THE PREFACES TO SIR EDWARD COKE'S REPORTS AND MODERN HISTORICAL JURISPRUDENCE

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The prefaces to Sir Edward Coke's 17th-century reports have a valuable role to play in the development of modern historical jurisprudence. The prefaces contain a unique legal philosophy. The jurisprudence of the prefaces is historical in that its central consideration is the role of the past in present law. The works of Frederic Maitland and Paul Vinogradoff reveal the primary weaknesses within this jurisprudence: Coke's conflation of legal and historical logic, and his insular notions of legal culture. Vinogradoff's model for the study of legal patterns provides the means of remedying these flaws. Coke's continued role in contemporary legal systems demonstrates the complexity of the relationship between history and law. From the perspective of a historian, Coke's work has limited validity. However, in the legal sphere, he continues to possess authority. The different meanings Coke takes on as a historical and legal figure demonstrate two areas of tension between law and history: (1) ahistorical practice lies at the heart of the common law; and (2) legal change can require the manipulation or misapplication of history. Ultimately, the prefaces provide three principles which should guide modern historical jurisprudence: (1) the law should be conceived of as a customary system; (2) past law guides present and future law and can do so in a way which facilitates modernity and legal evolution; and (3) change within the law must be viewed as a temporal phenomenon. If augmented with the works of Maitland and Vinogradoff, the jurisprudence of the prefaces may be the solution to the dissonances within the historical study of law that Coke's career and legacy make so clear.

I INTRODUCTION

Historical jurisprudence is largely absent from the current landscape of legal thought. Many of its foremost proponents have been lost in the shrouds of the legal past. However, Sir Edward Coke, possibly the first to set out a theory of historical jurisprudence in his 17th-century legal reports (the

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Reports),[1] remains a key figure within the legal system. His distinctly historical way of thinking about law and his continuing role in modern law together provide a unique pathway into the study of historical theories of law. His statements of law feature explicitly in modern judgments, whilst his ahistorical and mythological methods, which are just as pervasive, operate beneath the surface of legal practice. This dissonance sits at the crux of the problem facing students of historical jurisprudence. This article will argue that the prefaces to Coke's *Reports* (the *Prefaces*) espouse a particular historical jurisprudence which is relevant to modern theories of law in several ways. First, I will discuss the legal philosophy of the *Prefaces* and compare it to the theories of Frederic Maitland and Paul Vinogradoff, both of whom have a crucial role to play in any modern formulation of historical jurisprudence. Secondly, I will consider the validity of Coke's authority from a historical and legal perspective in order to illuminate the nuances in the relationship between law and history. Lastly, I will attempt to sketch the outlines of a modern adaptation of Coke's jurisprudence and consider some of the legal contexts in which this adaptation has utility.

II SIR EDWARD COKE, THE REPORTS AND HISTORICAL JURISPRUDENCE

A Sir Edward Coke

A brief outline of Coke's life and career is relevant to the substantive arguments of this article, particularly those regarding the nature of his authority. After studying at Cambridge, he was admitted to the Bar in 1578.[2] He served under Elizabeth I as Solicitor-General, Speaker of the House of Commons and Attorney-General.[3] Under James I, he was appointed Chief Justice of the Court of Common Pleas and then of the King's Bench. Throughout his career he became enmeshed in various rivalries, most notably with Lord High Chancellor of England, Francis Bacon, and Lord Chancellor Ellesmere.[4] He also had a famously tumultuous relationship with James I, which eventuated in his dismissal from the Bench in 1616. His controversial standing was often due to his ferocious championing of the common law. He successfully quashed Bacon's attempts to codify English law, in part through the mythologising of legal history discussed below.[5] He presented a secular conception of the common law as "artificial reason", which undermined rival jurisdictions and brought him into

1 John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826).

2 Ben W Palmer "Edward Coke, Champion of Liberty" (1946) 32 ABAJ 135 at 135.

3 At 135.

4 At 135; and Michael Lobban "The Age of Sir Edward Coke" in Enrico Pattaro (ed) *A Treatise of Legal Philosophy and General Jurisprudence* (Springer, Dordrecht, 2007) vol 8, 29 at 52.

5 Palmer, above n 2, at 138.

conflict with Ellesmere.[6] His anti-absolutist leanings were such that he once allegedly almost came to blows with the King after quoting that famous Bracton excerpt: *quod Rex non debet esse sub homine, sed sub Deo et lege*, the King is under no man but only God and the law.[7]

Coke is, and has always been, a polarising figure. He was labelled "credulous Coke" by Maitland, described by George Orwell as "an evil old man" and by Glenn Burgess as "fevered".[8] His detractors, however, are balanced by his devotees. John Marshall Gest wrote in the Yale Law Journal:[9]

> A modern lawyer who heaps his abuse on Coke and his writings seems as ungrateful as a man who climbs a high wall by the aid of the sturdy shoulders of another and then gives his friend a parting kick in the face as he makes the final leap.

It should be noted that much of the historiography regarding Coke is peppered sporadically throughout the 20th century. This makes it difficult to locate a unified contemporary academic construction of him. This ambiguity, however, is part of what makes him a key figure in the historical study of law.

By the time of his death, Coke had secured the common law's place within the English constitutional framework, drafted the Petition of Right, laid the foundations for judicial review and authored some of the most comprehensive treatises of English laws written prior to and during the 17th century.[10] Despite these momentous accomplishments, this article will demonstrate that one of his most significant was the unique and long-standing jurisprudence constructed within his *Prefaces*.

B The Reports

Coke began writing the *Reports* in the late 16th century and continued to work on them until his dismissal from the Bench.[11] They comprise reports on cases heard within his lifetime.[12] The first 11 reports feature prefaces written in English and Latin. These *Prefaces* contain historical arguments, general legal principles, summaries of the cases included in the *Reports*, reflections upon

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6 Lobban, above n 4, at 54; and Paul Raffield "Contract, Classicism, and the Common-Weal: Coke's *Reports* and the Foundations of the Modern English Constitution" (2005) 17 Law & Literature 69 at 71.

7 Roland G Usher "James I and Sir Edward Coke" (1903) 18 The English Historical Review 664 at 664.

8 John Marshall Gest "The Writings of Sir Edward Coke" (1909) 18 Yale LJ 504 at 530–531; Damian Powell "Coke in Context: Early Modern Legal Observation and Sir Edward Coke's Reports" (2000) 21 Journal of Legal History 33 at 40; and Allen D Boyer "Sir Edward Coke, Ciceronianus: Classical Rhetoric and the Common Law Tradition" (1997) 10 International Journal for the Semiotics of Law 3 at 5.

9 Gest, above n 8, at 506.

10 Harry Potter "Rex Lex v Lex Rex: Sir Edward Coke" in *Law, Liberty and the Constitution: A Brief History of the Common Law* (Boydell Press, Woodbridge (Suffolk), 2015) 119 at 130.

11 Raffield, above n 6, at 72; and Powell, above n 8, at 37.

12 Powell, above n 8, at 42.

contemporary legal developments and defences against criticisms of earlier work. Much can and has been written about the political and constitutional importance of the *Reports* and their *Prefaces*. This article will focus on the significance of the *Prefaces* to legal philosophy. Although Coke did not purport to craft a jurisprudence, the *Prefaces* contain the foundations for a particular way of thinking about law.

C Historical Jurisprudence

Because of its place at the fringes of legal studies, a general theory of historical jurisprudence is not readily available. However, all forms of historical jurisprudence essentially "subsume positive law in a social envelope" by considering the temporal contexts in which laws are created and enforced.[13] Oliver Wendell Holmes Jr provides a useful summary of a historical approach to legal philosophy:[14]

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it intends to become. We must alternately consult history and existing theories of legislation.

The practice of precedent and the aversion of the legal profession to traditional historicism makes the construction of historical theories of law complicated. Coke and other theorists discussed in this article employed unique ways of resolving this complexity.

III COKE'S HISTORICAL JURISPRUDENCE

A The Role of History

There is ongoing debate surrounding the degree of political calculation within Coke's use of history in his *Reports*.[15] However, it is undeniable that history was central to Coke's jurisprudence regardless of its political potential. He saw the common law as the "ancient and undoubted patrimony and birthright" of Englishmen.[16] Rather than descriptions of the contemporary operation of an institution, the *Prefaces* contain a reverent contemplation of a national heirloom. Thus, at the outset, Coke's jurisprudence was founded on a conception of the law as, above all else, a historical institution. The *Prefaces* can be read as a mythology of the common law. Coke asserts that the laws of England are of "greater antiquity than they are reported to be and than any the constitutions or laws imperial

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13 Stephen B Young "Beyond Bok: Historical Jurisprudence in Replacement of the Enlightment Project" (1985) 35 J Leg Ed 333 at 352.

14 Oliver Wendell Holmes Jr *The Common Law* (Harvard University Press, Cambridge (Mass), 1963) at 5 as cited in Young, above n 13, at 354, n 95.

15 Ian Williams "The Tudor Genesis of Edward Coke's Immemorial Common Law" (2012) 43 Sixteenth Century Journal 103 at 103; Lobban, above n 4, at 44; and Gest, above n 8, at 514.

16 Edward Coke "Preface to the Fifth Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 3 at v.

of Roman Emperors".[17] He describes the "divine knowledge" that can be drawn from past "sages of the law".[18] Throughout the *Reports*, the history of the law is intertwined with national and mythical histories. Paul Raffield has explored how figures such as King Arthur are used "as signifiers of the antiquity and constitutional hegemony of the common law".[19] In the preface to the Third Part, Coke locates traces of the 17th-century legal system in pre-conquest druids and argues that "time out of mind" trials by the "oath of twelve men" have been taking place in England.[20] In the ninth, he discusses the ancient origins of the words "Parliament" and "Sheriff".[21] This linking of legal history to the cultural and national heritage of England is often understood to be an attempt to legitimise the common law in the face of the political and jurisdictional threats of the Jacobean era.[22] However, its effect was broader. Regardless of his motivations, Coke's mode of writing formed the basis of historical jurisprudence, one which conceived of the common law as the ancient heritage of citizens. Thus, Coke was not only defending the law but creating a unique understanding of it. The idea of the law as "the most ancient and best inheritance" of English citizens informs all facets of the jurisprudence expounded in the *Prefaces*.[23]

B The Role of Change

To Coke, the past was not only a source of authority and legitimacy but was also important normatively and culturally. The laws of England were "good and profitable for the commonwealth" because they had been "proved and approved in all successions of ages".[24] Thus, in the preface to the Fourth Part the maxim of Periander of Corinth, "that old laws and new meats are fittest for us", is endorsed.[25] Necessarily, Coke was suspicious of legal reform. He warns readers that common laws and customs "cannot without great hazard and danger be altered or changed".[26] Once the common law is understood to be part of the heritage of England, its culture and content must be enshrined and,

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17 Edward Coke "Preface to the Third Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 2 at xviii–xix.

18 Edward Coke "Preface to the Second Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 1 at viii.

19 Paul Raffield "Common Law, Cymbeline, and the Jacobean Aeneid" (2015) 27 Law & Literature 313 at 315.

20 Coke, above n 17, at xi–xii and xvi–xvii.

21 Edward Coke "Preface to the Ninth Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 5 at xxv.

22 Potter, above n 10, at 127; and Lobban, above n 4, at 34.

23 Coke, above n 16, at v.

24 Edward Coke "Preface to the Fourth Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 2 at v–vi.

25 At ix.

26 At v–vi.

if necessary, "restored".[27] The *Prefaces* cast the laws of England almost as precious artefacts, intimately connected with the ancient past of the nation. Like precious artefacts, they had to be shielded from change and degradation.

However, within the *Prefaces*, Coke acknowledges the utility of some legal change. In the fourth, he lauds the King's confrontation of two contemporary "impediments" to the "execution and expedition of justice".[28] He praises the efficiency achieved by the addition of judges to the King's Bench and Court of Common Pleas. Coke attributes the second impediment to "new devices and inventions in assurances which the eye of the law in former ages never beheld".[29] He asserts that this issue will be resolved "according to the true sense of the laws of the realm",[30] which suggests a return to more traditional practices. Nevertheless, his treatment of these proposed reforms does not align with a legal theory which aims to maintain absolutely the institutional structures of the past.[31] Coke did not propose to freeze the legal system. His attitude towards reform was more nuanced than it might first appear.

The *Prefaces* show that Coke understood that change within the law was inevitable. They also reveal the conditions under which he believed valid change could take place. Coke's legal conservativism is widely understood to have been a response to threats of codification and jurisdictional reformation.[32] However, it was also a natural consequence of his conceptualisation of the law. Central to Coke's historical jurisprudence was his faith in the organic path of history. Some historians have described Coke as a whig historian.[33] This categorisation is well founded if, as JWF Allison proposes, the method rather than the content of whig history is considered.[34] The *Prefaces* demonstrate that Coke did not see the past as dark or ignorant but that he did subscribe to the concept of history as an (in a sense) upward journey. He returns again and again to the image of wisdom transmitted throughout the ages, for "out of the old fields must spring and grow new corn".[35] Thus, it would be wrong to conclude that the jurisprudence of the *Prefaces* endorsed a bar on the evolution of the law. Coke's reverence for history shaped his faith in its natural and unharried path. It was not

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27 Coke, above n 17, at xxxiii.

28 Coke, above n 24, at xvi–xix.

29 At xix.

30 At xviii.

31 At xix.

32 Lobban, above n 4, at 30.

33 JWF Allison "History to Understand, and History to Reform, English Public Law" (2013) 72 CLJ 526 at 527.

34 At 545.

35 Edward Coke "Preface to the First Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 1 at xxx.

change that he opposed, but "novelty".[36] He warns against innovation which is not based on precedent or historical sources.[37] In the eighth preface, he argues "works of nature are best preserved from their own beginnings … and justice is ever best administered when laws be executed according to their true and genuine institution".[38] The frequent allusions to nature employed throughout the *Prefaces* further stress the natural and organic movements of history. Coke's jurisprudence imagined not only the origins of English law reaching back into antiquity but also the chains of history linking those origins to his era. He was "conservative" in that he believed that these chains should not be broken by too far a divergence from tradition and precedent.

Michael Lobban has identified the problem facing JGA Pocock and other historians:[39]

> … while Coke described the law as a customary system, which might imply it changed over time with the manners of the people, he also seemed to hold to the view that the common law and the constitution had always existed in its present form.

I believe that the solution to this problem can be found within the *Prefaces*. Coke writes about change within the law as if certain evolutions are sanctioned by legal figures of the past. His references to the "true sense of the law" suggest that there is a natural way for the law to operate and develop according to the practices and wisdom of the past.[40] To Coke, it is not merely the written laws of the past which are useful in the present, but the legal culture and customs of the past. Thus, he writes that the study of precedent "doth set open the window of the laws, to let in that gladsome light, whereby the right reason of the rule … may be clearly discerned".[41] It is notable that here it is not a particular rule which is the object of study, but a "light": a method of understanding. The *Prefaces* propose not only the retention of the rules of the past but also of the theory and practice of the past to direct interpretation and creation of rules in the present. In this way, the sages and forefathers of the law play active roles in Coke's legal system. He writes:[42]

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36 Edward Coke "Preface to the Seventh Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 4 at x.

37 At x.

38 Edward Coke "Preface to the Eighth Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 4 at xxvi.

39 Lobban, above n 4, at 34.

40 Edward Coke "Preface to the Tenth Part" in John Henry Thomas and John Farquhar Fraser (eds) *The Reports of Sir Edward Coke, Knt in Thirteen Parts* (Joseph Butterworth and Son, London, 1826) vol 5 at xii–xiii.

41 Coke, above n 21, at xxxvii–xxviii.

42 Coke, above n 40, at xii–xiii.

> … as the alluminor spoken of in law, giveth light and lustre to the letter or figure to be coloured; so antiquity doth give light with grace and ornament, both for the understanding and meaning of the letter of ancient acts of Parliament, and of our book cases and authorities in law.

Thus, while Coke does not consider the law to be inflexible, he insists that its true essence can be found in the past. To him, the law had not necessarily always existed in its present form. However, the *Prefaces* suggest that his jurisprudence required that it develop in a way that could be contemplated and sanctioned by figures of the past.

C The Common Law as Artificial Reasoning

The centrality of history and its organic development to the legal philosophy contained in the *Prefaces* forms the basis of Coke's conception of the law as "artificial reason".[43] This construction frames the law as reason that, rather than being bestowed from a divine source or found inherently within individuals, has been generated through human artifice. To Coke, the wisdom of past "sages" and argument and discussion between legal professionals within and outside of the courts effectively constituted the reason of the law.[44] He writes:[45]

> For it is one amongst others of the great honours of the common laws, that cases of great difficulty are never adjudged or resolved *in tenebris* or *sub silentio suppressis rationibus*; but in open court, and there upon solemn and elaborate arguments …

This achieves "a reverend and honourable proceeding at law, a grateful satisfaction to the parties, and a great instruction and direction to the attentive and studious hearers".[46] In this way, Coke's philosophy reflects Brian Simpson's idea of the law as customary practice: "a body of traditional ideas received within a caste of experts".[47] Much has been written about Coke's thinking in this regard. It is relevant for our purposes that in regarding the law as artificial reason, he acknowledged that law is historically manufactured. In the *Prefaces*, the law is not something which can be located at a certain point in the ancient past; it is temporal in that it develops and is shaped by history. It is created through the labours of legal professionals throughout the ages and the continued transmission of their wisdom. On its face, this idea does not seem revolutionary. Lorren Eldridge and Brian Tamanaha have noted

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43 Harold J Berman "The Origins of Historical Jurisprudence: Coke, Selden, Hale" (1994) 103 Yale LJ 1651 at 1689.

44 Coke, above n 21, at xxxviii–xxxix.

45 At xxxix.

46 At xxxix

47 AWB Simpson "The Common Law and Legal Theory" in AWB Simpson (ed) *Oxford Essays in Jurisprudence, Second Series* (Clarendon Press, Oxford, 1973) 77 at 80.

that in contemporary studies the notion of law as a historical product is "virtually taken for granted".[48] However, it is significant that this notion is central to Coke's jurisprudence. This foundational assumption sets him apart from natural law theorists and positivists. Natural law theory's definition of valid laws as having divine origin or being inherent in human nature minimises the role of history in their creation. History has a similarly restricted role in legal positivism, which Eldridge describes as a model which attempts "to freeze law in time in order to describe it".[49] At the root of the idea of the law as "artificial reason" is the relationship between history and law. The jurisprudence of the *Prefaces* is historical not because of Coke's appeals to the authority of the past but because its core concern is the role of the past in the law of the present.

Harold J Berman has argued that from Coke's works "one may tease out the rudiments, at least, of a jurisprudence".[50] Coke's resistance to codification and jurisdictional intrusion may have necessitated his historical construction of the law. Conversely, this resistance could have stemmed from a pre-existing personal legal philosophy. Either way, his treatment of law within the *Prefaces* certainly takes the shape of a particular jurisprudence, which rests on the assumption that law is a historical product and requires that in its current operation the law must pay respect to and be guided by the legal past. This unique historical jurisprudence continues to have relevance to legal studies in that it provides a contrast to natural and positivistic theories and insight into the nuances of the relationship between law and history. Furthermore, it has much to offer more recent historical approaches to legal theory, like those of Maitland and Vinogradoff.

IV 19TH- TO 20TH-CENTURY HISTORICAL JURISPRUDENCE

Despite remaining on the fringes of legal studies, historical jurisprudence has evolved substantially since the 17th century. I will discuss historical approaches to the understanding of English law from two influential figures of the 19th and 20th centuries: Maitland and Vinogradoff. Although Maitland also pursued a career as a lawyer, both men established themselves as predominant historians of the English common law. Working from a historical rather than legal perspective perhaps placed them in a better position than Coke to untangle and clarify the complex relationship between history and law. Their work is relevant to any contemporary conception of historical jurisprudence and their theories differ from and resemble Coke's in various ways, allowing insights into the gaps within each man's work.

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48 Lorren Eldridge "Gone and forgotten: Vinogradoff's historical jurisprudence" (2021) 41 LS 194 at 195. See also Brian Z Tamanaha "The Third Pillar of Jurisprudence: Social Legal Theory" (2015) 56 Wm & Mary L Rev 2235 at 2237 and 2240.

49 Eldridge, above n 48, at 199.

50 Berman, above n 43, at 1682.

A Maitland's Legal History

Allison has described Maitland's proposed use of history as to "liberate us from the tyranny of the old".[51] Maitland asserted that it is "we who are guilty of our own law" if we do not use history to reveal the true origins of laws which have become anachronistic or were, at their conception, unfounded.[52] Central to his work was a commitment to the distinction between legal and historical thought. He understood that the logic of each study was diametrically opposed:[53]

> That process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority, and the logic of evidence.

Maitland's practice, therefore, involved the application of the logic of evidence (the logic of historians) to legal materials. The object of his study was to expose the true context and original substance of laws to show, contrary to the assumptions of the legal profession, that they were no longer appropriate or were being applied inconsistently with their "genuine" purpose. Thus, Maitland was concerned with the paradox within historical jurisprudence: that the practice of law is necessarily ahistorical. His solution to the dichotomy of thought was to expose the misuse of history within the law and to provide a truly historical account of the legal past.

Maitland's vision of the construction of a comprehensive legal history has not been realised in the years since his death. His efforts faced two significant hurdles. The first concerns the evidence available to legal historians. Most available historical evidence is to be found in sources like case reports and plea rolls. As JH Baker notes, these sources are legal sources.[54] They are subject to the ahistorical process of law and as such often do not acknowledge context. Worse, these records can contain judicial glosses that "bear little or no relation to what originally happened".[55] Therefore, part of the task of the legal historian is to dismantle the transmission of case law to avoid accepting meanings which were later ascribed to judgments rather than being originally inherent within them. The second hurdle is the prevalent disregard for legal history within the legal profession. This is inevitable considering what Robert Gordon has described as the "threat" that the logic of evidence

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51 Allison, above n 33, at 541.

52 At 542.

53 Frederic William Maitland "Why the History of English Law Is Not Written" in HAL Fisher (ed) *The Collected Papers of Frederic William Maitland* (Cambridge University Press, Cambridge, 1911) vol 1, 480 at 491 as cited in Allison, above n 33, at 549, n 122.

54 JH Baker "Why the History of English Law Has Not Been Finished" (2000) 59 CLJ 62 at 77.

55 At 77.

poses to legal thought.[56] A truly historical approach would largely suspend the development of the law. Using the logic of evidence, for example, the protections afforded to those with proprietary rights in choses in possession or in action could not be extended to the "owners" of cryptocurrency, as in *Ruscoe v Cryptopia Ltd (in liq)*,[57] because in his early writings on property, Blackstone certainly could not have contemplated an economy in which cryptocurrency serves as a valuable currency. Furthermore, under the logic of authority, sources of law are held to be justified purely because they are historical. Judgments must rest on previous statements of law to be valid and judicial changes to the law are largely framed as "extensions" or "exceptions" to earlier rules. This is often referred to as the doctrine of stare decisis.[58] Consequently, the law is reliant on past texts but must treat those texts ahistorically. Thus, Maitland's legal historian faces difficulties not only in the substance of their studies but in the reception of their studies within the legal community.

Maitland's project was the antithesis of Coke's. The *Prefaces* encourage us to follow the "courses, windings, fallings-in, and outlets" of legal history to find the "fountain and head itself" and bring contemporary application into line with ancient intentions.[59] Maitland wanted to trace the same path to "free" modern law from those same ancient influences.[60] Where Coke nurtured and tended, Maitland sought to prune and cast away. Nevertheless, centuries after the former's death, the latter took up the quest to understand and demonstrate history's role within, and pertinence to, the law. Maitland's work reveals the discordance between law and history, the acknowledgment of which is required to make Coke's jurisprudence truly modern. Vinogradoff's approach to historical law provides the key to the unification of these theories and the creation of a coherent legal philosophy.

B Vinogradoff's Historical Law

Vinogradoff's work is crucial to resolving the dissonances within historical jurisprudence. His theory of historical law can be read as a solution to Maitland's dichotomy of thought problem. Rather than embarking upon the process of untangling the accumulation of precedent, he proposed that history's utility was in demonstrating how laws operated in different contexts.[61] In the preface to *Outlines of Historical Jurisprudence*, he writes:[62]

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56 Eldridge, above n 48, at 197.

57 *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809.

58 Chris Dent and Ian Cook "*Stare Decisis*, Repetition and Understanding Common Law" (2007) 16 GLR 131 at 141.

59 Coke, above n 40, at xii–xiii.

60 Allison, above n 33, at 541.

61 Eldridge, above n 48, at 212.

62 Paul Vinogradoff *Outlines of Historical Jurisprudence* (Oxford University Press, London, 1920) vol 1 at vii.

> Some knowledge of historical jurisprudence is needed by historians, because it helps to arrange the data of political and social life in accordance with consistent schemes of law. For lawyers historical jurisprudence is the best introduction to the social interpretation of the innumerable technical rules and doctrines of their profession.

By concerning himself with the original reception and application of historical laws, rather than anachronisms within the law, he avoided the issue of the dichotomy altogether. Like Coke, his foremost claim was that the law was a historical creature. Underlying his theory was the idea that "legal ideas were the contingent products of social factors".[63] Thus, his contextualisation involved looking not only to the true purposes of laws, as Maitland did, but also to the philosophical, economic, social, cultural and psychological threads both feeding into, and stemming from, the development of the law.

In contrast to Maitland, Vinogradoff was willing to move away from typical historical processes. Where Maitland endeavoured to locate contemporary laws in the past and re-attach them to their original meanings, Vinogradoff's mission was to "trace the life of juridical ideas in their action and reaction on conditions".[64] This involved grouping materials "in accordance with the divisions and relations of ideas rather than with dates".[65] His theory can be thought of as a historically informed and conceptualised understanding of the movements of the law rather than an application of historical practice to legal studies. It is a study of the history of jurisprudence as well as the historical nature of the law. As he explains, "the order followed by legal history is chronological; that followed by historical jurisprudence is ideological".[66] Here, it becomes important to delineate between historical jurisprudence and the history of jurisprudence. Historical jurisprudence is a historically guided and contextualised way of thinking about law. The history of jurisprudence is the study of how people thought about law in the past. Much of Vinogradoff's work was in using the latter to achieve the former. Ultimately, in many facets, Vinogradoff's theories resemble those in the *Prefaces* more closely than they do Maitland's.

Firstly, both Vinogradoff and Coke stressed the often unacknowledged idea that the law is a historical product. By placing this claim at the forefront of their philosophies, both theorists enabled investigation into understandings of the law which are not visible through analytical (positivistic) lenses. However, they held different views on how the historical construction of law occurred. This is due to Coke's insular conception of the law. Here, it is useful to return to Simpson's idea of

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63 Eldridge, above n 48, at 195.

64 Vinogradoff, above n 62, at 155.

65 At 155.

66 At 155.

customary law and the "caste of experts".[67] The *Prefaces*' history of the law is the history of this caste: the "sages of the law".[68] The mythical treatment of the law within the *Prefaces* ascribes similarly mythical importance to members of the legal community. The *Prefaces* almost form an ode to the chain of legal minds leading to Coke's era. The development of the law is marked by the presence of figures such as Euripides, Honorius, the pre-conquest druids, King Arthur, Glanville, Bracton, Britton and Fleta.[69] To Coke, the argumentation and toils of historic men of "high authority, excellent wisdom, profound learning, and long experience" resulted in the law of his age.[70] In the fourth preface, he compares the transfer of wisdom between these men to "how King Philip taught and instructed his son Alexander how to fight".[71] In contrast, Vinogradoff's focus is external. His work considers the historical development of the law as informed by the development of logic, psychology, social science and political theory.[72] He exposes the fallacy of Coke's insular jurisprudence in the preface to *Outlines of Historical Jurisprudence*:[73]

> Law, both customary and enacted, is intended to be a direction of conduct, but its actual application is a compromise between intentions and circumstances. As Aristotle has put it, we have to take account in human affairs both of what is desirable and of what is possible.

Vinogradoff posited that the "gaps" that appear when social, political and cultural trends develop more rapidly than the law are of paramount importance. The stutters in legal doctrine where the law must race to satisfy external requirements reveal the extent to which the law is truly historically generated. As Eldridge explains, "these doctrinal scars showed how the law had developed".[74] Thus, the *Prefaces* elevated the historical construction of the law to a mythical plane while Vinogradoff rooted it firmly in the social, political and cultural realities of the past. Coke's "divine" system of truth stands in stark contrast to Vinogradoff's legal system pockmarked by "seams and scars".[75]

Secondly, both the *Prefaces* and Vinogradoff's work suggest that past law has continuing normative and substantive relevance. I have already considered the substantive role that Coke believed

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67 Simpson, above n 47, at 80.

68 Coke, above n 18, at viii.

69 Coke, above n 17, at vii and xvi; Coke, above n 24, at xix and ix; Coke, above n 21, at xxx; and Coke, above n 18, at v.

70 Coke, above n 24, at xi.

71 At xii.

72 Vinogradoff, above n 62.

73 At vii.

74 Eldridge, above n 48, at 202.

75 Paul Vinogradoff *Villainage in England: Essays in English Mediaeval History* (Clarendon Press, Oxford, 1892) at 127. See also Eldridge, above n 48, at 202; and Coke, above n 18, at viii.

historical law played in the institutions of his era. Vinogradoff saw the norms of the legal past guiding present law differently. By considering the content and practice of law as governed by historical developments, he demonstrated that past content and practice are crucial to understandings of contemporary law. After examining the history of common law procedure and the exclusion of evidence, he concludes:[76]

> … the rules of Common Law procedure, although based on logic, disclose in their technical framing the preoccupation of the lawyers to fit their action to the requirements of average situations and prevailing social views, even though many solutions based on probability may have to be rejected in the process.

By exposing a "scar" within historical legal practice he brings to light an intersection between social and legal history and is left with an insight which can, and should, be applied to modern law. In other words, Vinogradoff uses history to unmask contemporary interactions between legal and social factors. Thus, in the theories contained within the *Prefaces* and Vinogradoff's work, the legal professionals and laws of the past hold the keys to a true understanding of current law. For Coke, historical legal practice was a model to be emulated, whereas for Vinogradoff, it was a cypher that needed to be unpacked to translate the norms and codes of present and future law.

Considering the historical jurisprudence of the *Prefaces* in comparison to more modern theories is useful in many ways. It throws the treatment of law within the *Prefaces* into sharp relief, allowing an understanding of the deficiencies and assumptions of Coke's theories, most notably his lack of delineation between the logic of authority and evidence and the insular nature of his vision of historical construction. Maitland and Vinogradoff demonstrate that there are different ways of conceptualising the relationship between law and history. Furthermore, they show that historical jurisprudence is not an oddity of Coke's era. The way that history and law interact continued to be a concern to theorists of the 19th and 20th centuries. Contemporary academics have noted the lack of interest in the issues raised by Maitland and Vinogradoff in the years since their deaths.[77] The abandonment of their theories would be a mistake. In the same way, forgetting the jurisprudence of the *Prefaces* also poses a risk to the legal community. As I will explain, Coke's legal philosophy demonstrates that the study of legal history proposed by Vinogradoff must be undertaken. His standing in contemporary legal culture holds clues as to how this study could be conducted and proves that Maitland's commitment to the separation of logic cannot truly be instilled within legal practice. Nevertheless, Maitland's role cannot be dismissed. He exposed the most difficult and significant element of any general theory of historical jurisprudence: the dichotomy between legal and historical

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76 Vinogradoff, above n 62, at 15.

77 Eldridge, above n 48, at 194; and Baker, above n 54, at 62.

thought. As Vinogradoff wrote, "[t]here is nothing for it but to step into the breach in the hope of reopening the discussion".[78]

V COKE IN CONTEMPORARY LEGAL CULTURE

The separation of logics, as described by Maitland, suggests two distinct ways of viewing Coke as a historical figure. Applying the logic of evidence, he is the product of a particular historical context and thus his work must be read critically. The treatment of Coke within the legal community, using the logic of authority, is far less critical. The different meanings that Coke and his work have taken on since the 17th century demonstrate the complexity of constructing historical jurisprudence. Unpacking these different meanings provides a good illustration of how the logics of evidence and authority operate. Furthermore, the parallels between Coke's use of authority within the *Prefaces* and the use of Coke himself as an authority within contemporary law reveal the continuity of ahistoricism. Ultimately, Coke's continued legal credibility indicates that, while historical jurisprudence must acknowledge Maitland's dichotomy of thought, historical methods cannot be transplanted into the practice of law.

A A Historical Understanding of Coke

To a historian, Coke is not a "valid" authority. Firstly, some of the historical arguments made within the *Prefaces* verge on the ridiculous. In the preface to the Third Part, he uses the claim that "all the discipline of the Druides in France was nothing else but a very colony taken out from our British Druides" to assert that "the [British] Druides did customarily sentence causes and order matters public and private in the Greek language".[79] Regardless of whether this line of reasoning was consistent with 17th-century understandings and histories, it cannot be regarded as valid today. To a historian, these sorts of inaccuracies nullify many of Coke's arguments. Ian Williams has described Coke's historical method as to "identify a reference to a recognizable contemporary institution and to infer that such a reference imports the full contemporary panoply of associated institutions and offices".[80] Harry Potter, more succinctly, refers to this method as an "anachronistic tendency".[81] Some historians are less charitable. William Holdsworth wrote that Coke had "no critical knowledge" and that he accepted information "with a credulity which is as medieval as his law".[82] Notwithstanding the level of incompetence attributable to Coke, the approach described by Williams is obviously rife with problematic assumptions and biases. The larger part of the ninth preface is dedicated to establishing

78 Vinogradoff, above n 62, at vii.

79 Coke, above n 17, at xv–xvi.

80 Williams, above n 15, at 114.

81 Potter, above n 10, at 130.

82 William Holdsworth "Sir Edward Coke" (1935) 5 CLJ 332 at 337.

the "ancient" origins of the words "Parliament" and "Sheriff".[83] Coke draws on questionable sources to establish the pre-conquest roots of these terms and imports with them assumptions of pre-conquest practices which resemble those of the 17th century.[84] Thus, Coke's *Reports* must be read critically. His arguments are necessarily viewed with suspicion by historians and his work represents a viable source of 17th-century knowledge and philosophy rather than a viable source of modern history and law.

Secondly, Coke's career was politically charged. Many see his work as reactionary, responding to various threats facing the common law throughout the Jacobean era. During his life, and over the centuries since his death, not only the substance of his work but also his motivations have been hotly contested. The presence of bias in historical arguments weighs against their legitimacy. Richard Helgerson argued that Coke's use of history was highly calculated: "Not merely the product of a disorderly mind, Coke's lack of method was both politically motivated and politically effective."[85] Holdsworth concluded:[86]

> Coke's excursions into the domain of history were all made for the purpose of proving some thesis; and there is no doubt that history written from this point of view is, as history, worthless.

Thus, to a historian, Coke is very much the product of his era. He either suffered from the lack of historical method and information within the 17th century or purposely abandoned historical methods to protect the common law from codification or jurisdictional domination (or a mixture of both).[87] From this perspective, his substantive arguments are confined to the context in which they were created and have little validity in contemporary academia. A historically based understanding of Coke requires a critical eye to his sources, methods and motivations. The passage of time has revealed that all three weigh against his standing in current historical and legal discussions.

B A Legal Understanding of Coke

The critical approach sketched above would suggest that Coke's ideas have a limited role to play in any contemporary institution. However, this is far from the case. Just as the "sages of the law" within the *Prefaces* seem to preside over 17th-century law from above, Coke continues to live on within the legal system. Charles I spoke prophetically in 1631 when, in attempting to stop the

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83 Coke, above n 21, at xxxii.

84 At xxx; and Holdsworth, above n 82, at 337.

85 Stephen Deng "Translating the Law: Sir Edward Coke and the Formation of a Juristic Public" in Paul Yachnin and Marlene Eberhart (eds) *Forms of Association: Making Publics in Early Modern Europe* (University of Massachusetts Press, Amherst, 2015) 42 at 42–43.

86 Holdsworth, above n 82, at 340.

87 Deng, above n 85, at 43; and Berman, above n 43, at 1686.

publication of one of Coke's works, he stated: "He is held too great an oracle amongst the people".[88] Laws and interpretations expounded within Coke's writings continue to be applied to this day. Chief Justice Best summarised the situation when he responded to a challenge to a rule ascribed to Coke:[89]

> Lord Coke often had no authority for what he states, but I am afraid we should get rid of a great deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law.

Not only is Coke's work inextricably entwined in the operation of contemporary law, but it is also the basis of many beneficial changes to the British constitution. Dicey asserted that:[90]

> The fictions of the courts have in the hands of lawyers such as Coke served the cause both of justice and of freedom, and served it when it could have been defended by no other weapons.

His ahistorical and politically motivated iteration of the Magna Carta extended its intended protection of the nobility into a "shield protecting all of the King's subjects".[91] His mythologising of the common law, which necessitated the misuse of historical sources, prevented monarchical abuses of power. As Dicey explained:[92]

> Nothing can be more pedantic, nothing more artificial, nothing more unhistorical, than the reasoning by which Coke induced or compelled James to forego the attempt to withdraw cases from the Courts for his Majesty's personal determination. But no achievement of sound argument, or stroke of enlightened statesmanship, ever established a rule more essential to the very existence of the constitution than the principle enforced by the obstinacy and the fallacies of the great Chief-Justice.

In the legal community, Coke's substantive arguments continue to be drawn on, not in ignorance of, but because of, the very tendencies and methods that prevent him from being a valid authority from a historical perspective. It must be stressed that his enduring presence is not merely symbolic. He is, by consensus, a valid source of law.

Comparing Coke's status from a legal and historical perspective suggests that the jurisprudence of the *Prefaces*, although largely unacknowledged, continues to play a role in the legal thought of the 21st century. How he is perceived in the legal sphere more closely resembles his own treatment of authorities within the *Prefaces* than any modern historical jurisprudential approach informed by Maitland's dichotomy of thought. The lack of contextualisation within his work mirrors the lack of

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88 Holdsworth, above n 82, at 336.

89 See Potter, above n 10, at 131.

90 AV Dicey *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, London, 1885) at 18 as cited in Potter, above n 10, at 131, n 38.

91 Potter, above n 10, at 130.

92 Dicey, above n 90, at 18–19 as cited in Garrard Glenn "Edward Coke and Law Restatement" (1931) 17 Va L Rev 447 at 453, n 23.

contextualisation exhibited in contemporary usage of his arguments and laws. Thus, the ahistorical and mythological practices he tended towards are still very much in use in modern law. It is fitting that after paying so much reverence to the legal minds that came before him, Coke would go on to join the ranks of sages and oracles of the law.

This inquiry also raises two important points regarding the tensions between law and history. Coke is proof that ahistorical methods cannot be excised from the law because very little law would be left unscathed and because this would deprive the law of its creative force.

Firstly, just as Chief Justice Best noted, the excision of sources of law like Coke because of their problematic historical nature would erase much of our current body of law. If any common law rule is traced back to its origin (if its origin can be found) it will likely be found that its initial conception is inapplicable to any current context. As Simpson wrote, "common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception".[93] The common law system operates by virtue of the faith of legal professionals and the wider community in its validity. If the myths of the law are condemned, the system would fracture.

Secondly, this process would rob the law of its best means of surmounting future legal and constitutional issues. Dicey's legal fictions and the myths of the *Prefaces* are integral to the flexibility and coherence of the law. As Chris Dent and Ian Cook note, the practice of stare decisis regulates the creation of new law by making it dependent on past law without "restricting the possibility for 'action' on the part of those generating the law as to make the principle, rather than the various performances and statements, responsible for the law".[94] Coke demonstrates that the solutions to contemporary problems are to be found within but also fabricated out of the past. Legal history must be crafted and re-crafted to give legitimacy to innovations, such as his construction of the Magna Carta. His standing in current law suggests that, whatever be the role of Maitland's logic of evidence within historical jurisprudence, it cannot supplant the lawyer's logic of authority.

VI SKETCHING THE OUTLINES OF A MODERN HISTORICAL JURISPRUDENCE

Berman writes:[95]

> This, indeed, is a paradox inherent in the very concept of law: that rules laid down at one time remain binding at a later time – that the prevailing law is in effect, a memorial of the past.

The study of Coke's life and work allows an understanding of the pertinence of the description of the law as a "memorial". The law is not a static likeness of the past. Just as the construction of memorials

93 Simpson, above n 47, at 86.

94 Dent and Cook, above n 58, at 138.

95 Berman, above n 43, at 1676.

is inevitably rife with contemporary political influences, the mirror which the law puts up to the past is warped and purposeful. The student of historical jurisprudence is thus dealing with a subject which is historical in its nature and ahistorical in its operation. How is such a student to "step into the breach" and resolve this dissonance?[96] I believe that a model for doing so can be drawn from Coke's *Prefaces* and augmented by Vinogradoff's theories.

Like the jurisprudence contained in the *Prefaces*, modern historical jurisprudence must rest upon an understanding of the law as the accumulation of historical advances. It must also promote a study of legal history which pays respect to the peculiar historical practices within the law. However, where the *Prefaces* conceive of the customs and contributions of an elite group of legal professionals, modern historical jurisprudence must consider all historical factors. It must perceive the law as generated not only from the labours of lawyers but from social, cultural, psychological and political contexts. Ultimately, it must take Coke's proposition that future law is governed by the past and augment it with a conscious and discerning approach to legal authorities. This is not legal history as a historian would conduct it because its purposes are different. It is not legal history as a lawyer would conduct it because its methods are different. Thus, from the *Prefaces* we can draw three central tenets of a modern historical jurisprudence:

(1) The law should be conceived of as a customary system. The culture of the legal community, as well as positive law, should be considered.
(2) Past law guides present and future law and can do so in a way which facilitates modernity and legal evolution.
(3) Change within the law must be viewed as a temporal phenomenon. The wider historical trends feeding in and out of legal change must be acknowledged.

From Coke's continuing importance to our legal system, we can make these generalisations about the relationship between law and history:

(1) Ahistorical practice lies at the heart of the common law.
(2) Legal change can require the manipulation or misapplication of history.

Taken together, the propositions above form a modern approach to historical jurisprudence. If married with Vinogradoff's model of identifying and applying legal patterns, it has much to offer contemporary legal discourse.

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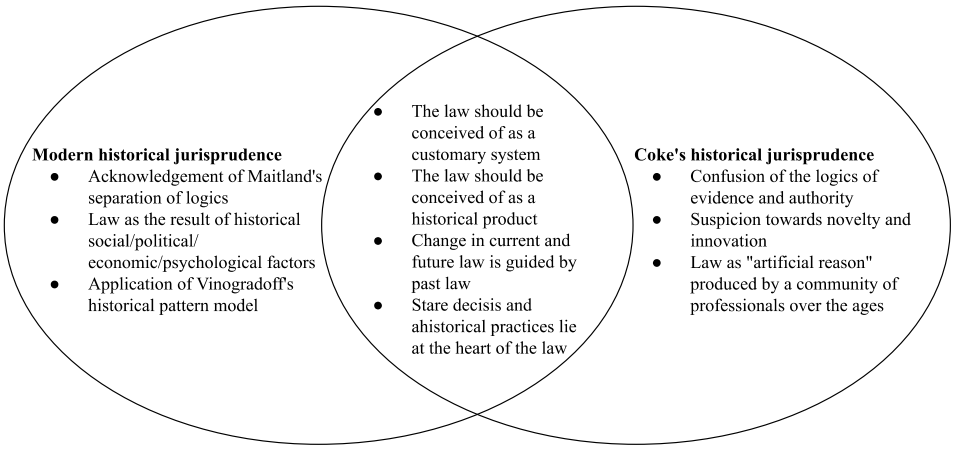
96 Vinogradoff, above n 62, at vii.

Modern historical jurisprudence and Coke's historical jurisprudence



Navigation of the complexities stemming from the last two general points identified above can be achieved using Vinogradoff's theories. Historical methods will necessarily play a role in the study of historical jurisprudence. However, the logic of authority must be drawn on as well. The law works best when it repurposes the fruits of the past to solve present problems. The logic of authority allows current laws' relationship to the past to constantly mutate and evolve. The logic put into practice by professional lawyers every day may be repugnant to a historian, but it has been a valid means of social and political change since Coke's *Reports* and earlier. Effective historical jurisprudence must acknowledge and understand the value of both logics. To do so requires that the movements of the law, rather than just its content, be considered. For instance, the decoding of the transmission of case law proposed by Maitland should be undertaken not to expose the fallacies of the current legal system, but to understand how the coding of this transmission takes place. This process will utilise historical methods without undermining the reality of historical fluidity within the law. It will allow insight into how the myths of the common law are expounded. Furthermore, if it is conducted with attention to the intersections between legal, social, cultural and political histories, it will, hopefully, contribute to an understanding of how the myths of the common law permeate beyond the legal sphere and into wider communities. This sort of study is relevant to the creation and implementation of future laws.

Another area in which this treatment of the law can be applied is that of the culture of the law. Specifically, the elasticity of this culture. Simpson's proposal that the law is best understood as a customary system has gone a long way to fill in the gaps which are left by positivist theories of law. If the law is taken as a customary system, the question becomes: how do we widen this system to

incorporate previously disenfranchised voices?[97] The problem of exclusion is acute in colonised nations such as Aotearoa New Zealand. I believe that historical jurisprudence can be applied to provide solutions. In New Zealand, it is crucial that the legal system integrate tikanga practices and values or, at the very least, evolves to serve the needs of Māori communities which it has traditionally oppressed and marginalised. This is not merely a legal or constitutional problem. It is social, cultural and psychological. Positivistic approaches do not leave enough space for these non-legal elements. Historical jurisprudence designates roles for these wider factors to come into play. Furthermore, using historical jurisprudence to construct models of the movements and evolutions of the law regarding these factors may facilitate predictions of how they will continue to interact. For example, investigating the operation of the law in times of significant constitutional or social change may help prepare for the consequences of the stress placed on the traditionally insular customary system of law by the integration of indigenous interests and methods. Like Vinogradoff's interrogation of the history of common law procedure, this would involve identifying patterns within historical legal practice and considering how those patterns might operate in a current or future context. It would be valuable to consider the way the law has responded to a change in social dynamics in the past, like the demographic consequences of the Black Death, or the circumstances of the "total wars" of the 20th century, to assess the successes and dangers of attempted and unintended changes to legal culture. This will aid in mapping the boundaries of the customary flexibility of the law, which is a necessary step in integrating colonial and indigenous systems.

VII CONCLUSION

Holdsworth wrote: "Coke was not writing legal history: he was stating modern law."[98] This statement encapsulates the paradoxical relationship between law and history. A deep reading of the prefaces to his *Reports* reveals that Coke was also developing a jurisprudence that, while not modern, has much to offer modern theories of law. In the centuries since his death, huge advances have been made in structuring the study of law and history. Just as Coke reaped the "old fields" to make his mark in the legal world, we must take the offerings of his works, bring them into line with contemporary academics, and adapt them to meet contemporary needs. There is a gap left by popular, positivistic understandings of the law. The jurisprudence of Coke's *Prefaces* may offer a way in which to fill this gap.

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97 For an application of the law as a customary system theory in regard to the integration of indigenous legal systems, see John Borrows "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill LJ 629; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.

98 Holdsworth, above n 82, at 341.