason;[36] in 1664 Chief Justice Kelyng (King's Bench) reported that a panel of judges had agreed that 'meeting and consulting to levy war is an overt act to prove the compassing the King's death within the stat. of 25 Ed. 3 ... altho' Co[ke] Pl[eas] Cor. 14 delivers an opinion against this ... yet that is no law ...' Kelyng added that 'it was observed that in these posthumous works of Sir E. Coke ... many great errors were published, and in particular in his Discourse of Treason ...'[37]

Though the statute 13 Charles II was hedged by a stipulation requiring the government to prosecute accused traitors within six months of the offence, this proved of little advantage to the defendant; if the six months had elapsed the indictment was laid on 25 Edward III with its constructive extensions.[38] Nevertheless, a celebrated debate involving the old Coke interpretation of treason took place in 1683 when William, Lord Russell, the respected Whig peer, was accused of compassing the king's death by conspiring to levy war. As the trial began, Russell, advised by Sir Robert Atkyns, objected immediately to the 'tacking of two treasons together ...'[39] 'I see you use Lord Coke,' Attorney General Robert Sawyer mockingly noted.[40] But the manoeuvre was to no avail. Solicitor General Heneage Finch asserted that 'common usage' had established that a conspiracy to levy war was in fact an overt act compassing the death of the king, 'and the error of my lord Coke hath possibly led my lord [Russell] into this mistake.'[41] The indictment against Russell stood as written and he was convicted. Yet, after the trial Coke's interpretation was widely publicized in pamphlets issued by Atkyns who lamented that the Russell decision created uncertainties in the meaning of the law, for it contradicted the statute of 1352. 'Conspiring to levy war ...' Atkyns wrote, 'is not conspiring against the king's life. For these are treasons of a different species.'[42] The statute of 1696 (7 & 8 William III) did not resolve this dispute, leaving it to the discretion of the court whether a conspiracy to levy war threatened the life of the king, although later practice, as Henry Hallam observed, denied that 'loose words or writings ... unconnected with any positive design ...' could amount to a conspiracy.[43]

Several other references to Coke's interpretation of the substantive law of treason ought to be noted. As part of that law Coke had included a statute of Henry VII which absolved from guilt any person supporting a *de facto* ruler of England;[44] Henry Vane referred to this statute in 1662 at his trial for treason against Charles II in the years 1649–60. Loyalty to Cromwell, the *de facto*

34. *Ibid.*, at 12; 5 *State Trials*, at 216.
35. *Ibid.*, at 222; The Statute of 1696 (7 & 8 Will. III, c. 3, s. viii) required that 'no evidence shall be admitted ... of any overt act ... not expressly laid in the indictment ...'
36. 13 Chas. II, c. 1.
37. Sir John Kelyng, *A Report of Divers Cases in Pleas of the Crown ... in the Reign of ... Charles II* (1708), in 84 Eng. Rep., 1062–3.
38. 4 *State Trials*, at 229–331; 8 *State Trials*, at 691–5, 802.
39. 9 *State Trials*, at 616.
40. *Ibid.*, at 618.
41. *Ibid.*, at 628–9.
42. *Ibid.*, at 722.
43. Hallam, *supra* note 6, at 577. Hallam presents a full discussion of the constructive extensions of 25 Ed. III at 574–82.
44. 11 Hen. VII, c. 1.

sovereign of the period, Vane argued, was not treason against the *de jure* ruler, Charles II. He then quoted from the *Third Institutes*: 'A King *de jure* and not *de facto* is not within the statute; against such a one no treason can be committed.'[45] Chief Baron Bridgman, presiding at Vane's trial, dismissed the argument, saying that the statute of Henry VII 'was for a king, and kingly government; it was not for an antimonarchical government.'[46] Justice Twisden went further, ruling that 'in the same instant the late king expired, in the very same his now majesty was king *de facto* ...'[47] Thus to the judges of the Restoration, Charles II in all his wanderings remained, in fact as well as right, king of England.

Coke had observed that the statute of 1352 should have protected defendants by including a time limitation on the indictment.[48] In the Regicide trials, twelve years after the death of Charles I, this statement by Coke was brought up, not by the defence, but by Solicitor General Finch in his opening argument: 'My lord Coke in his Comment upon this statute has one conceit ... I am sure it is very new; he seems to think that it would have added to the perfection of the law [25 Edward III], if there had been a time limited for the party to be accused. But certaine the work of this day has quite confuted that imagination. For here is a Treason that has so long out-faced the law, and the justice of this kingdom, that if there had been any time of limitation in the statute, there would have been no time ... left for punishment.'[49] Finch's statement forestalled any debate on this point in 1660, but the concept of statute limitation was introduced into 13 Charles II, and the law of 1696 limited the government's right to prosecute to within three years after the alleged crime was committed.[50]

Perhaps the most ironic reference to Coke, in view of his fierce hatred of Catholics, came during the Popish Plot trials. William Marshal, a Jesuit acquitted with George Wakeman in 1679 on charges laid to the statute of 1352, was retried with other priests upon the statute 27 Elizabeth I, which had defined priesthood itself as treason.[51] Marshal claimed that Coke, in his *Fifth Report*, had declared that priesthood ought not to be adjudged treason, despite the Elizabethan statute, unless 'there was annexed to the priesthood treacherous designs and treacherous attempts.'[52] The court without difficulty dismissed Marshal's plea, and it is safe to assume Coke would have done the same, for he was convinced that all priests were busy 'instilling still this poison into the subjects' hearts, that by reason of the ... bull of Pius v [1570] her majesty was excommunicated, deprived of her kingdom, and ... her subjects ... discharged of all obedience to her ...'[53]

Coke's comments on procedures in treason trials furnished defendants with additional arguments in their attempts to block the prosecution. Although he had pressed in Raleigh's trial for conviction on the testimony of a single witness, the author of the *Third Institutes* insisted that prosecution must present the testimony of 'two lawful witnesses ... [who] if they be then living, shall be brought in person before the party so accused, and avow ... that which they have to say to prove him guilty ...'[54] Coke thus gave his full support to the

45. Joseph Keble, *Reports in the Court of King's Bench ... from the 12th to the 30th Year of the Reign of Charles* (1685), in 83 Eng. Rep., 967–8; 6 *State Trials*, at 122–6, 175; *Third Institutes, supra* note 5, at p. 6, properly reads, 'and the other that hath right, and is out of possession, is not within this act.'
46. 5 *State Trials*, at 1114.
47. 6 *State Trials*, at 156.
48. *Third Institutes, supra* note 5, at 24.
49. 5 *State Trials*, at 1012–13.
50. 7 & 8 Will. III, c. 3, s. v.
51. 7 *State Trials*, at 683–8; 811–82.
52. *Ibid.*, at 875.
53. *Ibid.*, at 875–82; Sir Edward Coke, *Fifth Report*, in 77 Eng. Rep., 44–45.
54. *Third Institutes, supra* note 5, at 25–6.

statute 5 & 6 Edward VI which required two witnesses *viva voce* in treason cases, and by the middle of the seventeenth century professional opinion had come around to accept this two witness rule.[55] The view eventually became law in the statute 13 Charles II, which required 'two lawful and credible witnesses upon oath ... brought ... face to face ...' and was repeated in the statute of 1696.[56]

Hearsay evidence was used by Coke against Raleigh, but in the *Third Institutes* he termed the admission of such evidence 'a strange conceit' in court procedure.[57] Here again time proved Coke on the side of reform, for after the Restoration judges cautioned witnesses against such testimony.[58] By 1690 the rule against hearsay became firmly fixed in English court procedure.[59]

Coke also adopted for his time a forward position in calling for the admission of sworn testimony for the defence. Only witnesses for the prosecution were allowed to sanctify their testimony by the oath swearing procedure in the seventeenth century, on the theory that any person who swore on behalf of a suspected traitor was swearing against the crown. This prohibition puzzled Coke, who wrote, 'we never read in any act of parliament, ancient author, book case, or record, that in criminall cases the party accused should not have witnesses sworn for him ...'[60] When the five Jesuits were tried in 1679 John Gavan pleaded with Chief Justice Scroggs to allow his witnesses to be sworn so that he might better refute Titus Oates. 'My lord ... Coke in his Institutes says expressly, That there is no positive law against it; his words are, there is not so much as *scintilla juris* against it.'[61] But 'the constant usage and practice is so,' retorted Chief Justice North, 'and you cannot produce any [example] now, that in any capital case had his witnesses sworn against the king.'[62] Thus the practice was continued which enabled prosecutors to discredit defence testimony, as did Sergeant John Maynard in 1680, 'our evidence is given in all upon oath, and theirs is not.'[63] Not until the statute of 1696 would sworn testimony for the defence be allowed in treason trials.[64]

In the trial of Edward Fitzharris in 1681, early debate centred on a defence argument that Coke, in the preface to his *Third Report*, had described an ancient statute which guaranteed the defence access to copies of all trial records, the record in question being a copy of the indictment.[65] When Lord Chief Justice Pemberton announced (correctly) that in the court's view no such statute existed, and therefore no copy of the indictment would be granted, two of Fitzharris' defence lawyers resigned, allegedly for fear of their reputations.[66] The defence action, though politically motivated, reflected a new mood of indignation by lawyers toward court customs prohibiting copies of the indict-

55. John H. Wigmore, 'Required Number of Witnesses: A Brief History of the Numerical System in England,' 15 *Harv. L. Rev.* 83 (1901). Wigmore observed that Coke's support of the two witness rule 'counted for a great deal' in causing its eventual adoption; *ibid.*, at 104.

56. 13 Chas. II, c. 1, s. v; 7 & 8 Will. III, c. 3, s. ii.

57. *Third Institutes*, *supra* note 5, at 25.

58. 8 *State Trials*, at 461, 628.

59. John H. Wigmore, 'History of the Hearsay Rule,' 17 *Harv. L. Rev.* 437 (1904).

60. *Third Institutes*, *supra* note 5, at 79.

61. 7 *State Trials*, at 359.

62. *Ibid.*

63. *Ibid.*, at 1036.

64. 7 & 8 Will. III, c. 3, s. i.

65. 8 *State Trials*, at 259.

66. *Ibid.*, at 259–61. The *Fitzharris* case was a bizarre affair, for the defence moves reflected a wider Whig-court struggle in 1681. Fitzharris' Whig lawyers wanted to defeat King's Bench jurisdiction and turn the case into a parliamentary impeachment trial, to better expose a suspected Tory plot in which Fitzharris was involved. They cared little for the defendant. As Sir John Hawles wrote after the Glorious Revolution, 'both [parliament and crown] agreed that [Fitzharris] deserved to be hanged; the first thought it their advantage to save him if he would confess, the last thought it was fit to hang him for fear he would confess.' 12 *State Trials*, at 428.

ment and free use of counsel to the defendant; both of these crucial rights were allowed the accused in the statute of 1696.[67]

On the question of free use of defence counsel Coke was more traditional, agreeing that accused traitors ought not to employ lawyers to argue the facts of the case, because the appearance and plain language of the defendant was the jury's best clue to his innocence.[68] Yet at the same time, Coke urged the need for 'clear and manifest' proof of the treason and reminded the courts that they must 'be in stead of councell for the prisoner, to see that nothing be urged against him contrary to law and right ...'[69] In practice though, the prisoner's lack of learned counsel was his greatest single handicap. Under the strain of struggling for his life against a battery of professional prosecutors a defendant scarcely retained enough composure to affect the look of innocence (whatever that might be) and judges did not honestly undertake their prescribed role as counsel for the defence.[70]

Another shortcoming of Coke's writings was his failure to establish rules for evaluating the testimony of witnesses. He relied instead on the oath-swearing procedure to assure a witness's dependability, as this statement from the *Fourth Institutes* suggests: 'An oath ought to be accompanied with the fear of God, and service of God for the advancement of truth.'[71] In the seventeenth century few prosecution witnesses were awed by the fear of God. Indeed, during the hysteria of Popish and Whig plots, professional perjurers, carried by the winds of political change, swore by turns against Catholic priests and Whig politicians.[72] It was Sir Matthew Hale who introduced more sophisticated techniques of evaluating witness credibility, saying that little weight should be given to witnesses with records of perjury, felony, or those 'concerned in point of interest,' whether they swore an oath or not.[73]

Aside from these two procedural points of free use of counsel and the evaluation of witnesses, Coke's views on treason and the state trial were liberal for their day and repeatedly anticipated later reforms. Throughout the century, from the incorrigible publicist John Lilburne, pictured in a commemorative print of his 1649 acquittal lecturing the court from a large volume prominently marked 'Cooke's Institutes,' to the cautious navy secretary Samuel Pepys, who, fearing impeachment, wrote in his diary on 23 June 1667, 'up to my chamber, and there all the morning reading in my Lord Coke's Pleas of the Crowne,'[74] Coke's works remained the first resort of men facing the threat

67. 7 & 8 Will. III, c. 3, s. i.

68. Sir William Stanford, *Les Plees del Corone*, cited by Rezneck, *supra* note 16, at 328.

69. *Third Institutes*, *supra* note 5, at 29.

70. Sir John Hawles remarked, 'it is said his innocency shall defend him ... shall [it] appear in his forehead, or an angel come down from heaven and disprove the accuser?' 8 *State Trials*, at 733. Moments before her execution in 1685 Alice Lisle declared, 'I have been told, *That the Court ought to be Counsel for the Prisoner*; Instead of *Advice* there was *Evidence* given from thence ...' from *The Dying Speeches of Several Excellent Persons, who Suffered for their Zeale against Popery and Arbitrary Government* (1689), at 26.

71. Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of the Courts* (1809), at 279.

72. G. M. Trevelyan, in his *England under the Stuarts* (19th ed. 1947), at 332, wryly observed that toward oath-sworn testimony 'everyone in court, except the swearers themselves, attached a superstitious reverence.' For some defendants' lamentations about perjured or suborned testimony, see the pamphlets, *Mr. Love's Case* ... (1651), at 19; *The Two Speeches of Collonel John Penruddock and Hugh Grove* ... (1655), at 7; *A True Copy of the Dying Words of Mr. Stephen Colledge* ... (1681), at 1.

73. Sir Matthew Hale, 1 & 2 *History of the Pleas of the Crown* (1847), at 302–3, 277.

74. Samuel Pepys, *The Diary of Samuel Pepys*, Henry Wheatly, ed. (1928), at 23 June 1667.

of a state trial. This is not to suggest that a reliance on Coke enabled prisoners to prevail; as we have seen, the courts dismissed, denied, and disparaged Coke's writings in grinding out their inevitable verdicts of guilty. But it is indisputable that the climate of a seventeenth-century treason trial changed markedly, with defendants showing an aggressiveness and a confidence in their own cause contrasting sharply with the obsequiousness of Tudor prisoners. While Coke alone cannot be credited with inspiring pugnacity among defendants, his legal writings certainly helped turn criticism of treason trial procedures into the constructive channels which led ultimately to the reform statute of 1696.