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SIR HENRY JAMES SUMNER MAINE:
A STUDY IN NATURALISTIC LAW

by

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PREFACE

Ideas, once committed to paper, assume an alarmingly definitive form; yet, such form is, of course, misleading. The definitive study appears as elusive as the great American novel; each could be re-written, if not with significant new material, at least with new and different insight. At best, an historical study is but one facet of a many-faceted set of phenomena. It is in this light that the following study of Sir Henry James Sumner Maine is offered. It, too, might have been re-cast in another form and presented from another perspective. It might, for example, have been a narrative study rather than analytical, focusing on his life rather than on his intellectual contributions. It might have included a broader definition of the many social, political and economic interests which affected his life and that of the society in which he lived and it might have discussed such problems as the influence which Maine had upon the study of sociology and anthropology to the present. While these factors are not unimportant, they did not seem to fit into the pattern of the study or into the framework of my thought about Maine and have, in consequence, been muted or omitted.

The basic suppositions brought to bear on this analysis

of Maine's thought should be made clear, lest I too, like Maine, be accused of operating from an unexamined set of values. My bias is that of historical relativism; it is an assumption that patterns of thought or conceptions are temporally bound and are devices based upon an intricate inter-play of personal and societal values which change, blend and alter even as the individual and society change, blend and alter. To consider any analysis a truth in the sense of transcending time leads, it seems to me, to too rigid and too exclusive a view of oneself and the world. I claim for this bias no originality and no unassailable justification. It seems important to mention it only because the reader should be warned that it gives to this treatment of Maine a specific cast which he might or might not find acceptable.

Certain acknowledgements of a personal kind must be made, for though the perspective is my own, that which went into the construction of that view belongs to others. Professor William O. Aydelotte, particularly, not only saved me from several individual slips of logic and points of questionable analysis but contributed, perhaps more than he knew, to my view of and enthusiasm for the study of history. The concept of patterns of thought and the role they play were originally suggested by Professor Stow Persons, as was the definition of naturalism found in the study; if they have been misused, the fault is

entirely mine. Others whose ideas contributed in one way or another to the study are too numerous to mention.

I must, however, single out Professor J. Emmett Mulvaney of United College, Winnipeg, whose searching, probing mind has expanded my understanding considerably, and the students of History 240, who suffered through many hours in the philosophy of history; their curiosity stimulated my own and their scepticism forced me to think out problems which might otherwise have remained unexamined. Finally, to my parents, whose expectations were so long delayed, and my wife, Brenda, whose ability to suffer in silence and edit with diplomacy added greatly to whatever qualities the study has, I submit my most heartfelt appreciation and thanks.

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INTRODUCTION

Written work, like works of art, is circumscribed by the mind of the writer. In law and jurisprudence as in history and political theory, sociology and literary criticism, the written essay reveals the landscape of the author's mind and reflects, in however limited a fashion, his ordering of experience as well as aspects of his sensibility. Just as "the personality of the creative artist sets the limits within which his art can move,"¹ so does the personality of the jurist, the historian, sociologist or other academician establish the boundary within which his notions of reality are enclosed. To read a legal essay or an historical monograph is not only to learn something of law or history but also to gain some notion of the author's mental world. It is to see the man as well as the subject.

The portrait of Sir Henry Maine which his written work conveys is of a sharp and penetrating mentality, capable of creating order out of a seemingly chaotic mass of dubiously related material and of making relevant the most obscure portions of ancient law. The subject of Maine's research, the growth and development of western law from remotest antiquity to the mid-nineteenth century, gave to

1

R. R. Bolgar, The Classical Heritage and its Beneficiaries: From the Carolingian Age to the End of the Renaissance (New York: Harper and Row, 1964), p. 15.

this ability a heightened importance, for he had to lead his readers through a vast array of material on ancient Irish and Indian law, on relevant segments of Roman law, as well as on Teutonic, Greek and Slavonic customary law. Maine was also a capable Indian administrator and a skilled polemicist. The same capacity which enabled him to penetrate the thicket of ancient law allowed him also to slash through the intricacies of bureaucratic officiousness to define broad policy and establish lasting precedent. His experiences in India and the notions of the proper realm of governmental activity which he developed there tended to strengthen his conservatism by adding to it a marked authoritarian strain. One can see in all Maine's work the operation of a mind capable of incisive statement and one used to holding sway over his readers. His was, in an age of indecision and insecurity, a voice of calm and reasoned argument. Maine was capable of making the firmest assertion without assuming the pugnacious tone characteristic of James Fitzjames Stephen or the strident quality of Herbert Spencer. He knew, or thought he knew, that the general framework of his view of reality was true, even if specific interpretations of it were subject to change. His assertions of truth were, thus, too assured to be shrill, too calm to be dogmatic.

Individual genius, however, is a limited quality. While the deciding factor in original work is the mind of the

writer, that mind bears the stamp of the society in which it matured. "It is moulded by the education, the language, the experience which each individual shares with a larger or smaller group of his contemporaries."² Written works, then, reveal but a portion of the writer's mental world; the portrait of this world must be fleshed out by a knowledge of the environment in which he worked. To ignore this broader context would lead to an undue emphasis upon the personal genius of the writer and exhalt him beyond just proportion. As a photographer can testify, the most insignificant subject can, against an improperly defined background, be made to appear a giant.

The intellectual tradition which helped to shape Maine's thought was that of social positivism or, to use a term suggested by Stow Persons in American Minds: A History of Ideas, naturalism. The crucial concern of nineteenth century naturalism was to apply to the study of all parts of human society the techniques and methods developed by the physical sciences, particularly anatomy, chemistry and, more recently, biology. One of the first social studies to use the new techniques was philology; then came the turn of

²Ibid.³

Stow Persons, American Minds: A History of Ideas (New York: Henry Holt and Co., 1958). See especially pp. 217-235.

mythology, history, politics and the study of society as a whole. Even the study of law, after some prodding, was subjected to the same seemingly productive technique by Sir Henry Maine. Characteristically, naturalism included the following distinctive points: a tendency to assume a synoptic view of society and to treat it as a single, organic unit; a proclivity for searching out the natural, overriding law governing the growth of that society; the use of analogous argument which tended to slip, unconsciously, from an assertion that society was like an organism into an assumption that it was an organism; a tendency to discuss social evolution in terms of stages which were not seen as conceptualizations, but as real steps on the road from savagery to civilization; and, finally, the use of a comparative technique wherein evidence from widely separated cultures could be collated and the true path of social development traced. To this pattern of thought philologists added that a discussion of the growth of societies should be restricted to those groups shown, linguistically, to be part of a single race. English naturalism early developed a sense of Aryan unity. Together, these assumptions provided the apparatus by which a large number of mid-Victorians reduced the world about them to meaning and comprehension.

The interplay between Maine's individual genius and the intellectual climate which helped condition him was especially

intricate. It was Maine's individual genius which led him to apply naturalism to the study of law and jurisprudence, and to attempt the same for politics and political analysis. It was his genius which gave to his understanding of India and Indian affairs the naturalistic coloring noticeable in his discourse on Village-Communities and in his official correspondence. Yet, the naturalism which he used was not his creation, nor did he add to its basic framework. Maine merely applied to a new area of academic concern an intellectual synthesis which he found ready to hand, already formulated and quickening the pulse of other areas of research. The truth he utilized to understand the parts of the world in which he was interested was also the truth of a wide-spread intellectual community of which he was but a single member.

Though there is some concern for Maine's personality and for the impact of his ideas in this study, its primary emphasis is upon the intellectual framework Maine used and the way in which he applied it. Maine set out to establish the study of jurisprudence and, to a lesser extent, the study of politics and of India, upon an impartial, scientific basis. His hope was, by avoiding a priori conjecture and limiting himself to empirically verifiable phenomena pertaining to law and politics, to put these studies on the same footing as the physical sciences. The verities of jurisprudence should become as eternal as those of physics

or chemistry. The task, he admitted, was difficult because of the weaknesses of specific individuals engaged in the task, but he had unlimited assurance in its ultimate success. That he failed was the fault of both Maine and the method upon which he placed so complete a reliance. Maine failed because naturalism failed.

When discussing the problems inherent in the application of the scientific method to the study of society, Maine recognized that, because of the complicated nature of the evidence, the problem of maintaining an objective view and the impossibility of experimentation, it was possible for individual studies to be unscientific. He maintained, however, that it was ultimately possible for all these problems to be set aside and for truth to triumph in the social sciences. This sanguine expectation, common to all naturalists, was the very foundation of their error. Recognizing the presence of human fallibility and a priori idealism on one level of investigation, they failed also to recognize that these tendencies were present on all levels. They did not acknowledge the ineradicable presence of human bias in social investigation. When John Stuart Mill talked about pure inductive reasoning or pure deduction, he was discussing a pious dream. The facts of induction are chosen selectively by a biased observer; the facts become facts only when a priori meaning is attached to them. The prejudice of the observer and the identity of his facts are

inextricably combined. By the same token, the deductive method, so favored by the naturalist, was not pure. Perhaps even more than the process of induction, that of deduction was affected by the all-pervasive subjectivity of the investigator, himself a complex mixture of individual genius and cultural conditioning. Maine thought it possible to create a statement of law and society which was truthful and without value judgment. He created, instead, a statement so charged with his own and his society's values as to provide an excellent insight into both. This, as much as the simple assertion that Maine was a naturalist, is the thesis of this essay.

Ultimately, one must suggest that Maine, while not by any stretch of the imagination a second-rate thinker, was yet one of the second rank. His was not the mind either to transcend the bounds of naturalistic thought or to add to its essential content. His contribution was less dramatic, further from the realm of the seminal mind. Maine's lot was that of the greatest number of intellects in any age: to fill in, partly and incompletely, some of the previously blank and unexamined areas suggested by the dominant thought of the time.

Because Maine's relationship with his intellectual surroundings was so intricate, anyone treating of his ideas is faced with the difficult problem of finding a balance between what was specifically his idea and what

belonged to his age. The examination of Maine's thought which follows is a "life and times" study, attempting to account not only for Maine's own genius but also to indicate the milieu from which he received his inspiration. Though Maine is, hopefully, seldom far from the center of the stage, there have been times when it was necessary to dwell, at some length, upon the intellectual environment. In order to overcome some of the difficulties inherent in the attempt to juggle two lines of investigation, one relating to Maine individually and the other to the broader climate of opinion, both of which seemed often to compete for primacy of attention, particular care was paid to the problem of organization. Ten chapters have been grouped into four parts, each of which concentrates upon one element of analysis.

Because Maine's name has, in the time since his death in 1888, become the exclusive franchise of a limited number of academics specializing in anthropology, jurisprudence or nineteenth century British history, Part One, including Chapters I and II, deals with his biography. Maine's life in England was active; he was, simultaneously, a scholar, an advocate of educational reform, a journalist and author of half a dozen books on jurisprudence, international law and political theory. The one major break in these multiple activities came during the years from 1862 to 1869, when he became a member of the British administrative staff

in India. So important was his Indian experience to his later intellectual development that a separate chapter on his activities there seemed necessary to augment the first chapter.

Part Two is devoted to a discussion of the naturalistic framework within which Maine cast his thought. Since Maine did not create this framework, Chapter III is, in one sense, an interregnum, wherein Maine's own work is momentarily ignored in favor of a detailed examination of naturalism as it developed in the years preceding and overlapping his productive period. Only in the fourth chapter does Maine's writing again become important, here to show how completely he duplicated, in his own limited sphere of inquiry, the broader framework. The fifth chapter is less concerned with the pattern of Maine's thought than with its growth and development. Maine's ideas may have been conditioned by the intellectual environment within which he worked, but one cannot assume that this conditioning process was immediate or complete. Both the naturalistic framework and the specific content of Maine's thought came to him gradually, over a long period of time.

Part Three, Chapter VI, VII and VIII, contains a discussion of how Maine applied his organon in three crucial areas: jurisprudence, political theory and Indian administration. In each case, the concern was not only to determine what Maine had to say or even how he said it, but also

to determine the context within which his analysis was advanced. Maine spoke and wrote and thought, not in a vacuum, but in the midst of a cacophony of voices, many raised in opposition to what he argued, some in agreement. The chapters on Maine's application of naturalism attempt to put it within its historical context.

The last segment of the study, Part Four, including Chapters IX and X, attempts an evaluation, not of the veracity of Maine's ideas, but of their impact upon the British and American intellectual scene. Neither chapter is a complete analysis of how and to what extent Maine added to or changed the general intellectual development of either nation. The materials and the techniques available do not allow of this. Sufficient evidence was found, however, to indicate that Maine influenced several individual jurists, historians and popular philosophers and that the brilliance of his work was broadly recognized even by those who did not accept his specific formulations. One must conclude, however, that his influence was of the same proportion as his work: it was limited to those persons interested in the specific areas of naturalistic law, political theory or Indian administration. His work did not, apparently, affect all those interested in naturalism as a mode of thought, especially if their own interest was not specifically in these three areas of activity.

Because his work led him into an amazingly wide variety of fields, this study has had to deal with an assortment of materials not traditionally the prerogative of the historian. Of particular importance is the discussion of jurisprudence. In the normal course of events, the quip that "every profession is a conspiracy against the laity,"⁴ is not only an accurate assessment but a necessary one. The best studies of jurisprudence can be written by persons steeped in the technicalities of law. A knowledge of Contracts or Real Property must, admittedly, allow any essayist dealing with Maine's jurisprudence to penetrate more readily into the heart and substance of his work and to examine more knowledgeably the labyrinthine passages of that mysterious science.

There are, however, circumstances which do not fall within the normal course of events. When the historian is released from his traditional political concerns and allowed to encompass the study of man's past in its totality, he must, perforce, become familiar with areas of knowledge heretofore the prerogative of other disciplines and professions. Often he is obliged to discuss the outer configurations of another discipline and do with it the best he can. Yet, being on the outer fringes of jurisprudence, for example, has its advantages, however limited. It enables

⁴C. F. Mullett, "Value of Law to Historians," 9 Missouri Law Review 146 (1944).

the observer to see broad outlines, to trace general developments and to observe the connection between that profession and its work with other disciplines and other professions. His view, unsullied by unknown difficulties and uncluttered by unfamiliar arguments, is often clearer than that of the professional. It is easier to see a forest from the fringes than from the interior.⁵

Ultimately, the parts of this study dealing with jurisprudence are the result of external observation. Yet, insofar as Maine's own work covered many subjects not now thought necessary for juristic studies, the degree of specifically legal knowledge required to discuss his ideas would appear to be less than would have been the case with someone--Sir John Salmond, for example--more dear to the hearts of lawyers. Beyond this, however, there is the legitimate argument that insofar as Maine's ideas, even in jurisprudence, were common to his age and were a part of the general intellectual fabric, and insofar as this study of them is limited to this context, lack of technical competence is less important. Maine was, as is any jurist, a product of, as well as a contributor to, not only a restricted discipline but also the broad intellectual environment of his age. In this sense, his work is the prerogative of the historian equally as much as of the professional jurist.

⁵Ibid.

PART ONE

THE MAN

CHAPTER I

SCHOLARSHIP AND SOCIAL MOBILITY:
MAINE'S LIFE IN ENGLAND

The question of motive is one which returns again and again to haunt the biographer. Without it, the historian's understanding of his subject's life must always remain incomplete. In those instances, rare as they are exciting, wherein an historical figure has explained motive and laid bare the result of introspection, the historian's task is but partially solved; he has then to grapple with the question of the complexity of motive and the question of veracity: was the subject's explanation complete and truthful? When, however, the subject of a biography is peculiarly reticent about a motive, the historian's problem is magnified many times over. Caught between the need to discuss motive and the absence of even the most primitive sources, the search for a guiding thread becomes problematical and conclusions conjectural in the extreme. Without meaning to, perhaps even without liking to, the historian must become an impressionist, painting a man's character in wraith-like strokes, hoping to capture some, at least, of the essence of his life. This is the problem with which Maine's biographer must ultimately deal.

Sir Henry Maine seldom mentioned his private life; those occasions when he indicated the sources of particular

ideas were infrequent and insufficient to postulate a general pattern. Nor do his contemporaries furnish many clues. His friends, his students and even his semi-official biographer were singularly quiet about those personal motives which might logically be expected to have contributed to an explanation of his life. Some clues exist, however, in descriptions of his life and character and in discussions of his activities, which, when combined with a broad knowledge of contemporary English social attitudes and institutions, make possible some plausible conjectures concerning the basic motivational framework within which Maine lived and acted and thought. Briefly stated, Maine seems to have been acutely influenced by the relatively meagre or unexceptional nature of his social origins and to have attempted to use education and membership in the intelligentsia as a means of improving his station. It is possible to see Maine's life in two parts: the early years during which he pursued a successful career as a student, obtaining first class honors and gaining, by his efforts, a position in the academic profession, and the later years, beginning with his teaching career, wherein his life assumed a pattern distinctly characteristic of the English intelligentsia. Professor, journalist, administrator and author of some of the most exciting works in the history of English jurisprudence, Maine lived fully his life in that establishment.

In every society, "there is a differential evaluation of the occupational roles that men have to fill as a normal and necessary part of their daily lives."¹ In normal situations, there exists a certain amount of mobility among the various strata of society which accounts for "the movement by a man into an occupational position that is either more or less valued than the one his father held."² The channels which were, traditionally, available to an individual attempting to rise within a European social system were military or governmental service, the church, and commercial or industrial enterprise. In the nineteenth century, however, especially in England, "education became an increasingly essential prerequisite, both for social mobility and for maintaining the high position into which one was born."³ Educational institutions, particularly the universities, became one of the accepted means of promoting the process of social mobility. In England, the result of an extensive use of universities, particularly by the middle class, was the creation of a distinct group which can best be called the intelligentsia.

The world of the English intelligentsia has been

¹Bernard Barber and Elinor G. Barber (eds.), European Social Class: Stability and Change (New York: The Macmillan Co., 1965), p. 2.

²Ibid., p. 4.

³Ibid., p. 7.

described as one in which family connections were important in revealing "some caucus of power of influence" in the formation and moulding of English culture.

Such an influence was exerted by an aristocracy of intellect which began to form at the beginning of the nineteenth century. A particular type of middle class family then started to intermarry and produced children who become scholars and teachers. ⁴

Entry into the intelligentsia proved to be relatively open, especially to other members of the middle class but also to those whose claim to this status was somewhat tenuous. A public school education was not required for membership, although a university education or professional status was essential. A successful educational career and the attainment of high honors at the university meant that "no obstacle then remained to prevent the man of brains from becoming a gentleman."⁵ Though "the intellectual aristocracy never confused themselves with the real nobility and ruling class,"⁶ entry into that group proved an acceptable form of upward social mobility and presented a goal to which a person from a respectable but not propitious background might legitimately aspire.

⁴
Noel G. Annan, "The Intellectual Aristocracy," Studies in Social History: A Tribute to G. M. Trevelyan, ed. by J. H. Plumb (London: Longmans, Green and Co., 1955), p. 243.

⁵
Ibid., p. 247.

⁶
Ibid., p. 248.

Maine came from such a background. His family could best be described as respectable but unpretentious. Sir M. E. Grant-Duff, author of a Memoir, dismissed Maine's family connections in a single, short, paragraph:

Henry James Sumner Maine was the son of Dr. James Maine, who, himself, a native of Kelso, on the Scottish Border, married Eliza, the fourth daughter of Mr. David Fell, of Caversham Grove, a gentleman of good position residing in the neighbourhood of Reading. He was born near Leighton on August 15, 1822, and spent his very earliest years in Hersey; but family difficulties soon supervening, he was removed to England, and was brought up thenceforth exclusively by his mother, a clever and accomplished woman, who resided chiefly at Henley-on-Thames. ⁷

He was not, however, wholly without connections. In 1829, his godfather, Dr. Sumner, the Bishop of Chester and later Archbishop of Canterbury, secured for him a nomination to Christ's Hospital School. At Christ's Hospital, Maine very soon showed remarkable ability, sufficiently so that "in 1840 he went as an Exhibitioner of Christ's Hospital to Pembroke College, Cambridge."⁸ That Maine should have attended Cambridge rather than Oxford might well have been chance, but it also reflected a contemporary middle-class distrust of the Tractarian emphasis at Oxford.⁹ In later

⁷ Sir M. E. Grant-Duff, Sir Henry Maine: A Brief Memoir of his Life, With Some of his Indian Speeches and Minutes (New York: Henry Holt and Co., 1892), p. 2.

⁸ Ibid., pp. 2-3.

⁹ Noel G. Annon, "The Intellectual Aristocracy," p. 285.

years, Maine was known to have remarked to intimate acquaintances that he considered his Oxford contemporaries "just a little off their heads" because of the "extraordinary farrago of notions" to which they were introduced, including "Aristotle's Ethics, Patristic Theology, Formal Logic, High Church enthusiasms, and what not, which their University so bounteously fed her more studious sons during the Forties."¹⁰

Pembroke was a small college, and not wealthy, although it had "fostered a goodly host of most distinguished men," the most prominent of whom was Edmund Spenser.¹¹ From the first, Maine showed that he intended to turn his university years to good account; his undergraduate career was particularly brilliant.

In 1841 he was elected a Foundation Scholar of his College. In 1842 he gained the Chancellor's medal for English verse, the Camden medal for Latin hexameters, and the Browne medal for a Latin ode. In 1843 he gained two more Browne medals--the one for a Latin ode, the other for a Greek and a Latin epigram--becoming also Craven University Scholar.

.....

In 1844 he was Senior Classic, and having been able without much difficulty, though at the expense of a considerable loss of valuable time, to comply with

¹⁰

Sir M. E. Grant-Duff, Sir Henry Maine, p. 10.

¹¹

Brian W. Downs, Cambridge Past and Present (London: Methuen and Co., 1926), p. 121.

the perverse regulation which then obliged candidates for the Chancellor's Senior Classical Medal to take Honors in Mathematics, he tried for and won that high distinction. ¹²

In an extended competition with Mr. W. G. Clark of Trinity, "sometimes one got a University prize, and sometimes the other. The whole College was interested in a way that you would hardly now understand. The final victory remained with our late Master Maine who was Senior Classic and Senior Medallist in 1844."¹³ Charles Astor Bristed, "an American gentleman,"¹⁴ wrote an account of his experiences at Cambridge, in which Maine appeared as an exceptionally talented, driving and forceful student, with a strongly competitive instinct.¹⁵ Describing Maine's contest with Clark, Bristed said:

The result of the examination for the Chancellor's Medals is declared very soon after that of the Tripos. The two old competitors had a hard fight for it again, and again the Pembroke man came out first by a neck. ¹⁶

¹²

Sir M. E. Grant-Duff, Sir Henry Maine, p. 3 and p. 6.

¹³

Quoted in Ibid., p. 8.

¹⁴

Ibid.

¹⁵

See Charles Astor Bristed, Five Years in an English University (London: Sampson Low, Marston, Low and Searle, 1873).

¹⁶

Ibid., p. 156.

While there was undoubtedly the element of personal preference and of individual competitiveness in Maine's undergraduate success, it may also not be impossible that he saw in academic honors an entry into a superior society and the road to unquestioned gentlemanliness.

The rewards of scholarship were not long in coming. While still an undergraduate, Maine's mark as an outstanding scholar won him membership in the Cambridge Conversazione Society, more commonly known as the Cambridge Apostles.¹⁷ This remarkable society, limited to a dozen members, each of whom had "more than ordinary talents, as well as a distinct and original personality,"¹⁸ exposed Maine to the company of such people as Sir William Harcourt, Fitzjames Stephen and E. H. Stanley (Lord Derby), all his contemporaries.¹⁹

The eminence achieved in after life by almost every one of those early Cambridge Apostles shows that collectively they must have possessed, besides their talent and genius, a keen and critical perception of promise very remarkable in men so young.²⁰

17

See Frances M. Brookfield, The Cambridge 'Apostles' (New York: Charles Scribner's Sons, 1907), p. 4. See also Charles Astor Bristed, pp. 157-158.

18

Ibid., pp. 4-5.

19

A. G. Gardiner, The Life of Sir William Harcourt (London: Constable and Co., 1923), I, p. 40.

20

Frances M. Brookfield, loc. cit.

Initially, at least, contact among the Apostles was primarily intellectual; their meetings were informal and relaxed, a continuation in a comfortable environment of academic combat.

The usual procedure was to meet every Saturday night in the rooms of the one whose turn it was to read the essay, essays being read by each of them in regular succession. After preliminary precautions such as the sporting of the oak or outer door, as well as the locking of the inner one, the host of the evening would provide his guests with light refreshments, which invariably included coffee and anchovies on toast, after which he gave them his own thought--frank and free. Then the others replied, agreed, disapproved, criticized, as conscience or as humour dictated. ²¹

While such activities gave to the members unparalleled opportunity for sharpening their wit, the advantages of membership did not cease there. Apostleship did not end with college life. In the first place, members resident at Cambridge, or visiting, could attend meetings of the younger men; "to their last days...membership constituted a bond of friendship which revived in them the freshness of youth."²² Again, the yearly Apostolic dinner allowed members of all ages to bring "the tale of the newest success and latest laurels" to add interest to the proceedings.²³

Membership in the Apostles often provided entry into

²¹
Ibid., p. 6.

²²
Ibid., p. 12.

²³
Ibid., p. 13.

the illustrious Sterling Club. Maine eventually belonged to both, though it is not clear whether his membership in the one arose from his association with the other.²⁴ Membership in the Sterling Club, or even acquaintance with its members stemming from the common bond of Apostleship, was always of great help in beginning a long and rather laborious climb to renown. Charles Bristed's observations as an outsider were probably an accurate evaluation of this connection.

But what I mean by calling the Sterling Club an innocent and effective camaraderie, is that its members, controlling as they did among them many avenues of approach to the public and means of influencing the public mind, were able to benefit one another, and help on one another's reputation very much.... Thus when a member of the club publishes, one of the fraternity has a footing in the Edinburgh, another in the Quarterly, a third in the Fraser, a fourth in Blackwood, and so on--among them all there is a pretty good chance that his beauties will not be hid, or the reading community allowed to overlook his merits. 25

Maine's election to the Sterling Club occurred in 1877, by which time he had already spent a quarter-century writing voluminously for the popular press, including the Edinburgh, the Quarterly and even Blackwood's.

Maine had, then, by 1845, used his ability to promote his entry into the English intelligentsia. As yet, however,

²⁴

Charles Astor Bristed, Five Years in an English University, pp. 157-58.

²⁵

Ibid., p. 159.

his position was insecure in the way peculiar to persons untried and untested. While the doors were open, he had yet to show that he could take advantage of his opportunity. The first step came in 1845, when, lacking a vacancy at Pembroke, he accepted an invitation from Trinity Hall to become Tutor there.²⁶ This was followed, in 1847, by his appointment, at the "very unusually early age of twenty-five," to the position of Regius Professor of Civil Law.²⁷ Maine had, indeed, achieved a great deal in a very short time; in the cold and impersonal terms of the social analyst, Maine had attained a significant "instance of individual social mobility."²⁸

The sense of urgency with which Maine had constantly to live was indicated by Franklin Lushington, who knew

26

There is an admirable description of Maine at this stage in his career left by an unknown student: "I was curious," said a student coached by Maine at Trinity Hall, "to see how this tutor of mine, so young as he was, about two years my junior, would get on at first.... The result removed all doubts and surpassed my most sanguine expectations. I could feel that I was being admirably jockeyed. He had the greatest dexterity in impressing his knowledge upon others, made explanations that came to the point at once and could not be misunderstood, corrected mistakes in a way one was not apt to forget, supplied you with endless variety of happy expressions for composition and dodges in translation." Quoted in Woodrow Wilson, "A Lawyer With a Style," Atlantic Monthly, LXXXII (1898), p. 365.

27

Sir M. E. Grant-Duff, Sir Henry Maine, pp. 6-7.

28

Bernard Barber and Elinor G. Barber, European Social Class, p. 5.

Maine from 1843 to 1847, and who left a description, not only of Maine's intellectual powers but also of the nervous force that drove him:

Those who were intimate with him during these years of his academical course will not easily forget his face and figure, marked with the delicacy of weak health, but full to overflowing with sensitive nervous energy--his discursive brilliancy of imagination and intellect--his clear-cut style and precise accuracy of expression--and his absolute power of concentrating himself on the subject immediately before him. His mind was so graceful that strangers might have overlooked its strength, while the buoyancy of his enthusiasm was never beyond the control of the most critical judgment. His only fault lay in the habit of burning his candle too fast, by working without intermission and without any sort of physical recreation, for which indeed he had no natural turn. It was hard to drag him away from his rooms and his books, even for the ordinary minimum of constitutional exercise, though his spirits and width of interest made him at all times a joyous companion.²⁹

This drive, so characteristic of Maine's early years, never quite disappeared. The frequency with which he wrote and the speed with which he reduced large bodies of complicated information to comprehension was always remembered by his friend, Sir A. C. Lyall. Maine could, said Lyall, "read a thick volume in such a way as to appropriate what concerned him in it, while an ordinary man read a hundred pages."³⁰

Lyall continued:

In just such a swift and penetrating spirit he seems to have read India, the sacred literature, the

²⁹

Quoted in Sir M. E. Grant-Duff, Sir Henry Maine, p. 7.

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Sir A. C. Lyall, E. Glasson and F. von Holtzendorff, "Sir Henry Maine," ⁴ Law Quarterly Review, p. 130.

ponderous histories, the innumerable volumes of official records, and the heavy bundles of papers that came before him as a member of the Government. He could throw a succession of rapid glances over its diversified social and political formation; and his remarkably accurate apprehension of its salient features commanded the admiration of all who knew the difficulty of such intellectual exploits. 31

Maine spent the greater part of the remaining years of his life in ways characteristic of the middle class academic of the nineteenth century. In his personal life, for example, Maine tended to follow the pattern established by the intelligentsia of perpetuating itself unto the second or third generation. Children from the academic community tended to remain within the profession and to marry, in turn, into families "whose fortune and upbringing matched their own." The result of this intermarriage was to tighten the structure of the intelligentsia; "the same names recurred as professors and tutors and school masters; and by virtue of their affiliations their views on academic preferment carried weight."³² Maine's marriage to his cousin, Miss Jane Maine, in 1847, resulted in a small family of two boys, and the potential beginning of an academic dynasty.³³ Both of Maine's sons attended Cambridge, the eldest, Charles Sumner Maine, matriculating at Trinity College in

31

Ibid.

32

Noel Annon, "The Intellectual Aristocracy," p. 243.

33

Sir M. E. Grant-Duff, Sir Henry Maine, pp. 10-11 and 74.

1880.³⁴ That the dynasty never materialized was due largely to the great misfortune which befell Maine's eldest son. Though never in good health, Charles Sumner Maine had shown early promise; his untimely death shortly after his father's, prevented a transition from promise to fulfillment. A successful start at Cambridge, where he obtained his A.B. in 1873 and his A.M. in 1879³⁵ was followed by service in Egypt and by a brief career in law. Charles Sumner was clerk of assize on the South Wales Circuit when he died, "a young man of much promise."³⁶

That section of the Victorian middle class which successfully managed to rise to positions of influence and respect was also active in influencing public taste through the use of periodical literature. One of the dominant characteristics of this group was that "in literary life they were the backbone of the Victorian intellectual periodicals."³⁷ Part of this activity was undoubtedly idealistic--

³⁴

See Cambridge University, The Book of Matriculations and Degrees: A Catalogue of Those Who Have Been Matriculated or Admitted to any Degree in the University of Cambridge from 1851 to 1900 (Cambridge: Cambridge University Press, 1902).

³⁵

Ibid.

³⁶

Sir M. E. Grant-Duff, Sir Henry Maine, p. 74. Henry Hallam Maine, the younger son, was not listed as having been admitted to any degree, nor is he mentioned in any published material on Maine.

³⁷

Noel G. Annon, "The Intellectual Aristocracy," p. 285.

a desire to communicate, to inform and to educate the rapidly expanding literate public. Often, however, work outside the university was an economic necessity. Maine's testimony before the Cambridge University Commission in 1852 pointed out the need to augment his normal income. As Regius Professor of Civil Law, Maine received an endowment of £33 a year out of Treasury fees; in addition, the Government granted another £92 a year in his case; this was not, however, an endowment but a grant not designed to be passed on to his successor. From the students, he obtained five Guineas from each person taking lectures and seven Guineas from anyone disputing in School. Over a twenty year period these fees had averaged only £126 a year.³⁸ Out of this limited income the Regius Professor had to account for several permanent expenses: the position carried no residence, though quarters could be rented from the College, and the lecture hall, known as the Law School, was an apartment rented by the Professor from the

38

Great Britain, Parliamentary Papers, Vol. XLIV (Reports, Vol. V), 30 August, 1852, "Report of Her Majesty's Commissioners appointed to inquire into the State, Discipline, Studies and Revenues of the University and Colleges of Cambridge," p. 78.

The Regius Professorship, founded in 1534 by Henry VIII, carried with it the responsibility for lecturing four times a week; in addition the professor was "ordinary president at the disputations on Law, or public Exercise, performed in the Law School by candidates for the degrees of B.C.L. and D.C.L."

University.³⁹ Financial need, then, drove Maine into other pursuits. In a very effective understatement, Maine noted that seldom was the University "the theatre of the Professor's most engrossing labors."⁴⁰ Maine's diversions were many. He wrote first for the Morning Chronicle then under the direction of John Douglas Cook, for the Pall Mall Gazette, the St. James Gazette⁴¹ and for Thackeray's Cornhill Review. But it was his work on The Saturday Review in which he was most interested. It was this journal that remained, from 1855 to 1861, "Maine's principle means of communicating with the public outside that small portion of it which was engaged in legal studies."⁴²

The world of periodical literature was in a state of turmoil. Mid-century intellectuals realized that the composition of the reading public had changed radically in the preceding years and that there had been a corresponding change in the character of the popular journal. Whether this change in style and content was an improvement upon the traditional forms, or whether the popular journals were

³⁹
Ibid., p. 78.

⁴⁰
Ibid., p. 79.

⁴¹
Sir M. E. Grant-Duff, Sir Henry Maine, p. 75.

⁴²
Ibid., p. 20.

successful in their attempt to educate the newly literate classes, was heavily disputed. It was generally admitted that the purpose of periodical literature was to educate and to inform all segments of the population and to introduce them to the latest and most appropriate of recent opinion. Literature was, as T. H. Huxley said, "in some measure...a class question," however, and what constituted propriety had to be "judged on very different grounds according to the classes we are considering." For the lower order, said Huxley:

Information, if aimed at at all, must be in an attractive form while fiction itself has noble uses in raising the ignorant mind used to the low and coarse tone of its own public, to know what is the standard of opinion and sentiment accepted among the more cultivated and gentler bred. ⁴³

Huxley's argument, that popular literature had to be written to suit its audience, applied equally to the new middle class, not so much because of its lack of ability or comprehension but because it was so engrossed in practical concerns that the normal, leisurely pace of scholarly examination was no longer appropriate. Walter Bagehot made a similar point when he noted that:

It is a peculiarity of our times that we must instruct so many persons. On politics, on religion, on all less important topics still more every one must be taught to think rightly. Even if we had a profound and far seeing statesman, his deep ideas and long reaching

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Thomas H. Huxley, "Our Modern Youth," Fraser's Magazine, LXIII (1863), p. 123.

vision would be useless to us, unless we could impart a confidence in them to the mass of influential persons, to the unelected Commons, the unchosen Council, who assist at the deliberations of the nation. In religion, the appeal now is not to the technicalities of scholars or the fictions of recluse schoolmen, but to the deep feelings, the sure sentiments, the painful striving of all who think and hope, and this appeal to the many necessarily brings with it a consequence: we must speak to the many so that they will listen, that they will understand. It is of no use addressing them with the forms of science or the rigor of accuracy, or the tedium of exhaustive discussion. ⁴⁴

The bright hope of the publicist was now the "review-like essay and the essay-like review"⁴⁵ designed to appeal to the "merchant in the railway, with a head full of sums, an idea that tallow is 'up,' a conviction that teas are 'lively' and a mind reverberating perpetually from the little volume which he reads to...the railway, to the shares, to the buying and bargaining of the universe."⁴⁶

Bagehot recognized that the essay journals filled this new role well but not without error.

Their small bulk, their slight pretension to systematic completeness--their avowal, it might be said, of necessary incompleteness--the facility of changing the subject, of selecting points to attack, of exposing only the best corner for defense, are great temptations. ⁴⁷

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Walter Bagehot, "The First Edinburgh Reviewers," Works (Hartford: Travelers Insurance Co., 1889), I, pp. 4-5.

⁴⁵

Ibid., p. 6.

⁴⁶

Ibid., p. 4.

⁴⁷

Ibid., p. 6.

Leslie Stephen's description of the weaknesses of the early Edinburgh reviewers seems to have remained a common complaint throughout the Victorian period.

A clever man has turned over the last new book of travels or poetry, or made a sudden incursion into foreign literature or into some passage of history entirely fresh to him, and has given his first impression with an audacity which almost disarms one by its extraordinary naiveté.... The young gentlemen who write in these days have a jaunty mode of pronouncing upon all conceivable topics without even affecting to have studied the subject. 48

The effect of this carelessness upon the reading public was much feared. Huxley, particularly, pointed to the danger that:

Newspapers, reviews, magazines, railways publications, all bring a quantity of miscellaneous and hasty opinion before the public; opinion on every variety of subjects and information given out in an ex cathedra tone which masks its shallowness. The young read indiscriminantly, digest a small portion of this diluted knowledge and imbibe in toto the easy spirit of decision. It would not be possible for them to form an opinion on a tenth part of the subjects thus brought before them, but they can easily retail opinions, and thus at once deceive themselves and gratify their vanity by having something to say when any of this miscellaneous hoard is turned up in society. 49

While the special needs of the audience were held responsible for the decline in journalism, part of the blame was directed, as well, to the practice of anonymous author-

48

Leslie Stephen, "The First Edinburgh Reviewers," Hours in a Library (New York: G. P. Putnam's Sons, 1894), II, pp. 448-49.

49

Thomas H. Huxley, "Our Modern Youth," pp. 122-23.

ship. Lord Lytton, for example, thoroughly castigated this when he argued that "it is a practice which favours the ignorant at the expense of the wise, and skreens [sic] the malignant by confounding them with the honest; a practice by which talent is made obscure that folly may not be detected, and the loathsomeness of vice may be hidden beneath the customs which degrade honour."⁵⁰

These criticisms, to some degree, also applied to Maine's journalism. His writing was often facile, he did cover an amazing range of subjects about which he could have had but the slightest knowledge, and he was, under the cover of anonymity, often grossly insulting, especially in the pages of The Saturday Review. The Saturday Review was an exciting venture, bringing together people of the calibre of George Venables, Goldwin Smith, Vernon Harcourt, M. E. Grant-Duff and James Fitzjames Stephen, as well as Maine on the regular staff. Occasional articles were also contributed by Max Müller in philology and comparative mythology, by Mark Pattison who reviewed philosophical works and classical editions, George Henry Lewes, who wrote frequent scientific articles and reviews of works in science, philosophy, psychology and fiction, and Walter Bagehot, who did a series of articles on government, though he did not

50

Edward Bulwer Lytton, England and the English (London: Richard Bentley, 1834), II, pp. 28-29.

become a regular contributor.⁵¹

Maine's position on The Saturday Review was directly connected with his university days; the journal was, indeed, almost the public voice of the older Apostles.

The prevailing complexion at the beginning was Cantabridgian. Venables had taken the Chancellor's Medal and first class in the classical tripos at Cambridge in 1832.... Harcourt was a first in classics and a senior optime in mathematics in 1851; James Fitzjames Stephen, although he was graduated without distinction because of a distaste for mathematics, had won considerable reputation for the brilliance of his debates in the Cambridge Union, Harcourt supporting the liberal position and Stephen the conservative. As has been noted, most of these men were members of the Apostles. 52

With a stable of young intellectuals of this calibre, the principles reflected by The Saturday Review could only nominally be those of the proprietors. It was too much to keep all the contributors in line, especially when, as with Maine, they wrote on such broad selection of topics about which feelings were so strong. Reviews of literature often elicited opinions which were highly emotional and highly personal, as, for example, Maine's reaction to Walt Whitman's Leaves of Grass. Maine quoted extensively from the Whitman work, apparently in approval, but concluded:

51

Merle M. Bevington, The Saturday Review, 1855-1868: Representative Educated Opinion in Victorian England (New York: Columbia University Press, 1941), pp. 25-26.

52

Ibid., pp. 26-27.

After poetry like this, and criticism like this, it seems strange that we cannot recommend the book to our readers' perusal. But the truth is, after every five or six pages of matter such as we have quoted, Mr. Whitman suddenly becomes exceedingly intelligible, but exceedingly obscene. If the Leaves of Grass should come into anybody's possession, our advice is to throw them immediately behind the fire. 53

Similarly, much that went into Maine's castigation of Thackeray's lectures on the four Georges reflected Maine's own mixed reaction to the American phenomenon and his own aversion to openly challenging accepted and traditional institutions.

Mr. Thackeray addresses audiences which are quite unable to follow him in his distinctions between the kingly office and its incumbent; and, in decrying a King, he panders, probably without knowing it, to a very vulgar prejudice. In the judgment of Americans on England, the great element of error is always their over-estimate of the personal influence of the Monarch.... If you mention a King of England to an American, you speak to him of a person whom he believes to have infinitely more influence on our social and political life than the most powerful party-leader in the United States. Tell him that one of our Monarchs was a lunatic, and he infers that the community which submitted to a madman must have been afflicted by some decrepitude of intellect. Depict to him an English Sovereign as a monster of debauchery, and he is persuaded at once that the immorality of the Court radiated to every corner of the land which it controlled. 54

Though Thackeray might, Maine conceded, be convinced of the truth of his statements, "where is this cynical frank-

53

Sir Henry Maine, "Leaves of Grass," The Saturday Review, I (15 March, 1856), pp. 393-94.

54

Sir Henry Maine, "Mr. Thackeray and the Four Georges," The Saturday Review, I (15 December, 1855), p. 106.

ness to end?"

Is the dirty linen of Englishmen always to be washed in public? Are the principles applied by Mr. Thackeray to be carried to their legitimate consequences, and are we all to indulge systematically in that indecent garrulousness into which a despicable vanity seduced Lord Byron? 55

The lack of sympathy reflected in these articles for the capacity of the American democracy to produce acceptable literature or to make fine judgments was a part, however, of a broader scheme of things. The policy of The Saturday Review and of the majority of its writers coincided on the question of democracy. The right of the well-born, the intelligent and the propertied to rule was never doubted. Maine, particularly, was afraid that the masses, once admitted to political power, would become the instruments of tyranny, controlled by a few unscrupulous men, using the newspaper as the tool of deceit. The manipulator of public opinion in a democratic society could always take advantage of having a semi-literate, easily-swayed, reading public. Already he saw the signs of decay in the weekly press.

As for the weekly newspapers, they have degenerated into the toadies of the great daily journal, and if there be one form of this toadyism more ecstatic than another, it is that exhibited by the jokers of the hebdomadal press. All conversation, all action, all literature, is full of the proof that we

55

Ibid., pp. 106-107.

live under a tyranny; and, except for a small protesting minority, nobody seems much to mind it. 56

Above all, the attitudes of The Saturday Review and Maine coincided in being invincibly English. In his analysis of foreign questions, Maine often concluded that that government was most evil which departed most from the English model. None, of course, could match the truly English example. Maine's discussion of the French Senate under Louis Napoleon contained an implicit, negative comparison of it with the responsible character of the House of Lords, and an explicit condemnation of its membership.

Looked at from our insular point of view, the Senate seems to have turned out the exact sort of political body which it might have been expected to become. Composed of second or third-rate men, who have not, perhaps, the firmest confidence in the solidity of the structure of which they are an ornamental pillar ...we should have anticipated that its members would do the least possible work on the easiest possible terms, follow the first precedent which offered itself, slumber away their Session in gorgeous liveries on purple cushions, and pass their recess in hoarding or squandering the abundant stipend by which their services are purchased. 57

While the sins of the French under Louis Napoleon were clear, those of the small state of Sardinia were much less so; the mercies of having a non-military, secular state made Sardinia worthy of English support and affection to a

56

Sir Henry Maine, "Our Newspaper Institutions," The Saturday Review, I (3 November, 1855), p. 2.

57

Sir Henry Maine, "Lectures for Senators," The Saturday Review, I (26 January, 1856), p. 223.

degree which France never warranted. In May, 1856, Maine wrote:

The real similarity of Sardinia to England arises from her having, like England, depressed military and spiritual authority to their proper level. And her true importance in Italy proceeds, not from her temporary quarrel with the Holy See, but from her permanent and necessary antagonism to every government which has renounced, or never obtained, the supremacy of the civil power--the most precious acquisition of modern civilization. So long as Sardinia is the only really civilized State to the south of the Alps, it will be vain for Austrian bayonets to oppose her progress in Italy. 58

The one exception to this convenient measure of political worth was the United States, a nation which Maine was always to regard with a complex mixture of fear and compassion. American democracy, he feared, American literature he dismissed, American newspapers he considered to be filled with "obscenities, profanities and personalities,"⁵⁹ while American Presidents and politicians were too often irresponsible.⁶⁰ Yet, always there was an unwillingness to condemn out of hand. In later years, Maine was to hold the American Senate as an example of how

58

Sir Henry Maine, "Parma," The Saturday Review, II (31 May, 1856), p. 95.

59

Sir Henry Maine, "Memoirs of James Gordon Bennett and His Times," The Saturday Review, I (3 November, 1855), p. 15.

60

Sir Henry Maine, "Uncle Tom in Politics," The Saturday Review, II (25 October, 1856), p. 562.

best to contain democracy. And in The Saturday Review for October 25, 1856, he castigated the English press for meddling unduly in American affairs.

The entire English press, daily, weekly, monthly and quarterly, appears to have taken the stump for Colonel Fremont, and to be pressing his claims to the Presidency with an energy which would be excessive even if we all enjoyed the right of voting in Pennsylvania. A part, at all event, of the impressions under which we are making this dead set at Buchanan and slavery is without a shadow of foundation. We think that, because we abolished slavery in our West India Islands, we are so free from spot or stain of oppression as to put the Americans under the necessity of listening patiently to any amount of impartial criticism, weighty advice, or august rebuke which we may choose to send them. 61

After five years with The Saturday Review, during which time he contributed nearly two articles a week,⁶² Maine, together with Fitzjames Stephen, left to go to the newly founded Cornhill Review. Maine had evidently forgiven Thackeray his indiscretions concerning the four Georges, possibly because the Cornhill was "avowedly to be written by scholars and gentlemen for a similar audience.... Throughout the magazine, but particularly in Thackeray's own contributions, the ideal of the middle-class gentleman was held up for imitation."⁶³ When Thackeray had founded

61

Ibid.

62

Merle M. Bevington, The Saturday Review, p. 28.

63

Gordon N. Ray, Thackeray: The Age of Wisdom, 1847-1863 (New York: McGraw-Hill Book Company, Inc., 1958), p. 301.

the Cornhill in 1860, he had attempted to rely upon amateur contributions, of which he received almost a hundred a week. Eventually, however, he was forced to turn to professional writers such as Stephen and Maine for "public-question" articles, himself and Anthony Trollope for fiction, and George Henry Lewes and James Hinton for popular science.⁶⁴ The manner in which Thackeray acquired this staff was subject to severe criticism; Maine's transfer of allegiances, and Stephen's, was taken by The Saturday Review staff as apostasy, though most of the blame appears to have been put on Stephen's shoulders. Beresford-Hope's comment was:

Good riddances, I opine. Maine and Stephen enticed over to the Cornhill by Thackeray, like a jobber as he is. Stephen, who is very avid of money, agreed without Cook's knowledge to write a continuous series for the Cornhill, which is obviously treason, and he has got his dismissal accordingly. I think his departure will improve the religious tone of the paper, for with all his ability and often rightness of view, there was a self-will and frequent slyness in him which made him a very dangerous horse and a disturbing element.⁶⁵

Thackeray, too, was aware that his success in enticing the two could readily be construed as "jobbing," though he chose to put it in a more benign context. He told his friends at Punch that "free trade is the right policy in

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Ibid., p. 300.

⁶⁵

Quoted in Merle M. Bevington, The Saturday Review, p. 28.

in literature and art--man takes his work where he is best paid for it."⁶⁶

The practice of anonymous journalism which Maine had defended on The Saturday Review⁶⁷ was continued at the Cornhill. It seems evident, however, that his interests of The Saturday Review period remained: problems of American politics and the attitude of the middle classes toward education were examined, together with a defense of the legal profession and an attack upon competitive civil service examination.⁶⁸ The Cornhill, as The Saturday Review, gave ample opportunity for Maine to develop his social and political thought and to rationalize the biases which were to appear in his later work.

From the Cornhill, Maine's journalistic peregrinations took him next to the Pall Mall Gazette. Frederick Greenwood, a member of the Cornhill's writing staff, and for a

66

Quoted in Gordon N. Ray, Thackeray, p. 481, note.

67

Sir Henry Maine, "Anonymous Human Nature," The Saturday Review, II (8 November, 1856), p. 608.

68

See Sir Henry Maine "The Dissolution of the Union," The Cornhill Magazine, IV (1861), pp. 153-166; "Middle Class and Primary Education in England: Past and Present," The Cornhill Magazine, IV (1861), pp. 50-57; "The Morality of Advocacy," The Cornhill Magazine, III (1861), pp. 447-459; "Competative Examinations," The Cornhill Magazine, IV (1861), pp. 692-712. All of these articles have been attributed to Maine on the basis of style and content. Only "The Morality of Advocacy" contains passages which might seem dubious.

time its editor, was the initiator and first editor of the Pall Mall Gazette, while George Smith, of the publishing firm of Smith, Elder and Co., who had been the proprietor of the Cornhill, furnished the capital and an acquaintance with a writing staff.⁶⁹ As with The Saturday Review at an early date, the Pall Mall Gazette began with a brilliant staff. Maine and Fitzjames Stephen both came along, while Leslie Stephen, Lord Robert Cecil (later Marquis of Salisbury), John Morley, Sir William Harcourt, E. A. Freeman, James Anthony Froude, Goldwin Smith, and Walter Bagehot made frequent contributions.⁷⁰ Again, Maine was very active; his was the idea for the paper's name,⁷¹ and his were the "leaders" that appeared as often as two or three times a week, produced "at special rates of pay."⁷² Maine's association with the Pall Mall Gazette was almost continuous until 1880, despite the fact that the paper tended to support Disraeli and the Conservative Party, both of whom, in association at any rate, Maine continued to abhor. When, in May, 1880, Frederick Greenwood found

69

John William Robertson Scott, The Story of the Pall Mall Gazette, of its First Editor Frederick Greenwood and of its Founder George Murray Smith (London: Oxford University Press, 1950), p. 24.

70

Ibid., p. 27.

71

Ibid., p. 154.

72

Ibid.

backing for a new paper, the St. James Gazette, both Maine and Stephen transferred to it, despite the fact that it was a small paper and "cannot have been profitable."⁷³

The St. James Gazette was the last popular journal with which Maine was associated before his death in 1888.

By 1880, Maine's association with popular journals was entirely voluntary; he was now writing less out of a need for financial security than out of habit and a sense of responsibility. There was still a public to educate. This same sense of duty had earlier led Maine to interest himself in other spheres of activity: University reform and the reform of legal education in England. In this, as in his avocation for popular writing, his interest coincided with that of the intellectual community. From this group came the leadership and personnel which "led the movement for academic reform within the universities."⁷⁴ Maine was intimately involved in the question of educational reform, not only because he wanted to remove all obstacles then remaining to prevent a man of intellect from becoming a gentleman, but also because he hoped to improve the teaching of law and expand the teaching of jurisprudence. Throughout his life, Maine was to bemoan the tendency among prac-

⁷³
Ibid., p. 251.

⁷⁴
Noel Annon, "The Intellectual Aristocracy," p. 243.

ting barristers to avoid the study of jurisprudence. In 1853 and again in 1854, Maine attempted to create, first at the universities and then at the Inns of Court, an environment which would make jurisprudence a respectable area in which a student could work.

Maine's pride in his profession led him always to defend it, not as having "a higher standard of morality than can be claimed for members of other professions," but as "a practical expedient devised as the best mode of doing a very difficult thing, namely, administering the law."⁷⁵ As a profession, law had its disadvantages, and as a practical expedient, it was less than perfect. These imperfections, however, had to be put into proper perspective, though what Maine considered proper perspective indicated the intensely conservative side of his character. To the more rabid critics of the legal profession Maine answered that:

We must act on the principle that life is a good thing; therefore, that the administration of the law, which is essential to the transaction of the affairs of life, is good; therefore, that advocacy, which is essential to the administration of law, is good; therefore, that the shocks given by the practice of advocacy to the sentiment of justice, and the hardships inflicted by it on individuals, which are inseparable from advocacy, are drawbacks from its advantages, and not objections to its existence. 76

⁷⁵ [Sir Henry Maine], "The Morality of Advocacy," pp. 454-55. If Maine did not indeed write this article, his sentiments were, nevertheless, similar.

⁷⁶ Ibid., p. 452.

This did not mean, however, that some of the drawbacks to the advantages of advocacy could not be removed, particularly those drawbacks which Maine, as a teacher of law, encountered daily. Always Maine had before him a goal-- the training of men not only in the practice but in the principles of law. Even to the advocate, principle should precede practice.

After the great principles of jurisprudence have been instilled into the student's mind, a short course on the practical branches of English Law, coupled with the present method of attending chambers, would complete his legal education. Compulsory examinations, as a test of industry, are absolutely necessary, and the stimulus of honours and rewards for those who specially distinguish themselves is scarcely less so. 77

It was much to Maine's chagrin that he recognized that in neither principle nor practice was the training of lawyers of exceptional quality in the middle of the century.

In 1846, a Select Committee on Legal Education repeated the plaint of Lord Brougham that the study of law "is at as low an ebb as it is possible for education to be in any country."⁷⁸ Lord Campbell, in the same report, noted that, in his estimation, "England is the only civilized country in the world where there is not a regular course of discipline required for those who are to practice the

77

Sir Henry Maine, "The Inns of Court," p. 77.

78

Great Britain, Parliamentary Papers, Vol. X (Reports, Vol. VI), 25 August, 1846, "Report from the Select Committee on Legal Education," p. x.

profession of advocate and to administer the Law as Judges, where they may be regularly instructed in the different branches of the profession, and may be examined to see what proficiency they may have made."⁷⁹ A survey of the universities and of the Inns of Court bore out much of this statement. At Oxford there was a Chair of Civil Law and one of Common Law, but in Common Law there were only a limited number of students, no honors, no degrees and no examinations. The Committee concluded that:

...such a course, neither of long duration, nor consecutive, nor extending beyond the instruction of one professor, and uninigorated by examinations or honours, embracing a very small proportion of the students of the University, whatever may be the efforts or merits of the individual instructor, can scarcely lay greater claims to the character of efficient legal instruction than the course of Civil Law itself. 80

Cambridge was somewhat better equipped with two Professors of Law, the Regius Professorship of Civil Law, which Maine occupied in 1847, and the Downing Professorship of Civil Law and the Laws of England. Law was one of the four recognized Faculties, and a degree was offered in Civil Law. Since 1814, candidates for the degree of Bachelor of Laws had been required to attend, for three terms, the lectures of the Professor and to engage in a semi-formal disputation. The Committee, however, considered

79

Ibid.

80

Ibid., pp. iv-v.

this to be but "a meagre substitute for normal study."⁸¹ Only at the University of London was Jurisprudence one of the faculties and were the degrees of Bachelor of Laws and Doctor of Laws regularly conferred.⁸² Even here, however, the number of candidates seldom exceeded four or five people, and there were often no candidates for the Doctor of Law degree.⁸³ Instruction at the University of London was characterized by the committee as informal and not especially effective.⁸⁴

When the spotlight was turned upon the Inns of Court in 1854, it was quickly discovered that "they had ceased to be in any sense the legal university which they once

81

Ibid., p. v. See also Maine's statement in: Great Britain, Parliamentary Papers, Vol. XXII (Reports, Vol. V), 27 April, 1852, "Report of Her Majesty's Commissioners Appointed to Inquire into the State, Discipline, Studies, and Revenues of the University and Colleges of Oxford," p. 78.

82

Great Britain, Parliamentary Papers, "Report from the Select Committee on Legal Education" p. vii.

83

Ibid., p. xxviii.

84

Ibid., p. ix. Professor Amos of University College, London, had, for example, one public lecture a week. Private instruction was given in his chambers for payment of 100 Guineas to allow gentlemen "the run of the chambers." Haileybury College, for the training of East India Company servants, had the only other professorship of law outside the universities and the Inns of Court.

were, and had become simply associations of lawyers, to whom was entrusted the selection of the members of the Bar and its organization and discipline."⁸⁵ This meant, in effect, that a student preparing for the Bar had little recourse to formal instruction, but had to rely largely upon his own resources. Not until the 1840's were steps taken to provide training for persons interested in becoming solicitors. Sir William Holdsworth's conclusion was that "though the nineteenth century was an age of law reform, legal education was almost the last thing to be reformed."⁸⁶

Of the weaknesses of legal education in mid-century England, the worst, in Maine's eyes, was the almost mechanical nature of the training. In his undirected study, the student tended to acquire a severely practical knowledge of the law which emphasized the machinery rather than the theory of law. The student, according to Maine:

...attained some familiarity with the routine of certain branches of practical detail; he has become a handicraftsman more or less dextrous; he has stored his memory or his commonplace book, with a multitude of modern cases and precedents; but he has yet to learn the science of law. 87

85

J.W.S. Holdsworth, A History of English Law (London: Methuen and Co., Ltd., 1938), XII, p. 76.

86

Ibid., p. 78.

87

Great Britain, Parliamentary Papers, Vol. XVII (Reports, Vol. IV), 10 August, 1855, "Report of the Commissioners appointed to inquire into the arrangements in the Inns of Court and Inns of Chancery for Promoting the Study of Law and Jurisprudence," p. 197.

Whether the student gained some knowledge of legal principle "depended partly on his own abilities and industry, and partly on the capacity and willingness of his master to teach him."⁸⁸ As one who testified before the Oxford Commission asked rhetorically:

--is it to be wondered at that with such an education as this the English bar have as a body the reputation of being grievously deficient as jurists, while they are eminently skillful as mere legal mechanics? That with some few bright exceptions, our law libraries contain nothing of English growth but reports, indices, and compilations, while America furnishes us with works of depth and comprehension? 89

Maine's efforts to introduce into the study of law, especially the study of law at the universities, a sound theoretical basis, began with his testimony before the Cambridge Commission. From the beginning he found a sympathetic audience. The Commission concurred "in the opinion expressed by Dr. Maine in favour of establishing the Faculty of Law in the University upon a wider basis...." The report continued:

We have before expressed the opinion that it is desirable, in all cases where a student is designed for a learned profession, that the foundations of his professional education should be laid at the University.... With a view to this end, we are of the opinion that the instruction provided by the Faculty of Law should not be confined to the laws of this country or to any particular code, but that, in

88

Ibid.

89

Ibid., pp. 197-98.

addition to the study of English, Civil and International Law, it should embrace an examination of the principles on which existing systems of law are founded, and that it should be extended to an investigation of the principles on which all laws ought to be founded; in other words, that the study of General Jurisprudence, and of the science of Legislation, and of morals in connexion therewith, ought to be encouraged. 90

The recommendation of the Commission, that a Board of Legal Studies be created, "whose duty it would be to arrange the system of lectures and examinations for the Law Tripos"⁹¹ was instituted with the creation of a Board of Legal and Historical Studies.⁹²

The new structure of legal studies at Cambridge was a triumph for Maine. Not only had the reform come about largely as a result of his own testimony, but the new tripos was very broad and devoted to theoretical rather than to mechanical considerations. In view of the historical orientation which Maine brought to his own study of jurisprudence, the union of law and history in the same Tripos must have been especially pleasing. His was, however, to be but a partial victory. The wheels of the Cambridge gods seemed to grind more slowly than elsewhere; not till 1870

90

Great Britain, Parliamentary Papers, Cambridge University Commission, "Report," p. 91.

91

Ibid.

92

Denys A. Winstanley, Later Victorian Cambridge (Cambridge: Cambridge University Press, 1947), p. 206.

was the first examination under the new regulation held-- with unhappy results. The Board of Legal and Historical Studies concluded, in 1872, that:

...from the experience of the two recent examinations...the subjects of law and history cannot with advantage be treated together in the same examination, and a class list, arranged according to credit obtained in the two subjects, is very far from representing the real merits of the candidates. They also find that the subject of history is so large and varied that it requires a separate and distinct examination. They would therefore represent that it is advisable to remove modern history from the Tripos and to substitute for it the constitutional history and constitutional law of England. 93

As a consequence of this report, the Law Tripos was altered in 1873 and the two areas of study separated. Thus, while the study of law at the University had been reformed, the very broad historical orientation which Maine would have preferred was not completely realized.

The reform of the two universities had not gone unobserved by the Inns of Court. Largely in response to the examples set by both Oxford and Cambridge, the Inns appointed, in 1851, five readers--in Roman Law and Jurisprudence, Real Property, Equity, Common Law and Constitutional Law. The readers both lectured and prescribed readings, and were responsible for examining their students upon this work.⁹⁴ Maine was appointed to the first of these

93

Quoted Ibid., p. 207.

94

Sir M. E. Grant-Duff, Sir Henry Maine, p. 13. The remuneration was 300 Guineas for each lectureship. See Great Britain, Parliamentary Papers, Commission on the Inns of Court, "Report," pp. 358-59.

readerships; his earliest experiences were, however, unhappy. Frederic Harrison has left an account of the Inns during Maine's tenure:

When Maine first began to lecture at the Temple in 1852, as Professor to the Inns of Court of Roman Law and Jurisprudence, the British ignorance of Roman Law and at any rate of Comparative Jurisprudence was really a unique phenomenon. To the successful case lawyer a jurist was a term of reproach, meaning an ignorant impostor. And one of the greatest masters of Real Property learning in Lincoln's Inn would warn his pupils against 'that beastly book--Justinian,' by which he was believed to mean the Institutes, for he had never heard of Digest, Code or Novels. 95

Despite the inauguration of readerships in 1851, a Commission on the Inns of Court was established in 1854, before which Maine testified. It concluded that the Inns of Court had not made "their funds available to the promotion of the study of the law." At any of the four Inns of Court--the Inner and Middle Temples, Lincoln's Inn or Gray's Inn--the Commission found:

All that is of present required of a person wishing to become a student of the law in England, with a view of being ultimately called to the Bar, is that he become a member of one of the four Inns of Court, which is effected by making a formal application for the purpose, merely stating to the authorities of such Inn who and what he is, with a certificate of his respectability, signed by two Barristers attached to it; that he keep twelve Terms, by dining a certain number of times in the Hall, and that he attend during one year the Lectures of two of the Readers appointed by the Council of Legal Education, or at his option submit to a public Examination which is

95

Frederic Harrison, Memories and Thoughts (New York: The Macmillan Co., 1906), p. lll.

compulsory only upon those who do not attend the Lectures. ⁹⁶

Generally, the Commission concluded that "as regards the intellectual qualifications and the professional knowledge of a Barrister...there is not such security as the Community is entitled to require."⁹⁷

Maine's testimony before the Commission helped greatly to substantiate this picture of legal education at the Inns. He complained of the lack of systematic programming, the lack of sequence in those studies undertaken, and of the lack of many means of examining students on their courses of study. The solution which he advocated followed closely the preference for theory over practice which he had earlier expressed.

The simplest remedy would be to retain the obligation to attend certain course of Lectures, to declare that one of those selected should be either in Jurisprudence or Civil Law or Constitutional Law and Legal History; and then to insist that this course should be attended within a certain limited period after joining the Inn of Court.... I am most anxious also that the proper succession of subjects should be observed, that the more speculative branches of study should be engaged in before proceeding to the more practical. The minds of young men are never, I find, in a worse condition to consider the higher principles of Law than when they are on the eve of embarking in actual practice. Just then, the necessity for shaping every question with a view to immediate

96

Great Britain, Parliamentary Papers, Commission on the Inns of Court, "Report," p. 354.

97

Ibid.

success is apt to take precedent of all other considerations. 98

More precisely, he suggested that the course of study at the Inns should total three years, only two of which would be devoted to learning the technicalities of law in chambers.⁹⁹

Reform could not, despite the relevance of Maine's testimony, be effected overnight; when it did come about, it was not likely to follow the lines which he had laid down. Distrust, not only of jurisprudence, but even of the systematic teaching of English law was difficult to overcome, as was the absence of a significant body of English literature in legal theory.¹⁰⁰ Apart from Jeremy Bentham, John Austin and Blackstone, there were few Englishmen who concerned themselves with jurisprudence. Lord Bryce, many years after Maine's death, was still complaining that:

We have accomplished less than we hoped in raising up a band of young lawyers who would maintain, even in the midst of London practice, an interest in legal history and juristic speculation. The number of persons in England who care for either subject is undeniably small...and it increases so slowly as to seem to discredit the efforts of the Universities.

98

Ibid., p. 442.

99

Ibid., p. 444.

100

J.W.S. Holdsworth, History of English Law, XII, p. 89.

Of those who have undergone our law examinations, comparatively few have either enriched these subjects by their writing, or have become teachers among us, or have taken any part in promoting legal studies elsewhere. 101

As for European legal scholarship, there was a long-standing prejudice against it which continued long after the middle of the century.¹⁰² The continued restriction of the study of law, finally, only to persons who intended to become practitioners, meant that the technical demands of legal training continued to outweigh the requirements of theory. In effect, while the Inns of Court, dominated by the practicing lawyers, again assumed some aspects of a teaching body, emphasis was not upon the side of the study of jurisprudence as Maine would have liked, but on the side of practical technicality. In later years, after his return from India, Maine continued to complain that "we in Great Britain and Ireland are altogether singular in our tacit conviction that law belongs as much to the class of exclusively professional subjects as the practice of anatomy."¹⁰³ The very bulk of the law meant that its

101

James Bryce, "Legal Studies in the University of Oxford," Studies in History and Jurisprudence (New York: Oxford University Press, 1901), II, p. 900.

102

E. Campbell, "German Influences in English Legal Education and Jurisprudence in the Nineteenth Century," 4 University of Western Australia Law Review, pp. 388-89 (1959).

103

Sir Henry Maine, Village Communities in the East and West (London: John Murray, 1881), pp. 59-60.

complexity "beats all but the experts; and we, accordingly, have turned our laws over to experts, to attorneys and solicitors, to barristers above them, and to judges in the last resort."¹⁰⁴ This plaint, so eloquent, was to be repeated in many ways throughout his lifetime. Yet, neither he nor succeeding generations were successful in removing the study of law from a professional caste. Nor, perhaps, in a legal system as immense, as complicated, as that required by modern society, and as demanding of special knowledge, would such a development be entirely desirable. Maine's entire argument is indicative of how uncomfortable he was within the confines and attitudes of the Anglo-Saxon legal tradition.

While Maine was thus engaged in the teaching of law, and concurrently with his active participation on The Saturday Review, he began to publish materials on the study of jurisprudence. That Maine chose to treat of Roman Law was considered of little importance. "It may be doubted," said Maine, "whether even the best educated men in England can fully realize how vastly important an element is Roman law in the general mass of human knowledge, and how largely it enters into and pervades and modifies all products of human thought which are not exclusively English."¹⁰⁵ The

¹⁰⁴
Ibid., p. 60.

¹⁰⁵
Ibid., p. 33.

essay was designed to introduce Englishmen to "the bias of thought, the modes of reasoning, and the habits of illustration, which are given by a training in the Roman law."¹⁰⁶ Maine's concern was not so much in adding to the lawyer's ability to indulge in case law as it was to broaden his knowledge of theory by introducing him to Roman law, which "consists of principles and of express written rules."¹⁰⁷ Not only did the essay perpetuate and reinforce his faith in the desirability of theoretical law, but it firmly established the key position which the study of Roman law would always have in his later work. When Maine said, in 1856, that knowledge of the development of Roman law enabled the jurist "to learn something of the course of development which every body of rules is destined to follow,"¹⁰⁸ he was merely anticipating the crucial position which Roman law was to assume in his study, Ancient Law, in 1861.

The publication of this essay, followed by the appearance of Ancient Law, added a third dimension to Maine's life. He was now embarking upon the activity for which he

106
Ibid., p. 336.

107
Ibid., p. 334.

108
Ibid., p. 376.

is best remembered--the writing of a series of original works in theoretical jurisprudence. Before, however, his theoretical work came to full flower, he was to participate in yet another activity; he was to add, as a fourth dimension, the life of an Indian administrator. In reality, the one helped lead to the other; part of the justification for Maine's appointment to an Indian post was the concern for and knowledge of Indian civilization he had shown in his book, Ancient Law.

In 1862, Maine accepted the invitation of Lord Halifax to become Law Member of the Council of the Governor-General in India.¹⁰⁹ His appointment to the Government of India fell into the pattern common to Victorian middle class academics who, in public service, "were strongest in the Indian and Home civil service rather than diplomacy, which for long was too expensive for them and attracted the sons of the upper classes."¹¹⁰ His service there as an administrator reinforced the generally conservative tendency already inherent in Maine's early writings and, indeed, in the attitudes of most of the English intelligentsia. The characterization of the intelligentsia as "secure, established, and like the rest of English society,

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Sir M. E. Grant-Duff, Sir Henry Maine, p. 22.

¹¹⁰

Noel Annon, "The Intellectual Aristocracy," p. 285.

accustomed to responsible and judicious utterance and sceptical of iconoclastic speculation,"¹¹¹ was especially true of Maine after his return from India. That the English intelligentsia was stable--"that it was unexcitable and to European minds unexciting"--was due in part to the influence of such respected figures as Sir Henry Maine. And part of his conservatism stemmed from his work in India.

Maine resumed his teaching career immediately upon his return from India. He was offered the Corpus Professorship of Jurisprudence at Oxford, a position he held until 1878, when Sir Frederick Pollock succeeded him.¹¹² In line with the general movement of University reform, Oxford had established a school of Jurisprudence and History to meet the Reform Commission's recommendation that "if its Students cannot be made Lawyers and Physicians in Oxford itself, they may there be taught much that would prepare them for the strictly Professional Studies to be pursued in the great towns, where these professions are practiced."¹¹³ In this freer environment, Maine gave, first,

111

Ibid.

112

Sir M. E. Grant-Duff, Sir Henry Maine, pp. 36 and 48.

113

Great Britain, Parliamentary Papers, Committee on Legal Education, "Report," pp. 100-101. In 1872, Jurisprudence and Modern History were divided into two schools. See Charles Edward Mallet, A History of the University of Oxford (London: Methuen and Co., 1927), III, p. 297.

the series of lectures which was published as Village-Communities, and then the lectures which formed, four years later, in 1875, his Early History of Institutions. Although Maine left Oxford in 1877 to become Master of Trinity Hall, Cambridge,¹¹⁴ the lectures appearing, in 1883, in his Dissertations on Early Law and Custom were originally delivered at Oxford. Oxford continued to recognize Maine's scholastic importance by including portions of his work in the list of books recommended for "Greats" in 1878.¹¹⁵

Maine's second residence at Cambridge resulted in his last major published work; his International Law stemmed directly from his appointment as Whewell Professor of International Law at Cambridge, where he succeeded Sir William Harcourt.¹¹⁶ Maine had, even before his departure for India, written a book on international law, the manuscript for which had been lost during his absence. While the Whewell Professorship allowed him the opportunity to repair this loss, he was not to live to take advantage of it. Before his death, he was able to deliver only one

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Sir M. E. Grant-Duff, Sir Henry Maine, p. 48.

¹¹⁵

Charles Edward Mallet, A History of the University of Oxford, III, p. 459.

¹¹⁶

Sir M. E. Grant-Duff, Sir Henry Maine, p. 68.

course of lectures, posthumously edited and published by Sir Frederic Harrison and Sir Frederick Pollock.¹¹⁷ The book itself, at least in the form in which it appeared, stood outside the main stream of his thought; whether, given time, Maine would have attempted to put his studies on international law on the same footing as his work in legal evolution and history must remain a moot point.

Just as Maine's academic ability had won for him his early career, so too did it later win for him a long list of distinguished honors. In May, 1871, Maine was gazetted K.C.S.I. and was asked by the Duke of Argyll to accept a seat on the Council of the Secretary of State for India.¹¹⁸ In 1877, "he was elected a member of The Club"¹¹⁹ --the Sterling Club, for which his previous membership in the Cambridge Apostles had prepared him. Recognition came, too, from foreign sources:

On the last day of December, 1881, he became corresponding member of the Institut in the Academie des Sciences et Politiques, and in April, 1883, was made foreign member of the same in the room of Emerson. I think the American Academy was the first learned body abroad which recognized the merit of the great English jurist. It made him a member while he was still in India, in November, 1866. The Dutch

117
Ibid., pp. 68-69.

118
Ibid., p. 41.

119
Ibid., p. 48.

Institute followed suit about ten years later. Then in 1877 came the Accademia dei Lincei, and in 1878 the Madrid Academy. The Royal Irish Academy followed in 1882, the Washington Anthropological Society in 1883, and the Juridical Society of Moscow in 1884. 120

Socially and academically, Maine had arrived nearly at the pinnacle of success. He was, at his death, one of England's leading theoretical jurists. His presence on the Council of the Secretary of State for India meant that he continued to have a hand in the formation of Indian policy. He occupied an important niche in the

¹²⁰Ibid., pp. 48-49. Maine's election to the French Academy qualified him for the position of antagonist in the eyes of Herbert Spencer. Spencer's acidic and ill-tempered nature was never tamed by the conditioning process of university experience nor by the sense of having been admitted to a singular group such as the intelligentsia. This appears, in part, to account for the "associate status" which he seemed always to occupy in English intellectual circles. In a letter to E. L. Youmans, dated 17 and 24 May, 1883, Spencer gave vent to his petty outlook: "By this post, I send you a copy of yesterday's Standard in which you will see a leading article concerning my election to the French Academy. I affix also at the top of the page a cutting from the Pall Mall Gazette giving a different version of the election, which I suspect is the true one. If it is the true one, which I am taking steps to ascertain, then it appears that while the vacancy in the higher grade of membership made by the death of Emerson is filled by the promotion of Sir Henry Maine from the lower grade to the higher, I am invited to accept the vacant place left by this promotion of Sir Henry Maine. If I accept, it seems to me that I am by implication recognizing the propriety of this estimate of relative claims. Sir Henry Maine is my junior by two years, and he is in his standing as an author my junior by ten years; so that no plea of seniority can be alleged: it comes unquestionably to a judgment of our respective positions." Later he added the notation that "I am sending off today my letter to the French Academy, declining the so-called honour they have done me, in electing me a correspondent." See David Duncan, The Life and Letters of Herbert Spencer (London: Methuen and Co., 1908), pp. 232-33.

university world and led a creative professional life while at the same time continuing his contributions to the popular press. His membership in the Sterling Club and his acquaintance with a wide range of personalities signified his acceptance in contemporary society. But, Maine's health was never good. Grant-Duff tells of Maine's reluctance, in 1862, to take the proffered position in India because of it.¹²¹ Amazingly, his Indian experience seemed to agree with him, and during the years following his return, his health stabilized if it did not improve. In 1877, however, Grant-Duff noted a general decline in the level of Maine's awareness and in his interest in things about him. Even this, however, did not seem to mean that "he was in a much worse state of health than usual," and few suspected "that he was breaking up."¹²² It was, therefore, with both surprise and shock that Grant-Duff heard of Maine's death at Cannes on 3 February, 1888. Apoplexy was the immediate cause of death.¹²³

There was almost an organic unity to Maine's varied activities which united the most diverse influences. His

121

Sir M. E. Grant-Duff, Sir Henry Maine, p. 22.

122

Ibid., p. 73.

123

Ibid.

experiences as an Indian administrator led directly to the writing and publication of his work on Village-Communities, while the generally conservative and authoritarian environment in which he worked contributed to the appearance of those characteristics in his study of Popular Government. Maine's experiences in writing for the popular press--in which generalities took precedence over specific research--contributed to the characteristics which were both the strength and the weakness of his professional works. Sir Frederick Pollock, for example, noted that there was, in Maine's work, an appeal to broad interpretation which often outweighed his passion for research.

Youth is captivated by generalities; the full-grown scholar, in the ardour of wrestling with particulars, is apt to think that the generalities of his masters were childish things; but after a dozen years of finding out that even original research is not infallible, one may come round to think that a large view, an intellectual eye for country, is a guide not to be disposed of after all. It is good to know all the trees in the wood if one can; but it is better to do without knowing some of them than not to see the wood for the trees. Capable workers in historical research are many, directors of research are few. Maine's was, nay, is, one of the directing minds. 124

Finally, the teaching career, upon which Maine embarked after graduation and which was the most constant activity in his life, contributed even more directly to his professional writings. Woodrow Wilson, the future President of

124

Sir Frederick Pollock, "Sir Henry Maine as a Jurist," Edinburgh Review, CLXXVIII (1898), p. 121.

the United States, remarked, in 1898, that:

Without exception, I believe, his books were made up out of lectures delivered either to young law students, not yet masters of the technicalities of the law, or to lay audiences, to which professional erudition would have been unintelligible. He never seemed to stand inside the law, while he wrote, but outside; not explaining its interior mysteries, but setting its history round about it--showing whence it came, whence it took its notions, its forms, its stringent sanctions, what its youth had been, and its growth, and why its maturity showed it came from so hard a fibre of formal doctrine. 125

At the end of his life, Maine had earned the most precious of commodities, the respect of his peers. Sir Frederick Pollock's characterization of him conveys something of the acceptance which Maine achieved among his contemporaries:

There was nothing striking about the man's appearance at first sight, indeed I have known few men who to the eye showed so little of themselves; nor was there much in his words at first hearing. He was marked as a good talker by what is perhaps the highest test, the general contentment of his company. When the party broke up every man felt, without knowing why, not so much that he had listened to good talk as that he had himself been on his highest level. 126

125

Woodrow Wilson, "A Lawyer with a Style," p. 363.

126

Sir Frederick Pollock, For My Grandson: Remembrances of an Ancient Victorian (London: John Murray, 1933), pp. 74-75. The same valuation of his quick mentality and his easy conversation was repeated in Woodrow Wilson, "A Lawyer with a Style," together with a suggestion that Maine's mental powers declined somewhat in later years. Of Maine's conversation, Wilson quoted an acquaintance who said: "It was singularly bright, alert, and decided. You could not walk a couple of hundred yards with him without hearing something that interested you, and he had the very enviable power of raising every subject that was started

To have lived one's life in respect and regard, and to die honestly mourned, is in itself, a worthy comment. To have done so, however, after living a full and productive life is an even more laudible and praiseworthy accomplishment.

126(cont'd.)

into a higher atmosphere. In later life he became much more silent, and did not seem to put his intelligence as quickly alongside that of the person to whom he was talking." Woodrow Wilson, "A Lawyer with a Style," p. 367.

CHAPTER II

AUTHORITY AND RECONSTRUCTION:
LIFE AND WORK IN INDIA

Sir Henry Maine devoted the years from 1862 to 1869 to India, where he was involved not only in the day to day administration of the Government of India and in the establishment of important policy decisions, but also in an extensive series of private observations which were to contribute greatly to the formulation of his thought. That Sir Charles Wood, the Secretary of State for India, should have approached Maine to offer him the Law Membership in the Council of the Governor-General might, at first, appear somewhat unusual. Maine had, at that time, established little obvious claim to special knowledge about India or about the multitude of problems sure to beset its government. While he had already established himself as an excellent jurist and a provocative writer, there were many whose knowledge of, or experience in, India would seem to have given them prior claim. Nor did Maine have any previous administrative experience. He had, however, published a series of articles in The Saturday Review in 1857 and 1858 which were strongly sympathetic to the East India Company during and after the Mutiny.¹ He had, as

1

Sir M. E. Grant-Duff, Sir Henry Maine, p. 15. All the articles were unsigned in keeping with The Saturday

well, indicated some interest in and knowledge of Indian law and legal development in his Ancient Law.²

1(cont'd.)

Review's policy. On the basis of style and content, the following articles would appear to have been among those in the series: Sir Henry Maine, "The Coming Debate on the Indian Crisis," The Saturday Review, IV (25 June, 1857), p. 75; "Oude Before Parliament," V (11 July, 1857), pp. 29-30; "India," IV (18 July, 1857), pp. 49-50; "Indian Military Mistakes," IV (25 July, 1857), pp. 73-74; "Mr. Disraeli on India," IV (1 August, 1857), pp. 97-98; "Wild Justice," IV (8 August, 1857), pp. 121-122; "The Solvency of the East India Company," IV (15 August, 1857), pp. 147-148; "Lost Illusions," IV (5 September, 1857), pp. 214-215; "India," IV (12 September, 1857), pp. 234-235; "Theorizing About India," IV (19 September, 1857), p. 254; "Indian Government," IV (3 October, 1857), pp. 294-295; "The Opposition on the Indian Crisis," IV (10 October, 1857), pp. 317-318; "The New Schemes of Indian Government," IV (17 October, 1857), pp. 340-341; "Mutiny Not Rebellion," IV (24 October, 1857), pp. 363-364; "English Assertions and Indian Facts," IV (7 November, 1857), pp. 410-411; "The Indian Press," IV (4 November, 1857), pp. 435-436; "British Settlers in India," IV (21 November, 1857), pp. 459-460; "The Abolition of Double Government," IV (5 December, 1857), pp. 501-502; "The Lords on India," IV (12 December, 1857), pp. 528-529; "Control and Responsibility," IV (19 December, 1857), pp. 553-554; and "The Indian Reformers," IV (26 December, 1857), pp. 573-574; "The New Indian Department," V (2 January, 1858), pp. 1-2; "The Middle Classes and the Abolition of the East India Company," V (9 January, 1858), pp. 31-32; "Why Is There to be an India Bill Next Session?," V (16 January, 1858), pp. 55-56; "The Petition of the East India Company," V (23 January, 1858), pp. 78-79; "The Incorporation of India and England," V (30 January, 1858), pp. 101-102; "Double Government and Double Government," V (6 February, 1858), pp. 127-128; "Thirty Years of Improvement in India," V (6 February, 1858), pp. 129-130; "Is It the Time?," V (13 February, 1858), pp. 149-150; "The Chancellor of the Exchequer on the East India Company," V (20 February, 1858), pp. 180-181; "Progress of Opinion on the Indian Question," V (27 February, 1858), pp. 207-208.

2

See Sir Henry Maine, Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas (London: John Murray, 1905), pp. 5-6, 9, 15-16, 21, 135, 170-71, 202, 207, 231-34, and 249.

For whatever reasons, Maine was first asked to become a member of the Government of India in 1861, shortly after the appearance of Ancient Law. He at first declined the offer because of ill health. When, however, he was again approached, in 1862, he took the advice of his friends over that of his doctors and accepted the appointment.³ Maine's seven year tenure in India was two years longer than the normal appointment and during that time he served under four heads of government. Lord Elgin was Viceroy when Maine first arrived in India, but his death in 1863 necessitated the appointment of Sir William Denison as acting Viceroy: Sir John Lawrence, who took over from Denison, was in turn, succeeded by Lord Mayo. Maine served them all, returning to England mid-way through Lord Mayo's Viceroyalty.⁴ It was, however, during Lawrence's tenure that Maine was to make his greatest contributions as an administrator.

When Maine left for India to participate in the government, he already had some rather definite opinions

3

Sir M. E. Grant-Duff, Sir Henry Maine, p. 22. Grant-Duff was one of those who advised his going, saying that "having seen the wretched condition of mind into which he had thrown by feeling himself obliged to decline the former offer," he pressed Maine to leave "not at all because I believed that his medical advisers were mistaken, but because I thought that he would infallibly die at home, and that it would be a great deal better for him to die in much prosperity in India than to die in great adversity in England."

4

Ibid., p. 23.

about the difficulties which any government would face after the Sepoy Mutiny. In 1857 and 1858, Maine had not been happy with proposals to abolish the East India Company, not only because he felt that the company did not deserve the criticisms which it was receiving, but also because he feared that Parliamentary control of Indian government would open broad avenues of irresponsible and idealistic experimentation. In 1857, Maine hoped to save the Company as an effective counter-balance to the advocates of extensive reform. When this failed, he turned instead to the creation of an effective system of centralized government in India itself, sufficiently capable and sufficiently autonomous to be able to fend off the more obvious or obnoxious proposals for radical reform.

The basis for Maine's defense of the East India Company and of his fears that India would be flooded by irresponsible reformers was his distrust of popular government. Though he was to develop this argument at great length later on,⁵ he was already using the pages of The Saturday Review, in December, 1857, to suggest that the House of Commons, with its popular basis, was so filled with the "Party spirit" that only a strong, effective second chamber could prevent "an anarchy of aspiring

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This was the burden of argument in Sir Henry Maine, Popular Government: Four Essays (London: John Murray, 1885), especially chapter II, "The Nature of Democracy," pp. 127-195.

factions in our affairs."⁶ Never, said Maine, should the major problems of India, already sufficiently complicated in their own right, "be approached in a factious spirit. It is greatly to be hoped that India will never become the battle-field of Party."⁷ There was, however, nothing in the current political structure of Britain to prevent the factiousness of the Commons from carrying over into India in the event of the transfer of Indian Government completely to Parliamentary control. Certainly the House of Lords, as then constituted, was useless as a barrier to popular enthusiasm. "The Power of legislation the Peers have lost in all subjects about which the people feel any real interest. The utmost that the Tory majority among them can venture on is occasionally to mangle a Bill of secondary importance."⁸ Consequently, Maine feared that a broadly based, enthusiasm-ridden House of Commons, unchecked by the saner reflections of an effective House of Lords, would impose these enthusiasms upon an unsuspecting, unprepared and unwilling India. In the House of Commons, said Maine:

⁶ [Sir Henry Maine], "The Lords on India," p. 528.

⁷ [Sir Henry Maine], "The Coming Debate on the Indian Crisis," p. 75.

⁸ [Sir Henry Maine], "The Lords on India," p. 528.

It is not uncommon...to see men who will not be at the smallest pains to inform themselves on Indian subjects, and who in ordinary times cannot take the slightest interest in them, lashing themselves into a whirlpool of excitement, and denouncing in unmeasured language the crimes and follies of the authorities at home and abroad, when something has gone wrong in the Government of the country, and when events are occurring of which they cannot trace the causes, and the end of which it is impossible to foresee. 9

These public enthusiasms were dangerous at the best of times, but when let loose upon India, they were positively disastrous.

If we count upon our fingers the agitations which from time to time prevail in England, we shall find that not one could be reflected in India without enormous jeopardy to the Empire. Enthusiasm for toleration, enthusiasm for popular education, enthusiasm for military success, enthusiasm for universal retrenchment, enthusiasm for universal expenditure, detestation of idolatrous superstitions, horror of Sabbath trading--such are the passions of a British Parliament all respectable and honourable in their place, but absolutely suicidal when converted into the motive forces of an Indian policy.¹⁰

The contempt with which Maine contemplated the prospect of India being governed from afar is indicated in his observation, made before the final form of the Indian Government had been decided upon in 1858, that "a Secretary of State, directly responsible to Parliament is to govern

⁹ [Sir Henry Maine], "The Coming Debate on the Indian Crisis," p. 75.

¹⁰ [Sir Henry Maine], "The Solvency of the East India Company," pp. 147-148.

India with the help of a map and a gazeteer."¹¹

While Maine "could name men largely and profoundly acquainted with the affairs of India,"¹² despite not having been there, they were rare indeed. Most, however, of "the company of noblemen and gentlemen" who had opinions on India or on Hinduism were the same persons "who refuse to listen to an argument on the Sabbath question, who hesitate to sit on the same benches with a Jew, and who can only be jockeyed into not abolishing Maynooth."¹³ It was necessary to find some means of freeing India from the grasp of such men as these. The answer to this need, thought Maine, was an independent Government of India.

There is, in fact, but one kind of security for the consistent treatment of India, and therefore for the stability of the Empire. The Government must be as much independent of Parliament as is compatible with its admitted supremacy, and the governing body must include as much personal knowledge of the Eastern men and Eastern things as can be found in the country.¹⁴

Since the House of Lords could no longer check the excesses of the Commons, the Government of India had to be protected

¹¹ [Sir Henry Maine], "Mr. Disraeli on India," p. 98.

¹² [Sir Henry Maine], "The Coming Debate on the Indian Crisis," p. 75.

¹³ [Sir Henry Maine], "Mr. Disraeli on India," p. 98.

¹⁴ [Sir Henry Maine], "Wild Justice," p. 122.

from Parliament by some other institution. That protection, in the past, had been provided by the semi-autonomous East India Company, and it was upon this basis that Maine launched his famous defense of the Company's interests in The Saturday Review.

Sir M. E. Grant-Duff, when discussing his disagreement with Maine on this issue, stated the popular case against the Company. "The great convulsion of the Mutiny," he said, "and the public excitement following thereon had created a convenient opportunity for putting an end to arrangements which had grown up as the result of numerous historical accidents, not of set purpose, and which were certainly cumbrous in the extreme."¹⁵ Maine, however, did not see the Company as an historical accident or as an anachronism. Instead, he claimed that it had been almost completely effective in protecting India from the mismanagement of Parliament. Even allowing for the effect of calculated overstatement, his point was clear: "The Company is not responsible for one solitary mistake out of all those which are urged by its critics as reasons for extinguishing it."¹⁶ Such opponents of the Company as Mr. Disraeli had inadvertently admitted this point, said Maine:

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Sir M. E. Grant-Duff, Sir Henry Maine, pp. 15-16.

¹⁶

[Sir Henry Maine], "Mr. Disraeli on India," p. 98.

It is therefore perfectly amazing that he should place a proposal for dissolving the East India Company at the close of a speech which whether from intention or not, has the effect of showing that in proportion as the influence of the Directors has prevailed, wisdom and justice have been adhered to, and that exactly in proportion to the interpositions of the Crown, Anglo-Indian policy has miscarried. 17

Though Maine's defense of the Company was, of course, a failure, there remained the basic problem of preventing India from becoming "the football of contending parties."¹⁸ Therefore, when the Government of India was reconstructed on a moderate basis--when most of the advantages of Company rule were retained--Maine felt a great relief. He later noted that "the authors of the statutes of 1858... limited themselves to altering those parts of Indian institutions which seemed to them the most difficult to defend."¹⁹ The powers of the President of the Board of Control in the old Company government were transferred to a Secretary of State, and "the great amount of knowledge and experience" which had either been included on, or was

17

Ibid. Maine's defense of the Company continued, almost unabated, throughout his career. In 1887, he repeated his praise of Company activities in a survey of the role of Britain in India. See Sir Henry Maine, "India," The Reign of Queen Victoria: A Survey of Fifty Years of Progress, ed. by Thomas Humphrey Ward (London: Smith, Elder and Co., 1887), I, pp. 464-65 and 483-85.

18

[Sir Henry Maine], "The New Indian Department," pp. 1-2.

19

Sir Henry Maine, "India," The Reign of Queen Victoria, I, p. 482.

at the call of the Board of Control of the East India Company, was retained by the Indian Council with which the Secretary was to work.²⁰ In essence, Maine acknowledged, the new form of government remained as isolated from party disputes as the old.

In India itself, the new statutes actually improved matters. The creation of "an active legislature" composed of "experienced public servants and native and European gentlemen unconnected with public office," surrounded both the Governor-General and the provincial Lieutenant-Governors with the type of expert and knowledgeable advice which Maine had advocated. Just as the Secretary of State and his Council in England were insulated from popular pressure, so too were the various levels of government in India and their councils. This was as it should be.

Putting aside...the special differences which arise from the social condition of the East and of India, it seems to me that such large terms as self-government and responsible government must be discarded from all discussion about changes in Indian political institutions. There is no reason to suppose it possible that 200,000,000 men could govern themselves or enforce responsibility on the part of those governing them. These are the astronomical measures of politics. Human experience affords us no ground at present for supposing that the institutions of the popular governments which have arisen in the course of a century, and which, after a stormy history, are still on their trial, are capable of being applied at all to numbers of such figures. 21

20

Ibid.

21

Ibid., p. 512.

The Government of India, in which Maine was to serve, was, in the main, a new government and an authoritarian one, created by a series of legislative enactments extending from 1858 to 1861. The catastrophe of the Mutiny brought a formal end to that system of dual government which had existed since 1784, when the younger Pitt had established a Board of Control, subject to Parliamentary supervision, to govern together with the Company's Court of Directors. Though, from 1784 to 1858, the Board of Control was made responsible for the civil and military government of India, and for revenue, and while the Board had extensive powers of review and revision over the decisions of the Company directors, the Company retained considerable power, particularly in the field of patronage. To the end of its days, the Court of Directors retained "the power of recalling any office-holder in India, including all governors and the governor-general himself."²² The legislation of 1858 simply transferred all power formally residing in the Court of Directors and in the Board of Control to a Secretary of State, in concert with a Council which acted as an advisory body in certain

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H. H. Dodwell, "Imperial Legislation and the Superior Governments, 1818-1857," The Cambridge History of India, ed. by H. H. Dodwell (Cambridge: Cambridge University Press, 1932), VI, p. 13.

instances.²³ Thus, as far as that part of the Government of India residing in England was concerned, the system of double government and divided responsibility was at end.

It was not, however, until 1861 that extensive reforms were made in the structure of the government in India itself. In the interval, both the Governor-General and the provincial Governments had carried on much as before. However, a series of reforms in 1861 altered the structure of government and made of it a more efficient tool for preparing India for progressive reform. The Indian Civil Service Act limited a large number of administrative appointments to "members of the covenanted Civil Service," thus assuring that expertise rather than favor would prevail.²⁴ In addition, the Indian High Courts Act set up a uniform system of courts, well-staffed and capable of coherently enforcing British law in the provinces.²⁵ Of both these reforms Maine approved, because they contributed to an efficient, bureaucratic government, functioning under law and staffed by knowledgeable and qualified persons.

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Sir Courtenay Ilbert, The Government of India, Being a Digest of the Statute Law Relating Thereto, with an Historical Introduction and Explanatory Matter (Oxford: The Clarendon Press, 1907), p. 49.

²⁴

Ibid., pp. 98-99.

²⁵

Ibid., p. 103.

A third reform referred more directly to Maine's future activity; the Indian Councils Act established a Governor-General's Executive Council of five ordinary members, including a military member and two civil servants, as well as a financial expert and a legal member.²⁶ It was this latter post which Maine was to occupy in 1862.

Both the Governor-General²⁷ and the ordinary members of Council were appointed by the Secretary of State in India. The Council exercised two separate functions, serving both as an executive and a legislative body. The Executive Council was "in effect a cabinet of ministers who, with the Governor-General at their head, conducted the executive administration of the country." The Legislative Council was basically the same as the Executive Council with the addition of several new members.

The Indian Councils Act of 1861 provided that for the better exercise of the power of making laws and regulations vested in the Governor-General in Council he the Governor-General would nominate 'additional members' for the purpose of legislation only. The additional members were appointed for two years, but joined the Council only when it met for legislative purposes. The Council, thus reinforced and while thus engaged, could entertain no

26

Sir H. V. Lovett, "The Indian Governments, 1858-1918," The Cambridge History of India, VI, pp. 228-29.

27

The Governor-General was also known as the Viceroy although that term was not recognized in law. See Sir John Strachey, India: Its Administration and Progress, 4th ed. (London: Macmillan and Co., 1911), p. 50.

matters except those directly connected with the legislative business before it. The number of additional members was fixed by the Act of 1861 as twelve as a maximum of whom not less than one-half were to be non-officials, i.e., not holding offices under the Government. In practice most of the non-officials were always natives of India. The Lieutenant-Governor of the province in which the Legislative Council might meet was also made an additional Member. A Government majority was secured by the presence in the Legislative Council of the members of the Executive Council. 28

The Legislative Council's actions were severely limited: it could not criticize the financial policy of the Government except when financial legislation was necessary; most acts of the British Parliament could not be altered; and no law "affecting the authority of Parliament or allegiance to the Crown" was permissible.²⁹ In addition, the Governor-General, with the agreement of his Executive Council only, could make "regulations" which had "the force of law for the less advanced parts of the country, where a system of administration simpler than that in force elsewhere is desirable."³⁰ As a final indication of the limited power of the Legislative Council, the Governor-General could make, on his own authority and without consulting his Council, ordinances having the

28

Ibid., pp. 51-52.

29

Ibid., pp. 53 and 57.

30

Ibid., p. 58.

effect of law for a period of six months, though Sir John Strachey noted that this power "has seldom been exercised, and only for reasons of temporary convenience."³¹

The appointment of additional members to the Legislative Council had, then, little impact upon the outcome of debate, except that their advice could be heard. Though there were natives on the Council, membership was always adjusted to secure a government majority, and the Council could be effectively by-passed in a number of instances. The Governor-General and his Executive Council were a tight little, secure little, group. Small wonder that those who, like Maine, participated in the upper echelons of Indian government came to appreciate the merits of a restrictive government and an authoritarian regime. Especially when one was convinced, as Maine was, that government should provide both the framework within which civilization could flourish without threat of rebellion, and the laws necessary to promote this progress, did the value of Indian government become clear. Undoubtedly Maine, who was already conscious of the weaknesses of popular government and the dangers of popular enthusiasms, particularly appreciated the rigid, procedure-ridden, but effective government of India, unrestricted as it was by formal or informal checks to its power.

31

Ibid.

Sir John Strachey noted the remarkable degree of autonomy for the government in India, stating that "it is an error to suppose that the Secretary of State is constantly interfering in the ordinary work of Indian administration," despite improved facilities in communication which might have made it possible for him to do so.³² In India, neither the Lieutenant-Governors of the provinces nor their Councils could restrict the power of the central administration. Indeed, the very narrow purview of provincial administration left a wealth of business to be handled exclusively by the central government.³³ Internal disagreements were minimized, and the relations between the Governor-General and his Council were so constructed that order triumphed over individual volition.

All public business of every kind, however, trivial, was supposed to come before all the members of the Council. Questions were ordinarily decided by the majority, the Governor-General having a casting vote if the votes were equal. If the Governor-General determined to overrule the majority, it was provided that he and the members of the Council should 'mutually

32

Ibid., p. 78.

33

Ibid., pp. 60-61. The local councils could not, for example, "make any law affecting an Act of Parliament, nor, except with the previous sanction of the Governor-General, may it take into consideration any measure affecting the public debt, customs, imperial taxation, currency, the post office and telegraph, the penal code, religion, the military and naval forces, patents, copyright, or relations with foreign powers."

exchange with and communicate in writing to each other the grounds and reasons of their respective opinions.' They were then to meet for a second time, and if both parties retained their first opinions, their minutes were to be entered on the consultations and the orders of the Governor-General were to be carried out. ³⁴

Even in periods of internal stress, the authority of ordered, regular government was to prevail in India.

Despite his early reservations, then, Maine was reconciled to the new Indian government. From his point of view, it seemed to retain most of the advantages of the old while adding new ones. He was reconciled, too, by Lord Derby's insistence that "the government of India must be, on the whole, carried out in India itself."³⁵

Interference, Derby felt, should be limited to as small a scale as possible. Though Parliament "was responsible to the nation for the administration of India," it should, he noted, "discharge its responsibilities conscientiously."³⁶

While irresponsible reformers were thus excluded, the possibility of bringing true progress to India had increased.

"Possibly without design," said Maine, "Parliament swept

³⁴

Ibid., p. 63.

³⁵

Great Britain, 3 Hansard's Parliamentary Debates, CLI (1858), 1448.

³⁶

Ibid.

away the obstacles to a transformation as remarkable as has been the development of any Western country."³⁷

Though Maine did not insist upon the fact, he constantly implied that the Indian Mutiny of 1857 had resulted from excessive enthusiasm for unguided reform. Certain it was that the India to which Maine came in 1862 was a country permeated by bitterness and suspicion, by distrust and a growing sense of isolation. The Indian and British communities were increasingly separated. The British community more than ever tended to regard the Indian as a "natural inferior"; nor was his attitude in any way contradicted by an increasing tendency to create a self-contained European society, tinged with racial bias. Said one observer, "the presence of large numbers of English women in India has been an unfortunate factor in this respect."³⁸

37

Sir Henry Maine, "India," The Reign of Queen Victoria, I, p. 483.

38

Sir Percival J. Griffiths, The British Impact on India (London: MacDonal, 1952), p. 275. A classic fictional portrayal of this development is found in E. M. Forster, A Passage to India (Harmondsworth: Penguin Books Ltd., 1962), pp. 27-28. When speaking of contact between Native and European, Forster's characters said:

'I've avoided,' said Miss Quested. 'Excepting my own servant, I've scarcely spoken to an Indian since landing.'

'Oh, lucky you.'

'But I want to see them.'

She became the centre of an amused group of ladies. One said, 'Wanting to see Indians! How new that sounds!' Another, 'Natives! why, fancy!' A third, more serious, said, 'Let me explain. Natives don't respect one any the more after meeting one, you see.'

When Maine arrived in India, his normal duties in the administrative complex of a large government were sufficient to prevent him from closely observing the native community. When the social distinctions of the post-Mutiny years were added, the physical and mental separation between him and the mass of the population was nearly complete. This grand isolation undoubtedly gave Maine the security and the confidence needed to make magisterial pronouncements on the primitive state of Indian society; it allowed him, with clear conscience, to make epochal decisions concerning the social, political and economic future of India without consulting its inhabitants, and, since this state of affairs seemed imminently normal, it allowed him to urge its continuation. In government, particularly, Maine saw a need for the most rigid separation of the races. As he was to say later of the government of Bengal:

I should say there would be no more dangerous ingredient in the Council than a large number of educated Bengali natives. Nobody charged with the

38(cont'd.)

'That occurs after so many meetings.'

But the lady, entirely stupid and friendly, continued: 'What I mean is, I was a nurse before my marriage and came across them a great deal, so I know. I really do know the truth about Indians. A most unsuitable position for any Englishwoman--I was a nurse in a Native State. One's only hope was to hold sternly aloof.'

'Even from one's patients?'

'Why, the kindest thing one can do to a native is to let him die,' said Mrs. Callendar.

conduct of the Legislative Department will ever fail to be inundated with their proposals for legislative innovations; and, if those proposals are serious, all I can say is that there are many of them which Bentham himself would have thought premature. 39

The limited and Euro-centric environment in which Maine found himself was, in his case, reinforced by a firm conviction, which he believed to have a scientific foundation, of the natural inferiority of Indian civilization and of the consequent superiority of European, and especially British, civilization. From the point of view of those who defended the righteousness, and urged the permanence of, British rule, this isolation had an advantage.

The philosophic historian may well consider that a small body of foreigners can only hold sway over vast territories by keeping themselves aloof and brooking no equality with the subject people. As long, therefore, as self-government for India was indefinitely distant, the aloofness of the Englishman may have been based on an unconscious political wisdom; his failure to appreciate the spiritual awakening of India, which his own work had so largely produced, was for a time a source of strength; it left him able to rule because he took his ascendancy for granted. 40

In his role as law member of the Council of the Governor-

39

Sir Henry Maine, "Statute 33 Vict., c 3, ss 1 & 2; Bengal Legislative Council," Government of India, Legislative Department, Minutes by Sir H. S. Maine, 1862-1869: With a Note on Indian Codification Dated 17 July, 1879 (Calcutta: Office of the Superintendent of Government Printing, India, 1892), p. 165. Hereafter cited as Minutes.

40

Sir Percival J. Griffiths, The British Impact on India, pp. 276-77.

General of India, Maine functioned in an environment not so much oblivious to the needs of Indian society as one in which the Indian population existed merely as a complex problem to be solved by applying superior European expertise.

The functions of the Law Member of the Council were many. In the Executive Council, he was responsible for the operation of the Legislative department, for the drafting of bills in anticipation of their discussion by the Legislative Council, and for the preparation of final drafts of approved legislation. Maine was, himself, not particularly adept at this routine labor. As Grant-Duff noted, Maine avoided the less exciting business of drafting whenever possible.

It would be a mistake to infer from the large number of Acts which were passed in his time that Maine was a great adept in the art of drafting.... That was not at all the bent of his genius. His power lay in seeing very quickly what ought to be done in the way of legislation, in finding out who were the proper men to assist him by their skill in manipulating details, in piloting his Bills through the ordeal of Select Committee (the most important phase in the genesis of an Indian Act), and finally in carrying it safe and sound through the Legislative Council. 41

To a remarkable degree, then, the structure of the Indian Government and the duties were such that Maine was able to

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Sir M. E. Grant-Duff, Sir Henry Maine, p. 25. Mr. Whitley Stokes, Secretary to the Government in the Legislative Department, and later one of the editors of Maine's Minutes, did most of the work of drafting legislation.

integrate his administrative work into a theoretical framework and to co-ordinate the specifics of practice with considerations of theory. Maine's official Minutes and his speeches in the Council reflect the theoretical foundations of both his and the government's view on the purpose and scope of government in India.

Maine's activities as Law Member and the legislation which he helped to prepare should be seen as a reflection of his concept of the role of government in the process of social change--insofar, that is, as he was able to convince the Government, in India and in England, to adopt his policies. Thus again, Maine's Minutes and speeches served also to indicate, not only his own philosophy, but also that of other members of the Government. In a new government, one which was still finding its way among the rough indicators of the various acts of 1858 and 1861, these statements of principle or proposed principle were particularly important. In the mass of legislation with which Maine was concerned,⁴² two categories were prominent in his estimation. One of his major concerns was the reform of law, because it was through law and within the general framework provided by modern law, that Maine hoped India would advance into modern civilization. The other

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For a list of the major pieces of legislation enacted during his tenure of office, see the Appendix below, p. 652.

category of legislation focused upon economic matters, because in a peasant economy he considered alterations in the form and function of landholding the most direct way of facilitating social change.

The reform of law in India was important because a properly devised system of law could be used as an instrument of civilizing India. Frederic Harrison explained the great responsibility of creating a new body of law as having "a curious analogy with the growth of the Praetorian law of Rome."

On a far larger scale, and in a far shorter time, we have had to create a system of jurisprudence which would retain all the essential features of our own law, apply it to the case of a vast population having habits and institutions differing from our own, and which would be free from all that is local and historical in English forms. We have thus created, as it were, a real *Ius Gentium* out of our own civil law. But we have had one additional task from which the Romans were free. We have had to codify and recast our own law into a systematic form before we could present it to people who had not our English citizenship. ⁴³

The task, said Harrison, was greatly complicated not only by the absence of civilization among the natives to be governed, but also by the lack of trained judicial personnel in all parts of the country. ⁴⁴ In addition, "greater

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Sir Frederic Harrison, "The Historical Method," On Jurisprudence and the Conflict of Laws (Oxford: Clarendon Press, 1919), p. 78.

⁴⁴

Ibid.

commercial activity and free resort to the Courts" had disclosed glaring weaknesses in the prevailing system of commercial law "which were being partially and awkwardly filled up, almost haphazardly, by disjointed fragments of English law."⁴⁵ To remove the irregular and almost accidental aspect of legal reform and to place Indian law on a firm basis, extensive, though careful, efforts to construct a comprehensive body of law were needed. It was one of Maine's lasting contributions to India that he helped lay the foundation for this new legal structure.

In the legislation which he prepared on the civil usages of the natives, and on their religious opinions, Maine reflected his conviction that law should slightly anticipate social conditions so as to act as a civilizing instrument. The Bills he supported concerning divorce,⁴⁶ the remarriage of native converts⁴⁷ and the civil marriage of natives,⁴⁸ for example, established a precedent in "law-

⁴⁵
Sir Charles Tupper, "India and Sir Henry Maine," Journal of the Society of Arts, XLVI (March, 1898), p. 393.

⁴⁶
Sir Henry Maine, "Divorce," in: Sir M. E. Grant-Duff, Sir Henry Maine, pp. 91-114. The three speeches were dated 24 December, 1862, 14 January, 1863 and 26 February, 1869.

⁴⁷
Sir Henry Maine, "Re-Marriage of Native Converts," in: Ibid., pp. 130-164. The speech was dated 4 November, 1864.

⁴⁸
Sir Henry Maine, "Civil Marriage of Natives," in: Ibid., pp. 285-294. The speech was dated 27 November, 1868.

making in social reforms" which was, as Sir Charles Tupper noted, followed during the entire second half of the Victorian period.⁴⁹ To combat the tendency for judicial interpretation to fill the gap left by formal legislation--a process marked by indecision and lack of consistency--Maine submitted several Minutes which urged the Council to take legislative initiative from the judges.⁵⁰

I am quite well aware that many able men in India think that ingenuity and subtlety in the Judges of Appeal will enable him to draw from imperfectly reported evidence conclusions sounder than the rough impressions of the Native Judge below. I do not question the sincerity of their belief, but I consider that the theory arrived at under such circumstances...is in most cases a mere figment of the mind, and that the chances of error, so far from being diminished, are increased in proportion to the ingenuity of the Court of Appeal. 51

Such error and inconsistency in judicial legislation, Maine feared, would tend to bring the administrative function to a standstill.

The consequences of leaving India to be governed by the Courts would, in my judgment, be almost disastrous. The bolder sort of officials would...go on

49

Sir Charles Tupper, "India and Sir Henry Maine," p. 391.

50

Sir Henry Maine, "Office Establishment of the High Court at Bombay," Minutes, pp. 5-6; "Qualifications for High Court Judgeships," Minutes, p. 6; "Agra Sudder Court; Civil Justice; Courts of Small Causes," Minutes, pp. 28-35; and "Agra Sudder Court; High Courts; Civil Justice," Minutes, pp. 52-55.

51

Sir Henry Maine, "Agra Sudder Court; Civil Justice; Courts of Small Causes," Minutes, p. 31.

without regard to legal rule, until something like the deadlock would be reached with which we are about to deal in the Punjab.... But the great majority of administrative officials, whether weaker or less reckless, would observe a caution and hesitation for which the doubtful state of law could always be pleaded. There would, in fact, be a paralysis of administration throughout the country.⁵²

The type of legislation with which Maine had been so far engrossed did much to put the governance of India upon a firm and regular basis, but the more fundamental question of how to reduce English law to Indian needs required a broader perspective and greater imagination. The means which Maine suggested were two: to localize law, and to codify law. Maine's efforts to allow local governments considerable leeway in proposing legislation stemmed from his awareness that different parts of India required special treatment, the specific form of which was best recognized by the local administrator.

Now these provinces for which the Supreme Council is the joint or sole Legislature, exhibit very wide diversities. Some of these differences are owing to distinction of race, others to differences of land-law, others to the unequal spread of education. Not only are the original diversities between the various populations of India believed now-a-days to be much greater than they were once thought to be, but it may be questioned whether, for the present at all events, they are not rather increasing rather than diminishing under the influence of British government. That influence has no doubt thrown all India more or less into a state of ferment and progress, but the rate of progress is very unequal and irregular. It is growing more and more difficult to

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Sir Henry Maine, "Over-Legislation," Minutes, p. 217.

bring the population of two or more provinces under any one law which goes closely home to their daily life and habits. 53

So successful was Maine in urging flexibility in, and decentralizing of, local legislation, that his precedent was followed long after his departure. As late as 1898, Maine's influence in this area was acknowledged.

We are localizing legislation, and we are--more often as yet through the central than through any local legislature--supplying local needs, province by province by passing local laws, some of them containing important provisions of substantive law, but most of them constituting or elaborating the machinery of administration. 54

If allowed to continue unchecked, however, this process of localizing legislation would undoubtedly have created the same chaotic situation which judicial legislation threatened. As a counter-balance, then, to the admittedly necessary concessions to local needs, Maine urged the adoption of a fully-developed legal code for India. He wanted to establish a code containing principles of English law "with as much simplicity as was compatible with accuracy."⁵⁵ Maine's contribution to the development of codification was, however, more long-term than immediate.

53

Ibid.

54

Sir Charles Tupper, "India and Sir Henry Maine," pp. 394.

55

See Sir Henry Maine, "Indian Codification," Minutes, pp. 231-245.

Maine came to India at the height of the period of Code-making, which began with the appointment of the first law commission in 1834, and ended with the passing of the Transfer of Property Act in 1882. It did not fall to his lot greatly to advance the Code by specific enactments, but no one more clearly perceived or forcibly defended its necessity. ⁵⁶

In addition, however, to "clearly perceiving" or "forcibly defending" the need for codification, Maine also composed draft chapters, particularly of an Indian Civil Code, ⁵⁷ so that by the time of his departure, the ground work for future codification had been laid. James Fitzjames Stephen, Maine's successor as Law Member, acknowledged his great debt to Maine's preliminary work; when Stephen arrived in India, he found "everything prepared for the task of consolidation." From this preparation came, during Stephen's tenure, the codes concerning Contract Law and an Evidence Act, and a new Code of Criminal Procedure. ⁵⁸ Maine's contributions, then, to the development of the government of India after the disruption of the Mutiny included the creation of an extensive legal framework within which future administrators could operate effectively.

⁵⁶
Sir Charles Tupper, "India and Sir Henry Maine,"
p. 394.

⁵⁷
Ibid., p. 391.

⁵⁸
"Fitzjames Stephen on Codification," ⁵⁴ Law Times,
45 (1872).

Maine's activities in the realm of economic legislation, while extensive, may be dealt with briefly. They relate not only to his duties as an administrator but also to his interests as a scholar. Maine believed that one of the difficulties Britain faced in its efforts to civilize India was that the dead hand of custom led the native to cling to past usages and ancient traditions long unfamiliar to a westerner. The purpose of purely economic legislation was to promote changes in the existing interrelationships of kinship groups and village-communities, while at the same time limiting these changes to those which the native could accept short of rebellion. Maine desired, in other words, the adoption of a balanced and cautious approach to land reform.

Maine urged the Council to recognize that they should "never again confound Indian and English ideas of landed property."⁵⁹ In his estimation, normal Indian land-forms were, for the most part, still those of an early pre-feudal, communal system. Though he recognized the existence of this early form of property, Maine did not suggest that it be retained in its entirety; if India were to become civilized, its unique social structure had to be altered, even though change had to come about slowly. To those who wished to bring about rapid change, Maine pointed out the

⁵⁹
Sir Charles Tupper, "India and Sir Henry Maine,"
p. 397.

fallaciousness of believing that "Indians required nothing but School Boards and Normal Schools to turn them into Englishmen,"⁶⁰ and emphasized the "comparative preservation of primitive custom and idea in India."⁶¹ To those who wanted, on the other hand, to retain ancient land-forms and social customs in their entirety, Maine pointed out not only that custom could be changed but that to undo changes already brought about by previous British-imposed reforms would cause more harm than did the original misunderstanding. Maine argued that:

...while nothing seems to me to exceed the tenacity of the Natives of India in adhering to personal, family and religious usages, and to those customs of...property which are closely implicated with family relations, such as joint ownership and joint occupation, I must say that I have come to the conclusion...that there is a vast deal less of actual custom regulating the tenure of land by the cultivating classes than the large assumptions of the India Revenue Law on the subject of custom would lead one to suppose. 62

Custom, once broken could never be healed, even if the original legislation had been in error. Thus, when the British had, through a misunderstanding, allocated land to landlords before the Mutiny, leaving the tenants at the

60

Sir Henry Maine, Village-Communities, p. 215.

61

Ibid., p. 216.

62

Sir Henry Maine, "Prinsep's Punjab Theories," Minutes, p. 105.

mercy of an unscrupulous class,⁶³ they had committed a grievous error. But to return to a system of communal ownership some fifteen or twenty years after would also create problems. "I think our proper course is as much as possible to adhere to the status we find existing,"⁶⁴ he argued; to revert to a previously existing system of landholding would be to "jeopardize or destroy interests in land enjoyed by thousands of persons for a period very little, if at all, short of the time which in England would ripen those interests into vested rights, even though acquired originally by naked wrong."⁶⁵ His goal, then, was to prevent too rapid change in custom and to discourage the submission of India to the "whirligig of Indian opinion." Ultimately, British rule and consequent prosperity was "chiefly owing to the stability which we give to property--more to that, perhaps, than to the protection we give to life and limb."⁶⁶ If land reform were to be

63

Vera Anstey, The Economic Development of India, 3rd ed. (London: Longmans, Green and Co., 1949), p. 102.

64

Sir Henry Maine, "Prinsep's Punjab Theories," Minutes, p. 118.

65

Ibid., pp. 119-120. See also Maine's speech of 19 October, 1868, "Punjab Tenancy," in Sir M. E. Grant-Duff, Sir Henry Maine, pp. 270-71.

66

Sir Henry Maine, "Punjab Tenancy," in Sir M. E. Grant-Duff, Sir Henry Maine, pp. 284-85.

arbitrary, it were to be too out of step with accepted practice, if it were to be vacillating and inconsistent, then "I am not sure we shall not by such experiments arrest the progress of the country in civilization even more than did the disposed Native ruler by his tyranny and oppression."⁶⁷

Maine's concern for proper economic legislation led him not only to make administrative decisions and recommendations, it also led him to engage in extensive academic investigations concerning the exact nature of Indian land-holding before the advent of British rule. His concern for land-holding involved Maine in the construction of "nothing less than his view of the general history of property in land."⁶⁸ Briefly stated, Maine held that joint or communal land tenure came first in time, before the evolution of modern ideas of individual ownership. The communal holding, "approximated to a single type" which characterized both ancient and surviving examples. The commune had, at one time, Maine suggested, consisted of groups of families, connected by an acknowledged blood relationship, but in modern India, the disintegration of blood ties meant that the commune was only

⁶⁷

Ibid., p. 285.

⁶⁸

Sir Charles Tupper, "India and Sir Henry Maine," p. 397.

"held together by the land occupied in common."⁶⁹ Maine's theory implied that, before the arrival of the British and the imposition of an alien system of private land-holding, there was "something of a communistic type as regards the property in land."⁷⁰

Maine collected evidence of this early system of land-holding while pursuing his administrative duties. Residing, alternately, in Calcutta, the winter capital of the Government of India, and Simla, the summer headquarters, his personal investigations were limited to Bengal and the Punjab hills, with brief excursions to Allahbad, the capital of the North-western provinces.⁷¹ He was able to augment his own observations by written accounts, which were in the decade of the '60's, however, in a condition "very far from being what...[they have] since become."⁷² The result of Maine's work was to give him vast quantities of materials

69

John Stuart Mill, "Mr. Maine on Village-Communities," Fortnightly Review, XV (1 May, 1871), pp. 2-3. Mill was presenting a remarkably lucid synopsis of Maine's leading idea in this particular passage.

70

Ibid., p. 3.

71

B. H. Baden-Powell, Village Communities in India (London: Swan Sonnenschein and Co., 1899), pp. 33-34.

72

B. H. Baden-Powell, The Indian Village Community (New Haven: Human Relations Area File, 1957; Reprint of 1896 edition by Longmans, Green and Co.), p. 4.

which he used to great benefit in his later published works. His investigations have, however, been heavily criticized, particularly by B. H. Baden-Powell, who argued that there were more variations in the forms of landholding in the different parts of India than Maine admitted.⁷³ Even Baden-Powell, however, used Maine's work as a basis for his own. Much of Baden-Powell's criticism was directed against the "authority of Sir H. S. Maine's name" and against "the charm of his style and the suggestiveness of his method."⁷⁴ However, despite his attack upon the "extreme generality" of Maine's views, much of Maine's research has remained unscathed. A recent evaluation of Maine's Indian research concluded that "Maine's ideas may have been modified in a number of respects, but they are very far from having been completely disproved or entirely displaced."⁷⁵

When Maine returned to England in 1869, "looking twice the man he was seven years before,"⁷⁶ his connection with

⁷³ Ibid., p. 3.

⁷⁴ B. H. Baden-Powell, Village Communities in India, p. 3.

⁷⁵ Daniel Thorner, "Sir Henry Maine," Some Modern Historians of Britain: Essays in Honor of R. L. Schuyler, ed. by Herman Ausubel (New York: The Dryden Press, 1951), p. 79.

⁷⁶ Sir M. E. Grant-Duff, Sir Henry Maine, p. 36.

India had not yet ended. His administrative ability was again put to use when, in 1871, the Secretary of State for India, the Duke of Argyll, offered Maine a seat on the Council of India.⁷⁷ Membership on the Council was limited to fifteen persons, the majority of whom had served in India ten years and had not, at the time of their appointment, been five years away from India. Persons who had been Lieutenant-Governors of provinces or members of the Viceroy's Council were usually appointed, together with military men, bankers, and diplomatic, official or mercantile men.⁷⁸ In 1869, the Government of India Act allowed the Secretary of State to fill all vacancies on the Council, though at the same time membership on the Council was limited to ten years rather than the previously permitted tenure "during good behavior."⁷⁹ When Maine was appointed to the Council, the ten year provision was in force; yet, barely five years after his appointment, the Council of India Act of 1876 enabled the Secretary of State to appoint any person "having professional or other peculiar

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Ibid., p. 41.

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Sir John Strachey, India: Its Administration and Progress, pp. 74-75.

⁷⁹

Sir Courtenay Ilbert, The Government of India, pp. 104-105.

qualifications to be a member of the Council of India, with the old tenure, 'during good behavior,' which had been abolished in 1869."⁸⁰ This newly acquired power was exercised immediately in the case of Maine; it was, in fact, "probably conferred with special reference to him."⁸¹

The object of the Council of India was to give the Secretary of State, who could not ordinarily be expected to have an extensive personal knowledge of Indian administration, the advantage of special knowledge and skills. Maine, for example, interested himself in the judicial department of the India Office, "and soon made himself a power in all that related to it."⁸² The powers of the Council were limited and were certainly much less than those previously held by the Court of Directors of the East India Company. The Council of India could not initiate legislation or even render an independent opinion until a question was laid before it by the Secretary of State. Though every order issued by the Secretary of State was, in fact, submitted to Council, in any difference of opinion, the decision of the Secretary of State prevailed. Only in matters of a financial nature was a majority decision of

⁸⁰
Ibid., p. 106.

⁸¹
Ibid.

⁸²
Sir M. E. Grant-Duff, Sir Henry Maine, p. 41.

the Council necessary. Even this restriction on the power of the Secretary was limited to ordinary administrative business.⁸³ The power of the Council was restricted, then, to the ordinary business of advising the Secretary of State on administrative matters wherein the specialized experience of the members had some bearing. Only then was their advice asked or followed.

Part, at least, of the limitations placed upon the Council of India would seem to have been dictated by the uneven quality of its membership. Though the Council contained several excellent members, notably Maine himself and Sir Bartle Frere, or at a later date, Sir Alfred Lyall, there were also several weaker members. These, Grant-Duff characterized as being "far from their best"--men who "tried to persuade themselves by too frequent speaking that their minds were as active as ever."⁸⁴ Even those with ability were often assailed by growing malaise and by a nagging recognition that their absence from India was dulling their judgment. Lyall's description of the Council is reminiscent of a club of aged and somnambulent derelicts; in a rather pathetic letter to his brother, Lyall remarked:

83

Sir John Strachey, India: Its Administration and Progress, pp. 74-76.

84

Sir M. E. Grant-Duff, Sir Henry Maine, p. 41.

The India Office is comfortable and convenient, but rather depressing; in the first place, death visits the Council rather frequently; secondly, we have all rather the look of old hulks laid up in dock, and are men who have said goodbye to active service; thirdly, the distance and difference between London and India makes one feel as if looking at things through a glass darkly, not face to face, and in a year or two I shall begin to distrust my judgment. 85

In this environment, Maine continued to participate, peripherally, in the Government of India. His presence was not, perhaps, quite so continual or so depressing as some others'; he was, after all, quite involved in activities outside the Council, including publication and lecturing. The work which he did for the Council was "at least as effective as any other member of that body."⁸⁶ He spoke seldom, but effectively. He wrote infrequently but to good purpose.⁸⁷ Not till his death in 1888 did Maine finally sever his last link in that most important chain between himself and the continent which, in one way or another, did so much to enhance his reputation. The connection was, in the last analysis, two-fold: if Maine used India to advance his own personal and academic reputations, then it is equally true that, particularly in

85

Quoted in Sir Mortimer Durand, Life of the Right Hon. Sir Alfred Comyn Lyall (Edinburgh: William Blackwood and Sons, 1913), pp. 322-323.

86

Sir M. E. Grant-Duff, Sir Henry Maine, p. 41.

87

Ibid.

his written work, Maine popularized knowledge of India, making of it not only an administrative problem, or a foreign land where natives rebel, but an integral part of the western heritage. India and Sir Henry Maine are names indissolubly linked together. Even death did not end the connection, for it survives even as his ideas survive.

PART TWO

THE IDEA

CHAPTER III

PROGRESS AND SCIENCE:
THE PATTERN OF NATURALISM

The work done by Sir Henry Maine in jurisprudence and political science was, in one sense, not unique. While the specific ideas he advanced were his alone, both the pattern by which he chose to present them and the principles underlying them were similar to those advanced by several other contemporary authors. This common pattern can be called naturalism.

Writing, as he did, in the third quarter of the nineteenth century, it was almost impossible for Maine to escape the two dominant enthusiasms of that era--progress and science. Despite such reservations as T. H. Huxley's denial of moral progress or Tennyson's doubts about the all-conquering power of science, there appeared to be popular belief in the improvement of the world through the application of scientific discoveries. As a pattern of thought, however, naturalism was less dependent upon this popular faith than it was upon systematic formulations of the idea of progress and abstract discussions of the superiority of the scientific method. The philosophies of Auguste Comte, of Herbert Spencer and of John Stuart Mill contributed to a precise definition of naturalism. However, as long as the assumptions of naturalism remained the exclusive property of formal philosophers, and were closely tied to individual systems of thought,

there was little chance that these more exact assumptions would become an integral part of the intellectual life of the nation. The publication of Charles Darwin's The Origin of Species, based upon these same assumptions, was primarily responsible for transferring naturalism from the arid pages of Mill's System of Logic to the broader spaces of educated opinion. Once freed from its two previous associations--the vagaries of public enthusiasm and specific connections with systems of philosophy--naturalism assumed, in the hands of anthropologists, historians, political scientists, philologists and even jurists, a pattern applicable to many disciplines and to many kinds of academic research.

Edward B. Tylor, Sir James Frazer, E. A. Freeman and Max Müller, to name but a few, were active in establishing naturalism as the basis of their respective disciplines. They all aided in the development of a pattern of thought, the main characteristics of which were: a broad or synoptic view of society; the idea of natural law governing society; the analogy of a social organism; a tendency to discuss social evolution in terms of stages; and the use of a new, comparative methodology. To this pattern of thought, philologists added a significant footnote: that the pattern of social evolution be restricted to groups shown to be linguistically united. In England, a consciousness of Aryan unity was an integral and inseparable part of much naturalistic thought.

To examine naturalism, then, and to understand the intellectual context within which Maine wrote, one must approach it from three points of view: the popular, the philosophic and the academic.

I. The Popular Tradition

Montesquieu, Voltaire and the Encyclopedists had believed in man's capacity to "make" himself, and in the ability of reason to improve his material surroundings. In mid-nineteenth century England, this earlier tradition was reinforced by the Utilitarian faith in "the influence of reason over the minds of mankind,"¹ and in "the consequent unlimited possibility of improving the moral and intellectual condition of mankind by education."² Assurance that control of the environment would greatly improve human life was stimulated by the vast technological and material changes wrought by the industrial revolution--"by the application of machinery, the improvement of old technical processes and the invention of new ones, accompanied by an even more remarkable development of old and new means of locomotion and inter-communication."³ Man's increasing ability to control his

¹ John Stuart Mill, Autobiography (New York: Columbia University Press, 1924), p. 74.

² Ibid., p. 75.

³ Thomas H. Huxley, "The Progress of Science," Method and Results (New York: D. Appleton and Co., 1925), p. 42.

environment was generally assumed to be the basis of social progress.

A pervasive belief in improvement, an assertion of hope based upon progress, characterized English thought after 1830.⁴ Progress could mean simply growth as growth in the population of a town or nation; it could mean industrial or agricultural expansion, or the production of superior products. Progress could mean moral and intellectual advances as in science or art. Seldom did the general populace attempt to sort out the specific meanings of this vague and indefinite complex of ideas. When wealth increased and trade flourished, when science reduced the mysteries of the universe and the animal kingdom to human comprehension, when political reform altered the constitutional structure of the nation, seemingly for the better, it was difficult not to believe that human nature and human happiness were advancing at the same time. In spite of some obvious misgivings and doubts, anxieties and fears,⁵ Victorians on the whole believed that mankind was becoming less savage, less selfish and less unreasonable.⁶ Even the normally cautious Darwin argued that

⁴ Walter E. Houghton, "The Victorian Frame of Mind, 1830-1870" (New Haven: Yale University Press, 1957), p. 28.

⁵ See Ibid. on "Anxiety," pp. 54-89; on "The Need for Rigidity," pp. 173-176; and "The Open and Flexible Mind," pp. 176-180.

⁶ Basil Willey, "Origins and Development of the Idea of

since evolution by natural selection "works solely by and for the good of each being, all corporeal and mental endowments will tend to progress toward perfection."⁷ W. K. Clifford observed: "Those who can read the signs of the times read in them that the kingdom of Man is at hand."⁸

With equal enthusiasm, John Stuart Mill stated:

The first of the leading peculiarities of the present age is, that it is an age of transition...that the nineteenth century will be known as the era of one of the greatest revolutions of which history has preserved the remembrance, in the human mind, and in the whole constitution of human society. ⁹

Mill's revolution was based upon the contribution which he believed science and scientific technique were making to the material and intellectual development of the nineteenth century. Science had already made that century an improved age; the deliberate application of scientific discoveries and of scientific technique would lead to even greater progress. With the aid of science, Mill argued, "we may hereafter succeed...in determining what artificial means may be used, and to what extent, to accelerate the natural progress insofar as

6(cont'd.)

Progress," Ideas and Beliefs of the Victorians (London: Sylvan Press, 1949), p. 45.

⁷Charles Darwin, The Origin of Species (New York: P.F. Collier and Son Co., 1909), pp. 508-09.

⁸William Kingdon Clifford, "Cosmic Emotion," Lectures and Essays (London: MacMillan and Co., 1886), pp. 394-5.

⁹John Stuart Mill, The Spirit of the Age (Chicago: University of Chicago Press, 1942), p. 2 and p. 6.

it is beneficial."¹⁰ Mill was proclaiming, as many others proclaimed, the existence of a new scientific ideal, of new scientific inventions and of scientific discovery as the hope of the future and the basis of true progress.

The use of the words "science" and "scientific", always elusive, have varied considerably throughout history, though by the nineteenth century their meaning was becoming somewhat more precise; originally meaning knowledge in its broadest perspective, they came to mean knowledge of material phenomena alone and were largely limited to the physical universe. Francis Bacon, for example, had been quite flexible in his understanding of "scientia," translating it as "knowledge," as "learning" and occasionally as "science."¹¹ At a later date, certainly by the seventeenth century, what came to be considered science, the study of material phenomena, was most frequently termed "natural knowledge" or "natural philosophy." Thus, both the Royal Society for the Improvement of Natural Knowledge and the Royal Institution omitted the term "science" from their titles, and both used the term "philosophy" in formal or official statements of their objectives. Only with the formation of the British Association for the

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John Stuart Mill, System of Logic, Ratiocinative and Inductive, 5th ed. (New York: Harper and Brothers, 1857), p. 587.

11

John Theodore Merz, A History of European Thought in the Nineteenth Century (Edinburgh and London: Wm. Blackwood and Sons, 1914), I, p. 89.

Advancement of Science in 1831 did the word "science" receive official sanction for its later and more definite usage. Not till then did "science" become customarily associated with the specific area of human knowledge dealing with the material world.¹²

At the same time that the term "science" was being restricted to a specific area of human knowledge, it also acquired a more precise methodological meaning; to study a subject scientifically meant "the application of past experience to new circumstances by means of an observed order of events."¹³ The order of events was assumed to be sufficiently exact and uniform that one could repeatedly conduct similar experiments and achieve similar results. As repeated experimentation and observation defined the order of events with increasing precision, the scientist could ascertain with certainty the degree of constancy and exactness in the order he found. When the scientist achieved a high degree of exactitude, he could then begin to predict, beforehand, the results of a particular experiment; he could stipulate that, given a specific set of conditions, a specific set of results could be expected every time.¹⁴ Science

¹²
Ibid., I, pp. 89-90 (note).

¹³
William Kingdon Clifford, "Aims and Instruments of Scientific Thought," Lectures and Essays, p. 108.

¹⁴
Ibid.

came to mean a particular method: observation, experimentation and prediction.

Implicit in this definition of science was the need for expertise and specialized training. As long as science had been regarded as natural philosophy, a gentleman, though trained in the classics, could still aspire to at least conversational knowledge of the leading branches of scientific thought.¹⁵ In the hands of gentlemen, science was regarded primarily as a cultural tool mitigating the evils of philistinism. Until the middle of the nineteenth century, such a gentleman could still make "his stinks and bangs, and erect immobile machinery in cellars and outhouses."¹⁶ By mid-century, however, new emphasis upon precision enhanced the role of the theoretical scientist; work in thermodynamics became essential for the improvement of the steam engine, improvements in ship design awaited developments in the theory of hydraulics, and metallurgical developments depended largely upon contacts with chemistry.¹⁷ Consequently,

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S. G. Checkland, The Rise of Industrial Society in England, 1815-1885 (London: Longmans, Green and Co., 1964), pp. 79-80.

16

Ibid., p. 80. See also Alexis de Tocqueville, Democracy in America (New York: Vintage Books, 1960), II, pp. 42-49. In a chapter called "Why the Americans Are More Addicted to Practical than Theoretical Science," Tocqueville compared aristocratic influence upon science in England with the American pursuit of profit.

17

Ibid., pp. 88-89. Two industries, electronics and

because of the increased sophistication of the technological aspects of British industry "new revolutionary ideas must now come not from the manipulators and empirics, but from the higher reaches of mathematics, physics, chemistry, and electricity."¹⁸ The foundation of the British Association, 1831, marked a new era in the development of science--the application of specialized and theoretical scientific speculation to industrial development.

The association of scientific inquiry and industrial development helps to explain the subsequent public acceptance and general acclaim which science and the scientific method received. Theoretical science enabled man "to break up the equilibrium of actual existence, and to bring within our own power and under our control forces of undreamed of magnitude."¹⁹ Whereas technological innovations and practical inventions brought about by accident, by insight or by practical requirements had once influenced and stimulated scientific thought, the process was now reversed. New discoveries from the laboratory in chemistry, physics, and

17 (cont'd.)

photography, were almost exclusively the result of laboratory work. See Checkland, pp. 99-102 and pp. 172-74; and Helmut and Alison Gernsheim, The History of Photography (Oxford: The Clarendon Press, 1955).

18

S. G. Checkland, The Rise of Industrial Society in England, p. 95.

19

John Theodore Merz, A History of European Thought, I, p. 92.

electricity stimulated new practical achievements. Scientific speculation in the formal laboratory created new spheres of labor, of industry and of commerce. Where science once followed, it now appeared to lead; where science once responded to practical requirements, it now had "overtaken the march of practical life in many directions."²⁰ Science was positive. It was active. Science was the wave of the future; it "might become the god to displace a god."²¹

Science is sometimes erroneously supposed to be a human invention; it is represented as the truth of man, which is contrasted to the divine revelation of religious dogmas as being the truth of God. But Science is not of human make; Science cannot be fashioned by man as he pleases; Science is stern and unalterable; it is a revelation which cannot be invented but must be discovered. There is a holiness in mathematics, and there is ethics in the multiplication table. ²²

Though the physiological processes of man's body were treated in the new manner, the distinctively human activities of the mind were initially thought to be still the province

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Ibid., I, pp. 91-92.

21

"The New Orthodoxy," The Monist, VI (1895-96), p. 95.

22

Ibid. Again, however, faith in science, like faith in progress, was not universally held. In an age when fundamental conceptions of society, religion and politics were undergoing an almost complete re-examination, it was natural that there should be sharply divided opinion. Tennyson struck a dissenting note by suggesting that "I think we are not wholly brain," and that "Let Science prove we are, and then/What matters Science unto men." See Alfred Tennyson, "In Memoriam," in Jerome H. Buckley (ed.), Poems of Tennyson (Boston: Houghton Mifflin Co., 1958), stanza CXX, p. 250.

of purpose, will and spirit; the mind was the last, irrefutable evidence of a Divine Creator. When, however, Darwin brought the weight of science to bear even upon this domain, the last preserve of the non-scientific world appeared to fall. Darwin's The Origin of Species was a shock to the Victorian world, but his later works, especially The Descent of Man and Selection in Relation to Sex and The Expression of the Emotions in Man and Animals²³ did even more to show that man could no longer be said to have a more distinctive existence than any other earthly being. Man's most cherished attributes were now shown to be merely the product of an evolutionary process which connected him to other animals.²⁴ In his emphasis upon evolutionary change in the field of biology, in his emphasis upon natural selection and the survival of the fittest, Darwin gave to evolution--and consequently to the idea of progress-- the status of an unqualified, scientific fact. Though Darwin may have continued to treat his work as the elaboration of a set of hypotheses, his supporters often did not. Progress and science were, in their

23

Charles Darwin, Descent of Man and Selection in Relation to Sex (London: John Murray, 1901); and, The Expression of the Emotions in Man and Animals (London: John Murray, 1904).

24

See the discussion in Robert Scoon, "The Rise and Impact of Evolutionary Ideas," Evolutionary Thought in America, ed. by Stow Persons (New York: George Braziller, Inc., 1956), pp. 18-19.

eyes, united.²⁵ The concept of progress was no longer precarious and sporadic, no longer the result of genius and accident. After Darwin, progress became "organized, methodized, even mechanized. The method and the mechanism were of course science and its instruments."²⁶ The constant advance toward higher and more perfect forms was now proven scientifically. Progress was the improvement, not only of the material world, but of man himself.²⁷

Certainly science gave a better foundation to the concept of progress than did philosophy. Unlike philosophic speculation, which could leave the philosopher, after years of effort, at the very beginning of his work, it was believed that science developed in a strictly linear manner. G.H. Lewes saw the contrast between philosophic speculation and science very closely. The one was sterile, the other progressive:

Instead of perpetually finding itself, after years of gigantic endeavor, returned to the precise point from which it started, Science finds itself year by year, and almost day by day, advancing step by step, each

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For a discussion of the popular reception of Darwin's work, see Gertrude Himmelfarb, Darwin and the Darwinian Revolution (Garden City, New York: Doubleday and Co., 1959), pp. 280-93.

26

William Irvine, Apes, Angels, and Victorians: Darwin, Huxley and Evolution (New York: Meridian Books, Inc., 1959), p. 265.

27

Basil Willey, "Origins and Development of the Idea of Progress," p. 42.

accumulation of power adding to the momentum of progress.²⁸

To the advocate of scientific progress, modern innovation and recent advances brought increased comfort. Emphasis, however, was not so much upon individual invention as upon the general and growing ability of mankind to understand and to control his environment. This was the meaning of the statement by W. K. Clifford that "to every reasonable question there is an intelligible answer, which either we or posterity may know by the exercise of scientific thought."²⁹ The walls of the citadel of ignorance had been pierced by science. Time and the continued application of scientific thought would reduce the universe to human comprehension.

II. The Philosophic Tradition

The popular acceptance which science and the scientific method enjoyed in the middle years of Queen Victoria's reign was reinforced by specialized studies which attempted to impose upon this enthusiasm a structure and pattern. Early and widely-read examples of such speculation were Henry Thomas Buckle's History of Civilization in England, which took the country by storm in 1857 and 1861, and Robert

28

George Henry Lewes, The History of Philosophy from Thales to Comte, 3rd ed. (London: Longmans, Green and Co., 1867), p. xi.

29

W. K. Clifford, "Aims and Instruments of Scientific Thought," p. 88. Italics in original.

Chambers' Vestiges of the Natural History of Creation, which gave to the public a first taste of the philosophic implications of the new studies.³⁰ The reading public was made aware that attention to the scientific method seemed to imply both a deterministic history, guided by natural laws, and an abandonment of old, highly-cherished beliefs. The new science seemed to strip man not only of his much-vaunted freedom of action, but also of his non-empirically derived faith.

The work of Buckle and Chalmers was a startling revelation; however, to those who were able to keep an ear tuned to the world of more formal learning, Buckle's History and Chambers' Vestiges were merely dramatic presentations of tendencies more rigidly developed in formal philosophic circles. As a result of the work of a small band of disciples, including John Stuart Mill, the philosophic positivism of Auguste Comte was gaining a limited but enthusiastic audience in England. Mill was, himself, to make significant contributions to a philosophic understanding of the implications of the new study. The work of a native philosopher, Herbert Spencer, though dry and verbose, complex and highly dogmatic, also reflected a desire to give a scientific

30

Henry Thomas Buckle, History of Civilization in England (New York: D. Appleton and Co., 1897); and Robert Chambers, Vestiges of the Natural History of Creation (New York: Wiley and Putnam, 1845).

foundation to the idea of progress and to do so within a philosophic framework. While not a positivist in the strict sense, Spencer did give form and system to many of the same views expressed by Comte and his English followers. Finally, of course, crossing both the world of popular learning and that of formal academic philosophy, Charles Darwin, author of The Origin of Species, seemed to confirm the general validity of all previous scientific philosophies.

The net result of such systematic speculation, coming on top of an already existent popular eulogy of science and the scientific method, was a system of thought which can best be called naturalism or social positivism. While never totally dominant in England, naturalism was important from the fourth decade of the nineteenth century to the beginning of the First World War, although its period of greatest prominence would appear to have been during the forty years from 1850 to 1890.³¹ As a system of thought, naturalism had its roots deep in the past, but of its nineteenth century precursors, Auguste Comte, John Stuart Mill, Herbert Spencer, and Charles Darwin would seem to be the most important. During the middle and late Victorian period, naturalists borrowed from all these philosophic schemes, while adopting none in

31

The use of precise dates when discussing dominant intellectual trends is always approximate and often arbitrary. With few exceptions, however, most of the examples used in this discussion of naturalism are restricted to these dates. The most notable exceptions are, of course, Auguste Comte and John Stuart Mill, whose work dates from before 1850.

their totality. The result of such speculation was a system of thought whose roots can be traced and discussed individually, but whose content was somewhat more than the sum of its individual parts.

The single most important school of thought from which nineteenth century naturalists drew their inspiration was that of philosophic positivism. As an epistemology, positivism held that science provided the model for the only kind of knowledge attainable by man. Reality was limited to observation and to legitimate deductions from observation. Thus it was possible to know phenomena, to know laws governing the relationships of phenomena, but it was not possible to know anything incapable of empirical validation. Positivism was a denial of a priori reasoning and of the alleged knowledge obtained from it, just as it was also a denial of religious or metaphysical knowledge, for all of these were, by definition, concerned with a reality not related to phenomena, and consequently with a reality which could never be observed.³²

In addition to this epistemological meaning, the term positivism came to acquire at least three different and less

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For an excellent definition of positivism, see John Stuart Mill, Auguste Comte and Positivism (Ann Arbor, Michigan: University of Michigan Press, 1961), pp. 6-8. A much fuller discussion may be found in D. G. Charlton, Positivist Thought in France During the Second Empire, 1852-1870 (Oxford: The Clarendon Press, 1959), pp. 1-30.

precise meanings. Because of the importance which Auguste Comte's name and his work were to assume, in England particularly, positivism came to be associated with the entire body of Comte's thought, including his social, historical and religious doctrines. Secondly, "religious positivism," suggested by Comte and practised in positivist Churches of Humanity, gave to positivism more esoteric direction. Finally, "social positivism" came to be used generally as a term describing both a philosophy of history and a social theory which, while owing much to Comte, did not follow his precise outline. Social positivism or, alternatively, naturalism, came to indicate any system or theory based upon empirical evidence of historical and social phenomena, which emphasized law, connection and progress.³³

The application of philosophic positivism to the study of society was suggested by Comte in the fourth volume of his Cours de philosophie positive, which appeared between 1830 and 1842.³⁴ Comte argued that the scientific method should be extended to the study of society, and that those studying society must restrict themselves to co-ordinating observed facts and perfecting new techniques of investigation. This view was augmented by the firm belief that the student of

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D. G. Charlton, Positivist Thought in France, p. 5.

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See Auguste Comte, Cours de philosophie positive, 6 Vols. (Paris: Bachalier, 1830-42).

social phenomena must reject absolute ideas and restrict himself to that which was relative. Comte would not analyze, then, a static society but a society in the process of evolution.³⁵ History was an integral part of the new science, as that which held the key to understanding the dynamic, progressive and relative nature of society.³⁶ In working out this connection between science and history, Comte developed two ideas basic to social positivism. He insisted that the historian's attention be directed to the collective behavior of the masses and not merely to that of eminent individuals, for it was in collective behavior that one found the most important element in the understanding of social dynamics and social development. Secondly, Comte insisted that, just as in the scientific study of nature, so too in the scientific analysis of history and society, general laws, which he considered both necessary and constant, be emphasized, for it was these laws which formed, conditioned and guided the historical development of society.³⁷

³⁵ D. G. Charlton, Positivist Thought in France, pp. 29-30.

³⁶ Harriet Martineau, The Positive Philosophy of Auguste Comte (London: Kegan Paul, Trench, Trübner and Co., 1893), II, pp. 241-57.

³⁷ J. B. Bury, "Darwinism and History," Darwinism and Modern Science, ed. by A. C. Seward (Cambridge: Cambridge University Press, 1910), p. 533.

Comte distinguished four basic means of social investigation--observation, experimentation, comparison and the historical method.³⁸ Observation, or the exclusive utilization of empirically observable phenomena, was the basis of all other means of investigation. No social study could go beyond the confines of empirically observable evidence.³⁹ Experimentation, which might at first appear to be impossible because of the non-manipulative nature of social events, became feasible when Comte defined experimentation as the observation of what happened when a special or unique factor intervened in the regular course of social events.⁴⁰ The third means of scientific investigation was comparison, by which Comte meant the discovery of similarities both among human societies and between human and organic structures. Although this might be considered argument by analogy, such comparison, he thought, would lead to a clearer understanding of the nature of human society. In addition, comparisons of human societies need not be limited to existing groups; they could also be used in the study of consecutive stages of human society. Over a long period of time, this comparison of stages would lead to the fourth sociological

³⁸ Harriet Martineau, The Positive Philosophy, II, pp. 250-57.

³⁹ D. G. Charlton, Positive Thought in France, p. 29.

⁴⁰ Ibid., p. 30.

technique, the historical method.⁴¹ The study of history or of society in the process of development, properly conducted in conjunction with the comparative method, would enable the sociologist to discern which physical, intellectual, political and moral tendencies had become dominant and to suggest which opposing tendencies had gradually grown weaker.

Striking repetition would then suggest to the observer the laws of social dynamics which govern complex social phenomena.⁴²

The use of observation, experimentation, comparison and the historical method provide our immediate concern, for it was this methodology, rather than the specific application which Comte attempted that found widest acceptance in England.⁴³ John Stuart Mill, while perhaps the most famous exponent of Comte's thought in England was not the first. From 1838 on, there was a steadily widening reception of at least a portion of Comte's thought among the English reading public. It became increasingly difficult to avoid some knowledge, however superficial, of social positivism and of Comte's method, if not of his specific schemes or of his

⁴¹ Harriet Martineau, The Positive Philosophy, II, pp. 252-55.

⁴² Ibid., pp. 255-57.

⁴³ Richard Laurin Hawkins, Positivism in the United States, 1853-1861 (Cambridge: Harvard University Press, 1938), p. 6.

religion. Articles, books, university clubs, converts to positivism and the works of so-called "abortive positivists" did much to spread knowledge of at least the outlines of Comte's work.

Sir David Brewster, a physicist, had his attention drawn to Comte's work by another scientist, Sir Charles Wheatstone. In 1838, Brewster wrote a short, appreciative review of the first two volumes of Comte's Cours de philosophie positive for the Edinburgh Review.⁴⁴ In 1843, William Smith wrote the first English review of the completed version of the work for Blackwood's Edinburgh Magazine.⁴⁵ After that, articles began to appear in periodicals with greater frequency. Henry Roberts discussed Comte's work in the British Quarterly Review in 1854, while W. M. W. Call and John Chapman collaborated on a two-part article, "The Religion of Positivism," for the Westminster Review in 1858. Roberts published another short survey of Comte's thought in 1866, while anonymous articles graced the pages of the

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W. M. Simon, European Positivism in the Nineteenth Century: An Essay in Intellectual History (Ithica: Cornell University Press, 1963), pp. 172-73. See Sir David Brewster, "M. Comte's Course of Positive Philosophy," Edinburgh Review, LXVII (July, 1838), pp. 271-308.

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W. M. Simon, European Positivism, p. 173. Mention of Smith and his article can also be found in Alfred W. Benn, The History of English Rationalism in the Nineteenth Century (London: Longmans, Green and Co., 1906), I, p. 427. See William Smith, "Comte," Blackwood's Edinburgh Magazine, LIII (1843), pp. 297-414.

London Quarterly Review for 1868-9 and the Spectator in 1882.⁴⁶ In addition, there were Herbert Spencer's articles on "The Genesis of Science" and on "The Classification of the Sciences," as well as his "Reasons for Dissenting from the Philosophy of M. Comte,"⁴⁷ in which Spencer related what he considered to be the essential differences between their respective philosophic systems.

Shortly after the publication of Brewster's and Smith's reviews, a spate of books appeared on various aspects of Comte's work. The first, in 1853, was Henry Lewes' Comte's Philosophy of the Sciences.⁴⁸ Also in 1853, Harriet Martineau published a short, two-volume translation-condensation of the six volumes of the Cours of sufficient quality for Comte himself to give it a place in the Positivist

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See Henry Roberts, "Auguste Comte--His Religion and Philosophy," British Quarterly Review, XIX (1854), pp. 297-376; W. M. W. Call and John Chapman, "The Religion of Positivism," Westminster Review, n.s. XIII (1858), pp. 305-350. Call wrote part I, Chapman, part II. See also Henry Roberts, "August Comte, Life and Works," British Quarterly Review, XLIV (1866), pp. 59-89; "Philosophy and Positivism," London Quarterly Review, XXXI (1868-69), pp. 328-48; and "The Worship of Humanity," Spectator, LV (1882), pp. 9-11.

47

Herbert Spencer, "The Genesis of Science," Essays Scientific, Political, and Speculative (New York: D. Appleton and Co., 1907), II, pp. 1-73; "The Classification of the Sciences," Ibid., II, pp. 74-117; and "Reasons for Dissenting from the Philosophy of M. Comte," Ibid., II, pp. 118-144.

48

R. L. Hawkins, Positivism in the United States, p. 9. See George Henry Lewes, Comte's Philosophy of the Sciences:

Library.⁴⁹ Richard Congreve translated the Catechism in 1858, while a group of London positivists translated, with a careful running analysis and commentary, a four volume edition of the Politique positive.⁵⁰ For this same edition, H. P. Hutton translated a selection of "Early Essays." Finally, Thomas Huxley did an evaluation of positivism in his Lay Sermons,⁵¹ and John Fiske's ambitious compendium of naturalistic thought, Outlines of Cosmic Philosophy, also contained a discussion of positivistic thought and Comte's contribution to it.⁵² Thus, by the end of the 1870's, the main corpus of Comte's work was available to the reading public.

At both Oxford and Cambridge, informal literary groups

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Being an Exposition of the Principles of the Cours de Philosophie Positive of Auguste Comte (London: George Bell and Sons, 1887).

49

See Harriet Martineau, The Positive Philosophy of Auguste Comte.

50

See Richard Congreve, Essays Political Social and Religious (London: Longmans, Green and Co., 1874), I, p. 360. See also Auguste Comte, System of Positive Policy (London: Longmans, Green and Co., 1875-77); J. H. Bridges translated volume I, Frederic Harrison volume II, E. S. Beesly and others volume III, and Richard Congreve volume IV.

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Thomas Henry Huxley, Lay Sermons, Addresses, and Reviews (New York: D. Appleton and Co., 1870).

52

See John Fiske, Outlines of Cosmic Philosophy: Based on the Doctrine of Evolution, with Criticisms on the Positive Philosophy (Boston: Houghton Mifflin Co., 1920), 4 vols.

collected about such people as G. H. Lewes and George Eliot to study positivism. In this manner, between 1848 and 1859, J. C. Morison, Frederic Harrison and John Morley at Oxford and Leslie Stephen at Cambridge, all came into contact with the new thought.⁵³ All together, the intellectual ferment centering on Comte's positivism produced a brilliant group of disciples in England. Frederic Harrison, Richard Congreve, Edward Spencer Beesly and J. H. Bridges formed one of the most versatile bands of followers Comte had in any country.⁵⁴ Harrison's example is indicative of the stimulating effect Comte had upon these people. He read Harriet Martineau's translations in 1853 and was tremendously impressed with positivism, but was, at the same time, made aware that his education had left him deficient in knowledge of the physical sciences. To augment his education, he attempted to "acquire the rudiments and general conceptions of physics, geology, biology and anatomy."⁵⁵ After this

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Garreta Busey, The Reflection of Positivism in English Literature to 1880: The Positivism of Frederic Harrison (Urbana, Illinois: University of Illinois Press, 1924), pp. 4-5. Sir Henry Maine was at Cambridge, as student at Pembroke, tutor at Trinity Hall and Regius Professor of Civil Law, continuously from 1840 to 1852; while not proof that he was involved in any discussion of positivism, it does indicate that he had an opportunity to be exposed to it. See Sir M. E. Grant-Duff, Sir Henry Maine, pp. 3-14.

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Richard Laurin Hawkins, Positivism in the United States, p. 15.

⁵⁵

Frederic Harrison, Autobiographic Memoirs (London: MacMillan and Co., 1911), II, pp. 253-4.

impressive dabbling, Harrison felt himself ready to approach the reading of Mill, Spencer and other positive philosophers with an added degree of understanding.

I was well aware that this could not give me what would amount to a training in science; but it enabled me to study the philosophic syntheses, whether of Auguste Comte, or of Herbert Spencer, or the theories of Darwin, Wallace, Haeckel, Helmholtz, G. H. Lewes, Michael Foster, Huxley, Bastian, Bain, Maudsley, or Romanes, with an open mind and a more serious understanding.⁵⁶

Finally, those whom Comte termed "abortive positivists," or persons who accepted portions of the positivist philosophy but rejected the Religion of Humanity and the political aspects, further popularized the message. The importance of this criticism cannot be overlooked, for it was by this means that Comte's work was screened and the general methodology separated from the specific application which Comte had originally given it. The most important of the "abortive positivists" was, of course, John Stuart Mill. Mill was first attracted to Comte's positivism in 1837, and from 1841 to 1846, he carried on an extensive correspondence with Comte in which Mill claimed to be a disciple. However, disciple meant to Mill, not blind adherence to all of Comte's thought, but a selective adherence, reserving the right to criticize and to exercise influence as well as to be

⁵⁶
Ibid., II, p. 355.

influenced.⁵⁷ By 1865, Mill had not only broken with Comte personally, but had developed serious doubts about aspects of positivism itself. In his "Auguste Comte and Positivism," however, Mill tried, on the whole, to do Comte's work justice. He praised the Law of Three Stages, the philosophy of the sciences, and Comte's historical method.⁵⁸ Even his criticisms of Comte's views on education, religion, ethics and society were limited to broadly construed points involving Comte's closed mind and subjectiveness,⁵⁹ and did not prevent Mill from suggesting that Comte was at least as important in the history of thought as Descartes and Leibnitz.⁶⁰ In all, Mill's essay appears to have been one of the most important efforts to separate in Comte's work the useful methodology from the less useful and less acceptable

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For example, see the letter of 6 May, 1842 from Mill to Comte in Francis Mineka (ed.), The Earlier Letters of John Stuart Mill, 1812-1848 (Vol. XIII of the Collected Works of John Stuart Mill; Toronto: University of Toronto Press, 1963 --), p. 518.

58

For a general comment on Mill's treatment of Comte, see W. M. Simon, European Positivism, p. 192. See especially Mill's comments in Auguste Comte and Positivism, pp. 31-32, and 69-70.

59

See the comments scattered throughout Auguste Comte and Positivism, pp. 73-123.

60

Ibid., pp. 199-200.

specific application.

While Mill should obviously be considered an important influence in the spread of Comte's theories in England, he was also an independent force in English intellectual history. His System of Logic,⁶¹ particularly, was responsible for expounding a form of positivism which, while drawing from Comte in part, had roots in Mill's own Utilitarian past. Mill clearly recognized that both the Utilitarians and Comte drew from the same traditions when he said, "the foundation of M. Comte's philosophy is thus in no way peculiar to him, but the general property of his age, however far as yet from being universally accepted even by thoughtful minds."⁶² Philosophic positivism, whether of his father or of Comte, was "a simple adherence to the traditions of all the great scientific minds whose discoveries have made the human race what it is."⁶³ From his Utilitarian training, Mill had retained a great distrust of a priori knowledge⁶⁴ and he saw Comte's major contribution to philosophy as the creation of a sound case against theological and metaphysical

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See especially John Stuart Mill, System of Logic, Book II, Chapters V and XXIV; Book III, Chapter I; and Book VI, Chapter X.

62

John Stuart Mill, Auguste Comte and Positivism, p. 8.

63

Ibid.

64

A. W. Benn, English Rationalism, I, pp. 427-28.

arguments, plus the creation of an acceptable empirical method to provide an alternative to a priori truths. This was the basis of Mill's final evaluation of Comte: "M. Comte has not originated anything but has taken his place in a fight long since engaged, and on the side already in the main victorious."⁶⁵

Mill, too, did battle on the winning side. Beginning with the proposition that whatever man knows he knows from experience, Mill went on to argue that the most universally valid truths are those which have been generalized from the widest possible field of observation, uncontradicted by any unauthenticated exception. One of Mill's most significant contributions to naturalism was the argument that that truth which was best authenticated by empirical observation was the law of causation, or the proposition that all events depend on determinate antecedents. "Every fact," said Mill, "which has a beginning has a cause."⁶⁶ He went on to argue that, on the repetition of the same antecedent, the same event would invariably follow:

The state of the whole universe at any instant we believe to be the consequence of its state at the previous instant; insomuch as one who knew all the agents which exist at the present moment, their collocation in space, and all their properties, in other

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John Stuart Mill, Auguste Comte and Positivism, p. 12.

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John Stuart Mill, System of Logic, p. 363.

words the laws of their agency, could predict the whole subsequent history of the universe.... And if any particular state of the entire universe should ever recur a second time, all subsequent states would return too, and history would, like a circulating decimal of many figures, periodically repeat itself.⁶⁷

Thus, the observation of particular phenomena led Mill eventually to the need to generalize and to find laws governing the progress of particulars. In his Autobiography, Mill noted:

In attempting to fathom the mode of tracing causes and effects in physical science, I soon saw that in the most perfect of the sciences, we ascend, by generalization from particulars, to the tendencies of causes considered singly, and then reason downward from those separate tendencies, to the effect of the same causes when combined.⁶⁸

When Mill applied this concept to the study of society, deduction was important, not so much when asserting "what effect will follow from a given cause," but in ascertaining "what are the causes which produce, and the phenomena which characterize, States of Society generally."⁶⁹ Primary emphasis, in Mill's thought, eventually came to be placed upon the importance of general statement of law, for it was at this level that it was possible to develop a synthesis of scientific conceptions. Particularism succumbed to

⁶⁷
Ibid., pp. 385-86.

⁶⁸
John Stuart Mill, Autobiography, p. 112.

⁶⁹
John Stuart Mill, System of Logic, p. 574.

correlation.⁷⁰

Mill's treatment of general law was intimately connected with his emphasis upon the historical analysis of society. Commenting upon the deductive method in history, he said:

This method...consists in attempting by a study and analysis of the general facts of history, to discover ...the law of progress, which law, once ascertained, must...enable us to predict future events, just as after a few terms of an infinite series in algebra we are able to detect the principle of regularity in their recurrence.... The principle aim of historical speculation in France, of late years, has been to ascertain the law. ⁷¹

The conclusions which Mill derived from this association of law and the study of history he summed up in this manner:

...that the human mind has a certain order of possible progress, in which some things must precede others, an order which governments and public instructors can modify to some, but not to an unlimited extent: That all questions of political institutions are relative, not absolute, and that different stages of human progress not only will have, but ought to have different institutions.... That any general theory or philosophy of politics supposes a previous theory of human progress, and that this is the same thing with a philosophy of history.⁷²

This was a clear indication that Mill's philosophic speculation was distinctly historical in its orientation and that he was increasingly concerned with finding a determinable and

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See, for example, J. H. Bridges, "Evolution and Positivism," Fortnightly Review, XXVII (June, 1877), p. 854.

71

John Stuart Mill, System of Logic, p. 576.

72

John Stuart Mill, Autobiography, p. 114.

determinate pattern of evolutionary order.

Mill was, himself, unable to discover what the pattern of social evolution was or upon what precise scientific principle it rested. But, he noted, that "the most powerful and accomplished minds of the present age" were focusing on the question and that "it is the point towards which the speculative tendencies of mankind have now for some time been converging."⁷³ Not a little of the speculation which Mill noted was of his own creation; he left his mark, indelibly, upon the English intellectual community. John Morley noted at Mill's death that "for twenty years no one at all open to serious impressions has left Oxford without having undergone the influence of Mill's teaching."⁷⁴

One of the minds converging upon the "precise scientific principle" was Herbert Spencer's. Spencer attempted to establish the final basis of the organic and social worlds by seeking the laws of nature, of which Mill spoke, in the realm of physics. To him, "evolution...seemed to participate in the mechanical determinism which the physical sciences had established in the laws of gravitation and conservation of energy."⁷⁵ Spencer had, by 1855, marshalled

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John Stuart Mill, System of Logic, p. 587.

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John Morley, "The Death of Mr. Mill," Critical Miscellanies (London: MacMillan and Co., 1892), III, p. 5.

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Philip P. Wiener, Evolution and the Founders of Pragmatism (Cambridge: Harvard University Press, 1949), p. 137.

a mass of material in support of physical evolution and applied it in detail in his Principles of Psychology.⁷⁶ In 1858, a year before the appearance of Darwin's The Origin of Species, Spencer sketched an outline of his system of philosophy, based upon the law of evolution, the analogy of the social organism, and the idea of personal freedom as understood by Bentham and Mill. Spencer's philosophical system, though drawing in large part from the same intellectual sources as Mill, or even Darwin, was nevertheless, founded "upon a thoroughly distinct, though harmonious, set of fundamental assumptions."⁷⁷

The basis of Spencer's philosophic system was his conception of evolution, a much more fundamental element in his thought than either the social analogy or his political discussions of individual freedom.⁷⁸ Evolution was a cosmic process, found in all parts of nature; it was "that process of transformation going on throughout the cosmos as a whole

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Herbert Spencer, The Principles of Psychology (New York: D. Appleton and Co., 1906).

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Howard Becker and Harry Elmer Barnes, Social Thought from Lore to Science (New York: Dover Publications, Inc., 1960), II, p. 665.

78

Ibid., p. 666. See also W. Myall, "English Evolutionists," The International Review, XI (1881), pp. 60-61.

and in each larger and smaller portion of it."⁷⁹ So pervasive was the concept of evolution in his philosophy, and so central was it to understanding his thought that a contemporary critic was led to remark: "No other single man has done so much as he to establish the doctrine upon a scientific-philosophical basis, and to elaborate it into a complete and perfectly rounded philosophical system."⁸⁰

Spencer sought to found the law of evolution on the principle of the conservation of energy, which stipulated that since no energy is ever lost or created, the essence of cosmic existence is change or transformation, "an unceasing redistribution of matter and motion."⁸¹ Although this "unceasing redistribution" could take two forms, either evolution or dissolution, construction or destruction, Spencer was most concerned with the evolutionary side of the process.⁸² He argued that there was a two-fold character to evolution: there was, first, a tendency among phenomena to grow in size and complexity from small, homogeneous units to large, complicated units; at the same time there was, within

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Herbert Spencer, "Reasons for Dissenting from M. Comte," p. 140.

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W. Myall, "English Evolutionists," p. 59.

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Herbert Spencer, "Reasons for Dissenting from M. Comte," pp. 140-41.

82

Ibid., p. 142.

every phenomenon, a tendency to change from confused, undetermined arrangements of parts to ordered, determined arrangements. He found, in other words, that while phenomena grew in size and intricacy, there was, within these phenomena, an increasingly definite arrangement of parts. "The process of integration," said Spencer, "acting locally as well as generally, combines with the process of differentiation to render this change not simply from homogeneity to heterogeneity, but from an indefinite homogeneity to a definite heterogeneity...."⁸³ Particularly important was insistence that "the trait of increasing heterogeneity" and that of "increasing definiteness" which accompanied it, were universal, were "exhibited in the totality of things and in all...divisions and sub-divisions down to the minutest."⁸⁴

This insistence upon the universality of the law of the conservation of energy and the law of evolution, allowed Spencer to develop their applicability not only in the realm of physical and biological science, but also in the realm of social development. He insisted that society, like other phenomena, "is a growth and not a manufacture, and has its

83
Ibid., p. 141.

84
Ibid.

laws of evolution."⁸⁵ Just as the laws of evolution were, in the realm of nature, inexorable, so too were they in the analysis of society.⁸⁶ Both society and the individual organism started as "small aggregations" and increased in mass so that they might actually reach a size "ten thousand times what they originally were."⁸⁷ Along with the process of increasing size, there was a process of diversification or a "continually increasing complexity of structure."⁸⁸ This increasing complexity involved a multiplying of the various parts of society which, initially, had little contact or dependence upon one another; only in a later stage of development did these parts acquire, like any organism, a mutual dependence so great that the life of the whole was dependent upon the life of the part.⁸⁹

Any effort, according to Spencer, to obstruct social evolution was not only useless but harmful, for obstruction

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Herbert Spencer, The Principles of Sociology (New York: D. Appleton and Co., 1906), III, p. 321.

86

Herbert Spencer, Social Statics: the Conditions Essential to Human Happiness Specified, and the First of Them Developed (New York: Robert Schalkenbach Foundation, 1954), p. 388.

87

Herbert Spencer, "The Social Organism," Essays, p. 272.

88

Ibid.

89

Ibid., pp. 73-75. See also Principles of Sociology, I, p. 592.

of the evolutionary process was equivalent to the obstruction of progress. "To interfere with this process by producing premature development in any particular direction is inevitably to disturb the true balance of organization by causing somewhere else a corresponding atrophy."⁹⁰ While the outcome of the spontaneous evolutionary process was predictable, the results of interference with the "order of Nature" were not; they were uncontrollable and therefore dangerous. He argued that instead of allowing officious legislators to tinker with the social processes, society, as an organism, had to be allowed to grow naturally. "Until spontaneously fulfilled," said Spencer, "a public want should not be filled at all."⁹¹ As long, then, as society were left alone, the laws governing evolution would insure proper and balanced progress or, in Spencer's words, society's "various organs will go on developing in due subordination to each other."⁹² Society," concluded Spencer, "in its corporate capacity, cannot without...disaster interfere with the play of... [the] principles under which every species has reached such fitness for its mode of life as it possesses...."⁹³

⁹⁰ Herbert Spencer, Social Statics, pp. 349-50.

⁹¹ Herbert Spencer, "Over-Legislation," Essays, pp. 242-43.

⁹² Herbert Spencer, The Man Versus the State (Caldwell, Idaho, 1940), p. 106.

⁹³ Herbert Spencer, Principles of Sociology, II, pp. 240-42.

Despite the existence of internal contradictions⁹⁴ and the great dependence of his argument upon analogy, Spencer's philosophy was of a set piece. His philosophic system was for years, "the exclusive property of a very select few in England."⁹⁵ Though his work attracted some attention among the educated classes, it was taken up as a fad "among people who desire to be thought clever."⁹⁶ A part of the explanation for Spencer's limited popularity lay in the inability of the educated classes to accept any philosophic system in its entirety. Just as Comte's philosophy had been energetically screened and sifted, and the general method separated from the specific application, so too had Spencer's thought. Sir Henry Maine recognized the impossibility of any full system of thought achieving wide public recognition when he told W. E. H. Lecky "that he knew no modern reputation which had declined so much in so short a time as Buckle's and...the reputation of everyone who, like Herbert Spencer, treated

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See Walter M. Simon, "Herbert Spencer and the 'Social Organism'," Journal of the History of Ideas, XXI (1960), pp. 294-99, for an interesting examination of some obvious contradictions.

95

Justin McCarthy, A History of Our Own Times (Boston: Estes and Lauriat, 1897), IV, p. 337.

96

Ibid., pp. 337-38. McCarthy went on to comment that "it is not any part of our purpose to raise the question whether less honour is done to a great writer by neglecting him altogether, or by adopting him as one of the authors whom it is conventionally proper to have read, and with whom, therefore, everybody is bound to affect an acquaintance."

society mainly as an organization must suffer a similar collapse."⁹⁷ Part, too, of the lack of popular recognition was Spencer's neglect of style. He under-rated the necessity of having to communicate, and ignored the maxim that "if a man would convince, he must not disdain the arts by which people can be induced to listen."⁹⁸ The result of his stylistic turgidity, not to say incomprehensibility, was that "much of Mr. Spencer's greatest work has long been little better than a calling aloud to solitude for the lack of the attractiveness of style which he despises...."⁹⁹

Spencer's impact upon the English intellectual scene must be viewed, then, as general and indirect; Spencer's philosophy was brought to the educated public in dilute form by public lecture and popular article. A. W. Benn suggested that many people who found it difficult to define such ideas as the correlation of physical forces or the conservation of energy

still carried away with them from the lecture-room or the popular scientific article a very vivid impression of the universe as something self-existent and self-supporting, in which nothing was created and nothing lost, without beginning and without end. The law of universal causation, made so familiar to the educated

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Elizabeth Lecky, A Memoir of William Edward Hartpoole Lecky (London: Longmans, Green and Co., 1909), p. 106. Lecky repeated the anecdote in a letter to Mr. Booth, 18 July, 1875.

98

Justin McCarthy, History of Our Own Times, IV, p. 337.

99

Ibid.

classes by Mill's Logic acquired a new precision when translated into the language of a more exact philosopher, which represented each successive state of the universe as the dynamic equivalent of the state which had preceded and of the state which would follow it,¹⁰⁰

Spencer's importance lay, then, in the support he brought to a concept of the universe "self-existent and self-supporting ...without beginning and without end." Combined with the work of Comte and Mill before him, Spencer's philosophy helped greatly to establish the philosophic basis of naturalism.

That there was a general similarity between Comte and Spencer was recognized by Spencer himself who spoke favorably of Comte's "familiarizing men with the idea of a social science, based on the other sciences."¹⁰¹ Insofar as both were concerned with the scientific study of society "on a social historical base,"¹⁰² Spencer could commend Comte's work, for "the presentation of scientific knowledge and method as a whole...cannot have failed greatly to widen the conceptions of most of his readers."¹⁰³ In addition, Spencer recognized that both he and Comte utilized a form of organic analogy,

¹⁰⁰ Alfred W. Benn, English Rationalism, II, p. 150.

¹⁰¹ Herbert Spencer, "Reasons for Dissenting from M. Comte," p. 139.

¹⁰² Frederic Harrison, On Society (London: MacMillan and Co., 1918), pp. 206-07.

¹⁰³ Herbert Spencer, "Reasons for Dissenting from M. Comte," pp. 139-40.

Comte in general terms, Spencer with greater precision.

"The analogy," Spencer acknowledged, "between an individual organism and a social organism...is asserted in Social Statics, as it is in the study of M. Comte."¹⁰⁴ And, Spencer went on to say approvingly, "M Comte has made this analogy the cardinal idea of this division of his philosophy."¹⁰⁵

Though such broad agreement in conceptualization did exist, their systems of philosophy contained innumerable differences in specific detail. Except for their common emphasis upon a science of society and upon an organic analogy, Spencer insisted that his work was "fundamentally at variance with M. Comte's teaching in almost everything."¹⁰⁶ In many respects the differences were striking: Comte would reorganize society, Spencer would not interfere in social evolution at all; Comte was authoritarian, Spencer an advocate of laissez-faire; Comte was in favor of "a more pronounced nationalism," Spencer of "a more pronounced individualism."¹⁰⁷ All together, "except for the title Social Statics

¹⁰⁴
Ibid., p. 136.

¹⁰⁵
Ibid.

¹⁰⁶
Ibid.

¹⁰⁷
Ibid., pp. 136-7.

[this] work would never I think, have raised the remembrance of him--unless, indeed, by the association of opposites."¹⁰⁸ One must conclude that such similarity as did exist was "due to their participation in the same cultural base,"¹⁰⁹ rather than to intimate agreement.

Spencer's work not only touched broadly on the ground covered by Comte, but it also anticipated much that was later to be covered by Charles Darwin. That point at which Spencer anticipated Darwin most dramatically was his emphasis upon the principle of evolution. There was, however, an essential distinction to be found between their concepts: Spencer considered evolution a cosmic process found in all parts of nature; Darwin considered it characteristic only of life and living things. For Darwin, the process of evolution marked off the animate from the inanimate realms.¹¹⁰ The word "evolution" did not appear in the first edition of The Origin of Species.¹¹¹ Yet, though the word was absent, it was clear that through the phrase "origin of species," Darwin meant to convey an idea of "an evolutionary process of continual small variation which ultimately amounted to a species

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Ibid.

109

Howard Becker and Harry Elmer Barnes, Social Thought, II, p. 664.

110

Robert Scoon, "The Rise and Impact of Evolutionary Ideas," p. 34.

111

Ibid., p. 15.

recognizably different from any which had existed before."

In The Origin, Darwin presented but the slightest case for organic evolution and on the basis of this limited evidence proceeded to construct a complex theory of how evolution occurred.¹¹³ The first set of known facts which Darwin advanced involved the existence of variation. Offspring from the same parent showed slight variations which most naturalists considered to have little, if any bearing on the future of a species,¹¹⁴ but which Darwin accepted as determining the course by which species evolved; these minute, inherited variations were the raw material for the whole course of organic evolution.¹¹⁵ The second set of known facts was the existence of overproduction among the vast majority of organisms. Many more individual members of a species were produced than could possibly survive. Darwin observed that the relative numbers of species in existence remained more or less constant as did the relative number of

112

Ibid., pp. 15-16.

113

Alfred W. Benn, English Rationalism, II, pp. 161-62.

114

Charles Darwin, Origin, chapters I and II.

115

Ibid., p. 75. To influence the course of evolution, however, these variations had to be inherited. Darwin assumed this inheritance and "did not investigate the matter experimentally." Philip G. Fothergill, Historical Aspects of Organic Evolution (New York: Philosophical Library, 1953), p. 112.

individual examples of any species so that, of the excess number of individual organisms, some had died, a few survived.¹¹⁶ From these two sets of facts, Darwin made two deductions: the struggle for existence and natural selection. Natural selection came about because favorable variations in a given environment tended to survive longer than less favorable variations. Consequently, the favorable stood a better chance of propagating their kind than did the less favorable.¹¹⁷ Over a lengthy period, the more favorable variations, naturally selected, tended to dominate in a species, thus creating within that species a new variation making it distinct from its immediate predecessors.¹¹⁸ Over an even longer period, one could say that new species evolved.

Darwin was not only discussing evolution but progressive evolution. His momentous deduction that any accidental variation conferring an advantage to its possessor in the struggle for existence eventually led to the creation of a new species better adapted to its environment, suggested not only evolution but progress.¹¹⁹ In this respect, The Origin coincided not only with the popular thought of the age, but also with a different body of proofs, the tendency of formal

116

Ibid., pp. 76-82.

117

Ibid., pp. 93-101.

118

Ibid., p. 142.

119

Alfred W. Benn, English Rationalism, p. 154.

philosophies. His findings in biology seemed to confirm, scientifically, the progressive optimism of Comte, Mill and Spencer.¹²⁰ The doctrine of descent or organic evolution suggested that the plants and animals of the present day were lineal descendents of ancestors on the whole somewhat simpler and less complex. These forms, in turn, were descendent from yet simpler forms, "and so on backwards towards the literal Protozoa and Protophyta about which we unfortunately know nothing."¹²¹ This was not a new idea; Darwin himself acknowledged over a hundred predecessors in the realm of science.¹²²

That The Origin met an immediate response is shown by the fact that the first edition sold out on the first day of its publication.¹²³ In England, the ensuing controversy was exceptionally violent, with T. H. Huxley, Sir Joseph Hooker, J. S. Mill, G. J. Romanes, and even A. R. Wallace supporting the theory in varying degrees, while Richard Owen and St.

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See the comments in Milton Millhauser, Just Before Darwin: Robert Chambers and Vestiges (Middletown Connecticut: Wesleyan University Press, 1959), p. 4.

121

J. Arthur Thomson, "Darwin's Predecessors." Darwinism and Modern Science, p. 3.

122

See Charles Darwin, Origin, pp. 9-19, "An Historical Sketch of the Progress of Opinion on the Origin of Species."

123

Philip G. Fothergill, Organic Evolution, p. 115.

George Mivart opposed it strenuously.¹²⁴ Against the opposition of such biologically ill-informed critics as Bishop Wilberforce or any of the clergy who opposed Darwinism because of its mechanistic bias or its denial of original creation, such champions as Huxley could more than hold their own; against more knowledgeable opponents such as St. George Mivart, the Darwinians did not fare so well.¹²⁵ In the scientific world, the Darwinians had a difficult time holding their own against geneticists such as W. L. Johannsen, physicists such as Lord Kelvin, and even against defecting biologists such as A. R. Wallace, who soon introduced several reservations concerning the theory.¹²⁶

The relative merits of the opposing sides were, in one sense, not relevant, nor were the results of the multiple controversies, for the conflict itself was sufficient to popularize the book and broadcast its central ideas. Little distinction was made, among those outside of the scientific

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Ibid., pp. 119-120.

125

The public controversy has been treated several times; one of the most interesting is Gertrude Himmelfarb, Darwin and the Darwinian Revolution, pp. 223-294 and 361-427. There is also an interesting chapter, "Convulsions of the National Mind." in William Irvine, Apes, Angels and Victorians, pp. 101-126.

126

The scientific contest has been examined with verve and skill by Loren Eiseley, Darwin's Century: Evolution and the Men who Discovered It (Garden City, New York: Doubleday and Co., 1961), pp. 205-324.

world, between the theory of evolution and Darwinism.

Biology, the undisputed "Queen of the Hour," seemed to overshadow other sciences, particularly those involving the study of man; these, in turn, attempted "to participate in her prestige and to bask in her reflected glory."¹²⁸ Darwin's work in biological evolution "won wide-spread conviction by showing with consummate skill that it was an effective formula to work with, a key which no lock refused."¹²⁹ In the heat of controversy, the concepts of evolution, of progress, of struggle, and of the social organism, all seemed to have received scientific validation at the hands of a biologist. For the moment, Darwinism "had the capacity to stimulate new and significant explanations in one department after another."¹³⁰ Even the study of law and legal development took on added meaning when viewed in this new light.

III. The Academic Tradition

Scientific technique, successfully applied to the environment by chemists and physicists, to the universe by

127

Philip G. Fothergill, Organic Evolution, p. 120.

128 W. Stark, "Natural and Social Evolution," Darwinism and the Study of Society, ed. by Michael Banton (London: Tavistock Publications, 1961), p. 49.

129

Arthur Thomson, "Darwin's Predecessors," p. 3.

130

Robert Scoon, "The Rise and Impact of Evolutionary Ideas," p. 25.

philosophers, and to man himself by Darwin, appeared to have no limits. Logically the next step was to create a field not only of physical and biological science, but of social science as well. Ensuing activity in the new social sciences stimulated a series of significant and fundamental theoretical statements concerning the nature of man and his environment which absorbed the intellectual energies of England for over a quarter of a century. The pattern of thought which emerged from studies in history, political science, sociology and anthropology contained several characteristics, the most important of which were: a tendency to concentrate upon a synoptic view of society and history; the transfer of the concept of natural law and evolution to the realm of history and to the study of society; an insistence that society had an organic unity; an increasing tendency to discuss social evolution in terms of stages of growth, and the development of a system of comparative analysis based upon all of the preceding assumptions. Finally, the study of philology led to the development of the notion of an organic society based upon the concept of race. The sum of these assumptions was naturalism, a pattern of thought used extensively throughout the academic world, not least by Sir Henry Maine in his study of law and politics and in his understanding of Indian administration.

Science and evolution held the keys to the new study of man. The popularization of the theory of evolution showed

that the eighteenth century notion of a static and mechanical natural reality was a misconception.¹³¹ Human nature, definite and constant from age to age, which had been the goal of Hume, Robertson and Gibbon, seemed not to exist. Human nature was neither constant, nor uniform, but changing and in a state of flux. The purpose of history, once to illustrate the eternal, was now to suggest the transitional.¹³² The concurrence of evolutionary thought and previously existing historical attitudes resulted in a tendency to interpret the whole of reality in historical and relative terms. For the historian and for every student of man, the primary task was increasingly to trace the evolution of moral, mental and physical phenomena, and "thus scientifically reduce all the complicated phenomena of history to a plus or minus of their relative qualities and quantities."¹³³ All of nature appeared to have a history, thus justifying the belief that historical thought held the key to both natural and social reality.

Or, was it not the other way around? Did not science

131

See Ernst Cassirer, The Philosophy of the Enlightenment Boston: Beacon Press, 1955), pp. 37-92.

132

William Kingdon Clifford, "Cosmic Emotion," pp. 408-09.

133

Gustavus G. Zerffi, "The Science of History," Transactions of the Royal Historical Society, IX (1879), p. 3.

hold the key to history? While nature and history appeared to be parts of the same reality, it now seemed, especially after Darwin, that it was not history but natural science that had discovered this fact. If this were the case, the implications for the study of man were enormous; the study of history had to yield to science, for only through the use of scientific technique would one analyze man with the same thoroughness that had yielded the truths of nature.¹³⁴ If history were to remain among the leading disciplines, if it were not to relinquish its place in the forefront of intellectual endeavor, then it, too, must adopt and imitate the methods and techniques, the teaching and vocabulary of science.¹³⁵

"It is worth noting that in every period, the prevalent notion of what constitutes 'scientific' treatment depends upon what happens to be the predominant and victorious science of the time."¹³⁶ When D. G. Ritchie made this observation in 1896, he was analyzing the impact upon the study of

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Carlo Antoni, From History to Sociology: The Transition in German Historical Thinking, trans. by Hayden V. White (Detroit: Wayne State University Press, 1959), p. xvii.

135

F. A. Hayek, The Counter-Revolution of Science: Studies in the Abuse of Reason (Glencoe, Illinois: The Free Press, 1952), p. 13.

136

D. G. Ritchie, "Social Evolution," International Journal of Ethics, VI (1896), p. 166.

society of the science of biology. The apparent success of Darwin's scientific vindication of evolution "shook the foundations of the old principles of classification,"¹³⁷ and established the position of history among the sciences which deal with organic development. The new approach popularized by biology and adopted by the historian knit together facts and developments which had previously seemed to have no apparent connection. "As one of the objects of biology is to find the exact steps in the geneology of man from the lowest organic form, so the scope of history is to determine the stages in the unique causal series from the most rudimentary to the present state of human civilization."¹³⁸ It now appeared that "nature as a whole had a history," and that "human history was but part of the history of nature, both being subject to transformation in time and to natural laws."¹³⁹ Thus, the application of scientific technique to the study of history led first to an affirmative answer to the pair of questions raised by John Stuart Mill in his System of Logic in 1843. Mill had asked:

Are the actions of human beings, like all other natural events, subject to invariable laws? Does that constancy of causation, which is the foundation of every scienti-

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Franz Boas, "The History of Anthropology," Science, n.s. XX (October, 1904), p. 515.

138

J. B. Bury, "Darwinism and History," p. 535.

139

David Bidney, Theoretical Anthropology (New York: Columbia University Press, 1953), pp. 190-91.

fic theory of successive phenomena really obtain among them? 140

The discovery of social laws, however, presupposed that the analyst of social phenomena would focus upon the broad spectrum of events which alone would reveal invariable sequence. The main purpose of science was to generalize. Science, as opposed to simple erudition, "means investigation of the laws of nature; and a law of nature means the Perception of Uniformity in the midst of Variety."¹⁴¹ Such a synoptic view or vue d'ensemble as it was called by Auguste Comte, was essentially "the frequently unconscious habit of looking at things natural not in their isolation but in their togetherness in space and time."¹⁴² Natural phenomena existed only in company with others; "their reality [was] complex and manifold, and not simple or detached."¹⁴³ Therefore one had to step back, take a broad view, and establish the variety of connections existing among social phenomena before one could give "purpose and meaning to the collection of facts."¹⁴⁴

¹⁴⁰ John Stuart Mill, System of Logic, p. 521.

¹⁴¹ J. H. Bridges, "Evolution and Positivism," p. 856.

¹⁴² John T. Merz, A History of European Thought, IV, pp. 504-505.

¹⁴³ Ibid., IV, pp. 434-35.

¹⁴⁴ J. H. Bridges, "Evolution and Positivism," p. 856.

The division of scientific labor--a vue de detail as opposed to a vue d'ensemble--was defined as a dual process of analysis and synthesis. While the synoptic approach attempted to embrace the totality of knowledge, the analytic dissected knowledge into its parts and then attempted to bring those parts together again into an integral unit. The primary objection to the analytic approach was that principle was often lost in the concern for the specific, for "unlimited discovery of new facts and many practical results," prevented the achievement of a comprehensive view.¹⁴⁵ The loss of scientific generalization meant that one became concerned with fact for the sake of fact and that knowledge acquired by this means was merely the result of "the fondness for accumulation common to all collectors of curiosities."¹⁴⁶ Individuals retaining this approach "have obstructed science more than they have helped it."¹⁴⁷

John Stuart Mill, in his Logic, argued that, although every general proposition must in the last resort be proven by induction and particular experience, to reason from the particular to the general was not, in itself, sufficient to

¹⁴⁵ John T. Merz, A. History of European Thought, IV, pp. 434-35.

¹⁴⁶ J. H. Bridges, "Evolution and Positivism," p. 856.

¹⁴⁷ Ibid.

ascertain truth.¹⁴⁸ Because of the extreme complexity of experience, the causes of particular phenomena could often not be inferred exclusively from their effects.¹⁴⁹ To augment and to compensate for the defects of a strictly inductive reasoning process, it was often necessary to utilize deductive reasoning.¹⁵⁰ The deductive method, as it was practised in the physical sciences, said Mill, involved three distinct steps. The first was pure induction or the development of general truths from one's experience with particular phenomena.¹⁵¹ The second step was deduction by pure reason of the particular consequences that must follow from these generalized truths, assuming that they were indeed truths.¹⁵² The final step was to verify the results of the deductive process by comparison with facts revealed by direct observation or established by an independent process of reasoning. Thus it was possible to check the calculated results of the deductive method by an independent appeal to empiricism or by an appeal to another, separate, reasoning process. Only

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See John Stuart Mill, System of Logic, pp. 250-270.

¹⁴⁹

Ibid., p. 264.

¹⁵⁰

Ibid.

¹⁵¹

Ibid., pp. 265-66.

¹⁵²

Ibid., pp. 267-68.

when comparison verified the results of deduction as closely as circumstances allowed, was the theory upon which the deduction was based considered to be demonstrated.¹⁵³ Once proven, the theory could be considered a law to be applied in all similar circumstances. The only way to establish the existence and validity of a natural law in society was, then, to apply to social phenomena the vue d'ensemble.

That the progress of mankind was "displayed in the progress of civilization as a whole, as well as in the progress of every nation,"¹⁵⁴ was discernable only by utilizing the vue d'ensemble. John Fiske, *The American naturalist*, suggested that:

The discussion of endless minute historical details must be reserved until the law of social changes has been deduced from the more constant phenomena, and is ready for inductive verification. A law wide enough to form a basis for sociology must need be eminently abstract, and can be found only by contemplating the most general and prominent characteristics of social changes.¹⁵⁵

The law forming "a basis for sociology" which Fiske was interested in formulating, was the law of progress which "when

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Ibid., pp. 268-70.

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Herbert Spencer, "Progress: Its Law and Cause," Essays, p. 19.

¹⁵⁵

John Fiske, Outlines of Cosmic Philosophy, III, pp. 281-82.

discovered, will be found to be the law of history."¹⁵⁶ The basis, then, of Fiske's historical methodology was a general law of history, progress and evolution, "deduced from the more constant phenomena," which would enable those studying social phenomena to find a key to the history of both static and progressive nations. "When we are able to show how the latter have advanced, the same general principle will enable us to show why the former have not advanced."¹⁵⁷

The law of historical evolution which Fiske asserted should exist, John Stuart Mill found evidence for in a series of cause and effect relationships. Writing for the Edinburgh Review in January, 188, Mill argued:

...all history is conceived as a progressive chain of causes and effects; or...as a gradually unfolding web, in which every part that comes to view is a prolongation of the part previously unrolled, whether we can trace the separate threads from the one into the other or not.¹⁵⁸

The complex structure of civilization could be accounted for only by intensive examination of the preceding generation, and that, in turn, by an examination of an even earlier age. The development of human society must, of certainty, follow

156

Ibid., III, p. 282.

157

Ibid., III, pp. 286-87.

158

John Stuart Mill, "Michelet's History of France," Dissertations and Discussions, Political, Philosophic and Historical (New York: Henry Holt and Co., 1882), II, p. 207.

according to the prescription of some law. The fundamental problem of the student was to find out how to read that law.¹⁵⁹

Mill's lead was taken by several others. E. B. Tylor referred to the unity of both human and natural history and to the method of studying them when he said: "If law is anywhere, it is everywhere."¹⁶⁰ T. H. Huxley, too, observed that the association of history and biology was strengthened by their common concern with "that orderly relation of facts, which we express by the so-called 'Laws of Nature'."¹⁶¹ Huxley argued that "to any person who is familiar with the facts," it should be inconceivable that in the universe there be "room for chance action" or that events should "depend upon any but the natural sequence of cause and effect." The present became "the child of the past and the parent of the future."¹⁶² Natural law or the essential relationship of phenomena, stated by Mill as an assumption, had in Huxley hardened into the assertion that determinism was a reality.

¹⁵⁹ Ibid., p. 207.

¹⁶⁰ Sir Edward Burnett Tylor, Primitive Culture, Researches into the Development of Mythology, Religion, Language, Art and Customs (New York: Henry Holt and Co., 1874), I, p. 22.

¹⁶¹ Thomas H. Huxley, "The Progress of Science," p. 96.

¹⁶² Thomas H. Huxley, "Lectures on Evolution," Science and Hebrew Tradition (New York: D. Appleton and Co., 1896), p. 47.

It was now "quite certain that every intelligent person guides his life and risks his fortune upon the belief that the order of Nature is constant, and that the chain of natural causation is never broken."¹⁶³ In this way did the scientist and the social scientist urge man to conform to a nature which was not fixed and eternal, but historical in conception. History was a natural process, subject to natural law, "and by a happy coincidence, man's freedom consisted in conforming to this rational natural law."¹⁶⁴

Students of the past claimed "to be able to arrive... at a direct insight into the laws of succession of the immediately apprehended wholes."¹⁶⁵ The inductive process was almost ignored as historians attempted to understand individual elements in history only in the light of historical law. Oblivious to the difficulties inherent in such a scheme, and often ignoring the complexities of historical development, the historical scientists "deducted their systems from a few simple truths that seemed axiomatic," and "laid down the laws of social life with all the assurance of

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Ibid., pp. 47-48.

164

David Bidney, Theoretical Anthropology, p. 191.

165

F. A. Hayek, The Counter-Revolution of Science, p. 74.

pioneers."¹⁶⁶ When the connection between law and history was discussed by H. S. Stuart-Glennie as late as 1891, it had become generally acceptable to hope for "a truthful account of the more complex phenomena of even the History of Man, founded on verifiable theories of Man's History."¹⁶⁷

If society were the product of laws of evolution, then it was necessary for any society to adhere to the dictates of those laws. It was this point that Charles Kingsley had in mind when he wrote, in a letter to John Stuart Mill, in 1869: "In five-and-twenty years my ruling idea has been that which my friend Huxley has lately set forth as common to him and Comte: that 'the reconstruction of society on a scientific basis is not only possible, but the only political object worth striving for'."¹⁶⁸ By another view, the scientific method, as applied to the study of society, would, "in revealing the past enable us to understand the present, and not only forecast the future, but determine the future, by our own rightly directed action."¹⁶⁹ The ability to ascertain the laws of nature would, then, eventually enable man to

¹⁶⁶ Walter E. Houghton, The Victorian Frame of Mind, p. 148

¹⁶⁷ J. S. Stuart-Glennie, "History as a Science of Origins," Transactions of the Royal Historical Society, n.s. V. (1891), pp. 232-33.

¹⁶⁸ F. C. Kingsley (ed.) Letters and Memories of Charles Kingsley (New York: The Co-operative Publication Society, 1899), I, p. 255.

¹⁶⁹ J. S. Stuart-Glennie, "History as a Science of Origins," p. 238.

distinguish between those actions which would enhance the chances of national well-being and those which would lead to disaster.

It was because of the conviction that to act contrary to natural law was to invite calamity, that The Times ran a lead article, in March, 1848, on the dangers facing France as a result of the activities of the new Revolutionary government. Commenting upon the promise of the French government to secure work for the people by the creation of national workshops, the article first condemned the promise as socialistic and then as dangerous to French society.

To fulfill such promises is not only beyond the power of any Government, but absolutely contrary to the laws of nature itself, and it may be conjectured what the probable consequences are of making, in a moment of triumph, such promises as these, which are destined by inevitable necessity to be turned into the bitterest disappointment hereafter. 170

It was this very article which provoked a scoffing comment from Matthew Arnold, who asked in a letter to Arthur Clough: "Don't you think the eternal relations between labour and capital the Times twaddles so of have small existence for a whole society that has resolved no longer to live by bread alone [sic.]."¹⁷¹ Most Englishmen, for several decades to come, would have been shocked by the question and have given

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London Times, March 1, 1848, p. 5.

171

Howard Foster Lowry (ed.), The Letters of Matthew Arnold to Arthur Hugh Clough (London: Oxford University Press, 1932), p. 253. The letter, too, was dated March 1, 1848.

a spirited negative answer.

That the laws of social dynamics proved elusive was disappointing, but historians were buoyed by optimism and stimulated by a firm conviction that only in acknowledging the laws of progress could man's future avoid the bleakness of his past. Charles Kingsley noted the extreme self-assurance of the new science and attempted to account for it in terms of the contemporary intellectual milieu. "Young sciences," he noted, "like young men, have their time of wonder, hope, imagination, and of passion too, and haste, and bigotry."¹⁷² He went on to note that: "Dazzled, and that pardonably, by the beauty of the few laws they may have discovered, they are too apt to erect them into gods, and to explain by them all matters in heaven and earth."¹⁷³

The study of history as a science of origins remained deeply involved in the discovery of uniform laws of development, of essential similarities, and of basic unity. Such emphasis upon uniform historical development implied that the whole of human society was like a natural organism in structure and members, in origin and development.¹⁷⁴ In the

¹⁷² Charles Kingsley, The Roman and the Teuton: A Series of Lectures Delivered Before the University of Cambridge (Cambridge and London: Macmillan and Co., 1864), p. xlvii.

¹⁷³ Ibid.

¹⁷⁴ F. W. Coker, Organismic Theories of the State: Nineteenth Century Interpretations of the State as Organism or as Person (New York: Columbia University Press, 1910), p. 9.

hands of Auguste Comte and Herbert Spencer, however, the organic analogy in social investigation soon went beyond analogy to an insistence that the "organismic doctrine was no mere analogy but a reality."¹⁷⁵ After Darwin had added seeming validity to the organic analogy, the idea that the development of human society was absolutely similar to organic development gained ready credence, and social scientists began consistently to deny that they were using simile and to assert with Albert Keller that "I find something in the social field which is selection and not merely like it."¹⁷⁶ There was, according to the organic theory, a harmony of structure and function both in the organism and in society, which worked toward a common end through a system of simultaneous action and reaction within the various parts of the organism and within the surrounding environment. This harmonious development was best noted in human society, which was considered the final step in the process of organic evolution.¹⁷⁷ The exponents of the doctrine further argued that the social process was marked by increasing specializa-

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Howard Becker and Harry Elmer Barnes, Social Thought, II, pp. 572-73.

176

Albert Galloway Keller, Societal Evolution: A Study of the Evolutionary Basis of the Science of Society (New York: The MacMillan Co., 1916), p. 15.

177

J. Le Conte, "Scientific Relations of Sociology and Biology," The Popular Science Monthly, XIV (1878-79), p. 328.

tion of functions and a corresponding tendency toward a perfection or adaptation of individual parts of society.¹⁷⁸

The organic concept of social evolution implied a theory of unilinear growth. It assumed a similar response of the human mind to similar conditions of geographic environment, leading to the conclusion that one had to expect parallel development in culture and institutions among people widely separated in space.¹⁷⁹ The organic argument also suggested an essential continuity between civilized and primitive cultures; the multiplicity of primitive customs and beliefs still existing throughout the world appeared as examples of simple cultural forms from which contemporary civilized societies had evolved.¹⁸⁰

These assumptions were the source of Sir James Frazer's argument that differences among various groups of mankind were quantitative, not qualitative, and that "the

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F. W. Coker, Organismic Theories of the State, pp. 123-24. Even those, such as Lester Ward, who held that "the evolution of the world is not obviously identical with the evolution of an organism," supported the notion that evolution of matter was "from the indefinite and homogeneous to the definite and heterogeneous." See Lester F. Ward, "Cosmic and Organic Evolution," The Popular Science Monthly, XI (1877), pp. 672-682.

179

Howard Becker and Harry Elmer Barnes, Social Thought, II, pp. 747-48.

180

Franz Boas, "The History of Anthropology," p. 516.

savage is not a different sort of being from his civilized brother; he has the same capacities...but they are less fully developed...."¹⁸¹ Because of this essential unity of mankind, it was possible to concentrate upon the laws by which this evolution from savagery to civilization had taken place. Thus, Frazer added to the above statement the observation that:

...as savage races are not all on the same plane, but have stopped or tarried at different points of the upward path, we can to a certain extent, by comparing them with each other, construct a scale of social progression and mark out roughly some of the stages on the long road that leads from savagery to civilization. In the kingdom of mind such a scale of mental evolution answers to the scale of morphological evolution in the animal kingdom.¹⁸²

Thus, within the world, conceived as a single organic unity with uniform reactions to environment, there existed but one evolutionary pathway along which all societies must develop. Some societies travelled the entire route from savagery to civilization; others travelled only a part of the way. When this idea was developed by Sir Henry Maine, he, too, was led to insist that, whether Indian or Irish, Slavonian or English,

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Sir James G. Frazer, Man, God, and Immortality: Thoughts on Human Progress (New York: The MacMillan Co., 1927), p. 26.

182

Ibid.

all were part of the same organic unit and that the Indian was "not a different sort of being from his civilized brother...."

Of the early sociologists, E. B. Tylor was perhaps the clearest exponent of this theory, finding his proof in the existence of similar customs and beliefs the world over. Human institutions, "like stratified rocks, succeed each other in series substantially uniform over the globe, independently of what seem the comparatively superficial differences of race and language, but shaped by similar human nature."¹⁸³ One had only to analyze a sufficient number of world-wide cultures to be able to determine the steps or stages by which all cultures, at all times, proceeded from a stage of utmost savagery to varying degrees of civilization.

The climb of various societies from one level of social development to another, as suggested by Tylor, indicated that the course of social evolution could be divided into a set number of stages, each a necessary antecedent to its successor. No stage could be eliminated.¹⁸⁴ Tylor's task in Primitive Culture was, then, to consider the relationship

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Sir Edward Burnett Tylor, Researches Into the Early History of Mankind and the Development of Civilization (New York: Henry Holt and Co., 1878), p. 245. See pp. 245-269 for Tylor's extension of the argument.

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Sir Edward Burnett Tylor, Primitive Culture, p. 1

between the civilization of the "lower tribes" and that of the "higher nations."¹⁸⁵

In establishing criteria for measuring social development, Tylor selected evidence only from that portion of society he called "culture." Culture was taken to mean "the history not of tribes or nations, but of the conditions of knowledge, religion, art, custom, and the like among them...."¹⁸⁶ Said Tylor:

The principle criteria of classification are the absence or presence, high or low development, of the industrial arts, especially metal-working, manufacture of implements and vessels, agriculture, architecture, &c., the extent of scientific knowledge, the definiteness of moral principles, the condition of religious belief and ceremony, the degree of social and political organization and so forth. 187

On the basis of fact thus determined, Tylor suggested that "few would dispute that the following races are arranged rightly in order of culture: Australian, Tahitian, Aztec, Chinese, Italian."¹⁸⁸

All civilizations, said Tylor, pass through a three-stage pattern which, unlike Comte's theological-metaphysical-

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Ibid.

186

Ibid., pp. 5-6.

187

Ibid., pp. 26-27.

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Ibid.

positive stages, involved the progress from savagery to barbarism to civilization. The stage of savagery was primarily characterized by a dependence on wild plants and animals for food, and a utilization of stone-age implements; the barbaric stage was characterized by the use of agriculture, the development of metal work and the establishment of some form of community life in towns and villages; the civilized stage began with the acquisition of writing.¹⁸⁹ Though Tylor nowhere denied that there might be exceptions to cultural evolution through his three stages, it would be up to the person finding an exception "to prove by valid evidence this anomalous state of things, otherwise the doctrine of permanent principle will hold good, as in astronomy or geology."¹⁹⁰

Tylor's insistence upon stages of evolution was characteristic, too, of the work of the American, Lewis Henry Morgan, who added to the basic savage-barbaric-civilized division of Tylor a series of lower, middle and upper-subclassifications. Not only did Morgan end up with nine stages of social evolution, but added the notation that "these... conditions are connected with each other in a natural as well as necessary sequence of progress."¹⁹¹ The stages of evolution

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Ibid., pp. 32-33.

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Ibid., p. 23.

¹⁹¹

Lewis Henry Morgan, Ancient Society, Or, Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization (Calcutta: Bharati Library, 1958), p. 3.

having been set up, time and actual history became unimportant. One could now assume that what was true of one culture at a particular stage was true of any other culture at a similar stage. "It does not affect the main result," said Morgan of his periods, "that different tribes of the same linguistic family, are in different conditions at the same time, since for our purpose, the condition of each is the material fact, the time being immaterial."¹⁹²

Following upon this assertion, it was possible to re-create a generalized picture of savage society by extracting evidences from several extant societies having the same basic condition. Sir James Frazer, for example, talked about the evolution of the human mind "from perhaps bare sensation" to a "comparatively high level of intelligence."¹⁹³ Assuming that "a savage is to a civilized man as a child is to an adult," Frazer suggested that "if we would understand what primitive man was we must know what the savage now is."¹⁹⁴ When Maine turned first to India and then to existing Slavonic examples in his own research, he was but acknowledging the accuracy of Frazer's dictum.

¹⁹²

Ibid., p. 13. Italics are Morgan's.

¹⁹³

Sir James G. Frazer, Man, God, and Immortality, p. 9.

¹⁹⁴

Ibid., pp. 24-25.

From the assumptions already made by Tylor, Morgan, Frazer and other anthropologists, came the comparative method of investigation. By picking examples from widely scattered societies, and by comparing basically similar examples, one could develop a comprehensive view of the essential nature of each stage. Concentrating upon what they considered to be essentials, and limiting themselves to discovering the conditions sufficient and necessary to prove their point, sociologists and anthropologists assumed that whenever a particular society did not present sufficient data concerning institutions, customs and beliefs, it was proper and desirable to search for such evidence in other societies and other periods of time.¹⁹⁵ One could, for example, compensate for the dearth of material about the pre-history of western civilization by turning to evidence offered by existing savage and barbaric societies.

The comparative method also reinforced the belief that society had evolved from a single source. Since this was ultimately the point which social evolutionists were attempting to establish, comparative studies seemed to provide concrete proof of the evolutionary process at work. A. H. Sayce, writing in 1876, showed how comparative philology could contribute to the proving of social evolution:

¹⁹⁵ See, for example, Morris Ginsberg, "The Comparative Method," Essays in Sociology and Social Philosophy (New York: The MacMillan Co., 1961), III, p. 204; or J. Le Conte "Scientific Relations of Sociology and Biology," pp. 425-26.

Inasmuch as we have to compare phenomena belonging not only to the same period, but also the different periods in the history of language, that part of linguistic research which is not purely phonological has to assume an historical character, so that to discover the causes of the phenomena is to explain their origin and the process of growth.¹⁹⁶

Social evolution as established by the comparative method was equivalent to progress and improvement; Sayce clearly stated that comparative philology "bears unequivocal testimony to the belief that the history of humanity has been on the whole a progress and not a retrogression."¹⁹⁷

The comparative method was justified by evidence adduced from biology, especially from Darwin. "It was in the name of biological facts themselves," said C. Bougle, in 1910, "that he taught us to see only slow metamorphoses in the history of institutions, and to be always on the outlook for survivals side by side with rudimentary forms."¹⁹⁸ The development of the method can, however, be traced back almost a century before Darwin. Several of the sciences, particularly anatomy and biology, led the way in developing systems of

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A. H. Sayce, "The Science of Language," Nature, XIV (June, 1876), p. 88.

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Ibid., p. 89.

198

C. Bougle, "Darwinism and Sociology," Darwinism and Modern Science, pp. 466-67.

classification based upon comparison, but such work made less of an impression upon the academic mind than did the growth of the comparative method in philology, mythology and religion.¹⁹⁹ These areas of study, drawing from earlier investigations, were combined with the post-Darwinian concepts of social evolution and of stages of evolution to form an integral unity. As A. H. Sayce pointed out, even language, "those winged words," were "as subject to the action of... laws as the forces and atoms of material nature."²⁰⁰

The discovery of the comparative method was hailed as one of the great intellectual accomplishments of then recent history. Max Müller, the philologist, went so far as to proclaim before the International Congress of Orientalists in 1874: "The comparative method is the truly scientific spirit of our age, nay, of all ages."²⁰¹ And E. A. Freeman, in his lectures on comparative politics in 1874, somewhat more modestly stated that "the establishment of the Comparative Method of study has been the greatest intellectual

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John Fiske, "The Study of Language," The Nation, V (November, 1867), p. 369.

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A. H. Sayce, "The Science of Language," pp. 88-89.

201

Friedrich Max Müller, "Opening Address at the International Congress of Orientalists," Chips from a German Workshop (New York: Charles Scribner's Sons, 1895), IV, p. 343.

achievement of our time."²⁰² Its greatness lay in the scientific validation given to the study of society, its laws of development and its nature, through all time. The comparative method

has carried light and order into whole branches of human knowledge which before were shrouded in darkness and confusion. It has brought a line of argument which reaches moral certainty into a region which before was given over to random guess-work. Into matters which are for the most part incapable of strictly external proof it has brought a form of strictly internal proof which is more convincing, more unerring.²⁰³

Of the new comparative disciplines, by far the most successful was philology or the study of linguistics. Comparative philology, as it emerged in the second half of the nineteenth century, did much to popularize and make explicit the advantages of the comparative method. It also provided evidence of linguistic evolution which was valuable to the sociologist in constructing an evolutionary pattern. Stemming from sources independent of positivistic or naturalistic philosophy, it blended into the general stream of naturalistic thought, reinforcing it and helping further to define its content. Philologists, drawing upon both European²⁰⁴ and

²⁰² Edward A. Freeman, Comparative Politics: Six Lectures Read Before the Royal Institution (London: MacMillan and Co., 1896), p. 1.

²⁰³ Ibid.

²⁰⁴ A good introduction to the study of continental philology is Helger Pedersen, Linguistic Science in the Nineteenth Century: Methods and Results (Cambridge: Harvard University Press, 1931). There is some material, also in P. Giles, "Evolution and the Science of Language," Darwinism and

English materials, made their study an integral part of the study of man, and in the process suggested that the concept of organic society, of stages of evolution and of the comparative method, were better restricted to racially defined areas. While Frazer and Morgan, for example, attempted to treat social evolution on a world-wide basis, philological evidence pointed to the idea of restricting investigation to those people demonstrably united by common linguistic ties.

The development of comparative philology centered on the discovery of Sanskrit, the language to which all Indo-European languages were ultimately to be related. The discovery of Sanskrit by philologists and the recognition of its importance was predominantly an English achievement. Though French, Portugese and Dutch missionaries had previously become acquainted with the language, it was not until Warren Hastings made the decision, in 1776, that Indians should be ruled according to their own law and consequently ordered a commission to compile a code of Hindu ordinances, that the world became acquainted with Sanskrit, the language

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Modern Science. An anonymous article, "Comparative Philology," The Edinburgh Review, XCIV (1851), pp. 297-339, contains a good summary of findings to that date, and Franz Bopp, Comparative Grammar of the Sanskrit, Zend, Greek, Latin, Lithuanian, Gothic, German, and Slavonic Languages (London: Williams and Northgate, 1885), has a review of preceding discoveries in comparative philology on pages vii-viii. Frederic Seebohm, The English Village Community Examined in Its Relation to the Manorial and Tribal Systems and to the Common or Open Field System of Husbandry (London: Longmans, Green and Co., 1896), comments upon the contributions of continental philology to his system of economic anthropology on pp. ix-xii.

in which the original Hindu texts were printed. At first such texts had to be translated by Indian scholars into Persian, a language with which the English were familiar.²⁰⁵ Only during the decade of the 1780's did Charles Wilkins, later the East India Company's librarian in London, master Sanskrit and begin the process of translating directly from it to English. Before leaving India in 1786, Wilkins had translated the Bhagavadgita and approximately one-third of the Institutes of Menu, upon which he thought so much of Hindu law rested.²⁰⁶

It was upon this basis that the famous Sir William Jones built. Founder of the Asiatic Society (later the Royal Asiatic Society) in 1784, Jones made the Society the focus for working with Sanskrit materials. As a result of his work on the Institutes of Menu which he finished translating, Jones was able to suggest that an essential connection existed between Sanskrit and the classical languages. In the third annual discourse to the Society, in 1786 he said:

The Sanskrit language, whatever be its antiquity, is of a wonderful structure; more perfect than the Greek, more copious than the Latin, and more exquisitely refined than either, yet bearing to both of them a stronger affinity, both in the roots of verbs and in the forms of grammar, than could possibly have been produced by accident; so strong indeed, that no philologist could examine them all three, without believing

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A. J. Arberry, Asiatic Jones: The Life and Influence of Sir William Jones (1746-1794), Pioneer of Indian Studies (London: Longmans, Green and Co., 1946), p. 21.

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Ibid.

them to have sprung from some common source.²⁰⁷

Jones' completion and publication of the Institutes of Hindu Law, in 1794, marked the first appearance of Sanskrit literature in English, with the exception of Wilkins' Bhagavad-gita.²⁰⁸

Sir William Jones' most noted successor was Henry T. Colebrooke, who followed up Jones' concept of the relationship among Sanskrit, Greek and Latin, adding to that list the German and Slavonic languages.²⁰⁹ His contribution was not limited, however, to extending contemporary knowledge of the family of Aryan languages; he also attempted to suggest that the similarity of words and grammar which indicated a common source for language could also be used to prove a common cultural base. Max Müller, who was later to develop this point extensively, found in Colebrooke's manuscript for the years 1801 and 1802, long lists of words similar to Sanskrit in Greek, Latin, German and Slavonic. The lists were not of

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Sir William Jones, "Third Annual Discourse," Works, (London: John Stockdale, 1807), III, pp. 25-26. The speech was delivered on February 2, 1786.

208

See Sir William Jones, Institutes of Hindu Law: or, the Ordinances of Menu according to the Gloss of Calcutta Comprising the Indian Systems of Duties Religious and Civil, Verbally translated from the original Sanskrit, in Works, VIII, pp. 75-399.

209

Friedrich Max Müller, "Address at the Congress of Orientalists," Chips, IV, p. 334.

indiscriminately chosen words but of those which Colebrooke considered to be essential for expressing the ideas of primitive life, suggesting that the similarity of words indicated a corresponding similarity of ideas and of culture.²¹⁰

Colebrooke's early and incomplete efforts to utilize comparative philology as the key to comparative cultural studies not only anticipated Müller's work by over a half-century, but if the following comment by Müller is any indication, Colebrooke was directly responsible for stimulating Müller's later work. Said Müller:

Colebrooke had clearly perceived the relationship of all the principal branches of the Aryan family, and, what is more important,....he had anticipated the historical conclusions which a comparison of the principal words of the great dialects of the Aryan family enables us to draw with regard to the state of civilization anterior to the first separation of the Aryan race.²¹¹

James Cowles Prichard and Max Müller were to work out the implications of Colebrooke's linguistic proofs of cultural affiliation, and in the process were to add to the comparative study of languages a comparative study of culture. Ultimately, because of the growing emphasis upon the unity of the Aryan group, they aided the development of the study of linguistically defined racial origin and development. This transformation required at least two steps. The first was to

²¹⁰ See Ibid., pp. 400-416 for the list of words as duplicated by Müller.

²¹¹ Friedrich Max Müller, The Science of Language, Founded on Lectures Delivered at the Royal Institution in 1861 and 1863 (New York: Charles Scribner's Sons, 1891), I, p. 290.

utilize philological evidence to substantiate the common cultural origin of all peoples of the Aryan family; the second was to show that it was possible to acquire knowledge of the primitive state of the more advanced portions of the Aryan family by looking at existing primitive Aryan societies.

James Cowles Prichard's The Natural History of Man, the first edition of which appeared in 1813, contained a clear statement of cultural as well as linguistic affinity among those people having a clear connection with Sanskrit.²¹² In that work, Prichard argued that the "Sclavonian, German and Pelagian races" were connected with "the ancient Asiatic nations."²¹³ The proof of this connection was to be found both in the general structure of language and "in those parts of the vocabulary which must be supposed to be the most ancient, as in words descriptive of common objects and feelings, for which expressive terms existed in the primitive ages of society."²¹⁴ Prichard concluded that "the nations to

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James Cowles Prichard, The Natural History of Man, Comprising Inquiries into the Modifying Influence of Physical and Moral Agencies of the Different Tribes of the Human Family, 4th ed., ed. by Edwin Norris (London: H. Bailliere, 1848), p. 534.

213

Ibid.

214

Ibid.

whom these languages belonged emigrated from the same quarter."²¹⁵ By 1857, Prichard, in his The Eastern Origin of the Celtic Nation, had developed his argument further, saying: "The use of languages really cognate must be allowed to furnish proof, or at least a strong presumption, of kindred race."²¹⁶ The conclusion he drew from his researches was that those European nations which spoke dialects traceable to the Aryan family of languages "are of the same race with the Indians and other Asiatics to whom the same observation may be applied...."²¹⁷

While Prichard went beyond speaking of a family of languages and began to speak in terms of race, he was yet willing to admit that the proofs for establishing the connection between individual nations and the Aryan source often rested upon an unsatisfactory basis.²¹⁸ These reservations were largely removed as a result of the enthusiasm generated by Darwin's work in biology. Darwin's successful application of classification and comparison made these methods seem

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Ibid.

216

James Cowles Prichard, The Eastern Origin of the Celtic Nations Proved by a Comparison of their Dialects with the Sanskrit, Greek, Latin and Teutonic Languages (London: Houlston and Wright, 1857), p. 9.

217

Ibid., p. 40.

218

Ibid., p. 39.

totally acceptable and the conclusions deriving from their use completely unquestionable. Speaking of the relationship between philology and biology which developed after Darwin, John Fiske reflected the new enthusiasm when he urged linguistics to profit from the example of biology. "The two sciences," he said, "indeed, utterly diverse as are their subjects of research, are wholly alike in their methods, and the science of language will do well not to neglect the useful hints which she may often receive from the experience of her older sister."²¹⁹ As enthusiasm spread, the tendency was less and less to dwell upon the possible weaknesses of the suggested connections among the members of the Aryan family but more to ignore such reservations and to picture, graphically, the spread of the Aryan race. Philology, exciting and enthralling, was "to discover how a vast sea of speech--the Aryan sea--had come into existence."²²⁰

Max Müller pictured a small reservoir of Aryan humanity existing long ago near the head-waters of the Oxus river, north of Afghanistan and west of the Pamir and Hindu Kush mountains, "speaking a language not yet Sanskrit or Greek or

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John Fiske, "The Study of Language," p. 369.

220

Sir Arthur Keith, "The Aryan Theory as it Stands Today," The Frazer Lectures, 1922-1932, ed. by Warren R. Dawson (London: MacMillan and Co., 1932), p. 289.

German, but containing the dialectic germs of all....²²¹ It was a clan "advanced to the state of agricultural civilization," recognizing blood ties and having a formal religion²²² From this reservoir of humanity there spilled, at infrequent and irregular intervals, waves of Aryan-speaking peoples. Each wave broke either east or west--east to "the plains of India, the plateaus of Persia and Armenia," west over Europe, each wave pushing the other to the Atlantic.²²³

When these succeeding waves of migration left their Aryan homeland, they took with them linguistic evidences of a common cultural origin. It was possible, in Müller's eyes, to reconstruct the intellectual and social state of "the primitive and undivided family of the Aryan nations."²²⁴ if one took all the words existing in the same form in French, Italian and Spanish "to show what words, and therefore what things, must have been known to the people who did not as yet speak French, Italian and Spanish," one could reconstruct the

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Friedrich Max Müller, The Science of Language, I, pp. 289-290.

222

Ibid.

223

See a dramatic synopsis of Müller's theory in Sir Arthur Keith, "The Aryan Theory," pp. 289-90.

224

Friedrich Max Müller, "Comparative Mythology," Chips, II, pp. 19-20.

content of Aryan society.²²⁵ Thus, by taking the French, Italian and Wallachian words for "bridge", allowing for local peculiarities, it would be possible to say that "the name for 'bridge' was known before these languages separated, and that, therefore, the art of building bridges must have been known at the same time."²²⁶ One could do this for books, bread, wine, houses, villages, towns, towers, gates--on into a modest description of Aryan society.²²⁷ If one found similar words for "house" among several modern Aryan tongues, Müller believed that "we are fully justified in concluding that before any of these languages had assumed a separate existence...the ancestors of the Aryan race were no longer dwellers in tents but builders of permanent homes."²²⁸ While the re-creation would not be complete, "significant traits" would be uncovered, allowing the investigator to feel "the real presence of that early period in the history of the human mind."²²⁹

²²⁵ Friedrich Max Müller, Lectures on the Science of Religion (New York: Charles Scribner's Sons, 1893), p. 69.

²²⁶ Friedrich Max Müller, "Comparative Mythology," Chips, II, pp. 19-20.

²²⁷ Ibid., p. 20.

²²⁸ Friedrich Max Müller, Lectures on the Science of Religion, pp. 70-71.

²²⁹ Friedrich Max Müller, "Comparative Mythology," Chips, II, pp. 20-21.

Müller's efforts to show how linguistic evidence could help in the reconstruction of a society long thought dead were not his alone; as early as 1851, an anonymous author, writing in the Edinburgh Review, made the same assertion, adding that "Comparative Grammar addresses itself not only to the Grammarian, but to the Philosopher and the Historian also."²³⁰ To the public, reading this, or hearing Müller teaching at Oxford or lecturing at the Royal Institution in London, it seemed as if philologists had suggested a "perfectly intelligible combination of causes" to prove the existence of an Aryan family and to show how contemporary language groups had evolved from this common source.²³¹ Certainly, other areas of study, particularly Maine's comparative law and E. A. Freeman's comparative politics, leaned heavily upon Müller's definition of the Aryan community as a cultural unit.

Freeman contended that when the historian found in the institutions of apparently diverse nations belonging to the Aryan race "the same kind of likenesses which we find in their language and their mythology," then the obvious conclusion to be drawn is that "in all cases" the likeness "is due to the same cause."²³² The early Aryan community had "made

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"Comparative Philology," pp. 327 and 339.

²³¹

Ibid., pp. 394-95.

²³²

Edward A. Freeman, Comparative Politics, p. 22.

certain advances in political life," and had "developed certain common political institutions of the now isolated nations."²³³ The method which Freeman used was, of course, the comparative method, and the assumption which he made was that all modern Aryan nations had passed through the same stages of evolution, while some had, for a variety of reasons, dropped by the wayside. Therefore, if one wanted to examine the origins of contemporary society, one had only to utilize evidence from existing Aryan societies in a more primitive stage of development.²³⁴

The basis of his previous statements was, of course, Freeman's insistence upon the essential unity of history, at least of Aryan and European history. "The history of the Aryan nations," he said, "their language, their institutions ...all form one long series of cause and effect, no part of which can be rightly understood if it be dealt with as something wholly cut off from, and alien to, any other part."²³⁵ Such unity was almost self-evident; philologists had shown that there was not only a single Aryan source for most of Europe's peoples, but that there was also a direct and continuous line of evolutionary development from this original

²³³ Ibid.

²³⁴ Ibid., pp. 12-15.

²³⁵ Edward A. Freeman, "The Unity of History," Comparative Politics, p. 197.

source to the present. Consequently, philology "has swept away barriers which fenced off certain times as 'dead' and 'living' languages, as 'ancient' and 'modern' history."²³⁶ The Historian had to cast away such artificial distinctions and to recognize that "as man is the same in all ages, the history of man is one in all ages."²³⁷ This unity, this continual cause and effect relationship of evolutionary history, originally suggested by Comte, by Mill and by Spencer, and applied on a world-wide scale by Lewis Henry Morgan and Sir James Frazer, was limited by Freeman to the Aryan world.

Comparative philology was the queen of the new methodology, but there were, potentially at any rate, other realms of comparative study: mythology, astronomy, music, philosophy, geometry, religion and even law. Max Müller foresaw a great future for the method when applied to all areas, for it would allow one to "arrive at some idea of what is natural or inevitable, and what is accidental or purely personal in every case."²³⁸

The importance of the studies developed by Prichard,

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Ibid., p. 196.

237

Ibid., p. 197.

238

Friedrich Max Müller, "Address at the Congress of Orientalists," Chips, IV, p. 330.

Müller and Freeman was two-fold: they encouraged the limitation of comparative studies to those peoples who were demonstrably within the Aryan world and suggested an alternative to the wider comparisons of earlier anthropologists; at the same time, the enthusiasm and apparent conclusiveness of their findings encouraged the extension of the method into other areas of study. It was within this tradition and within this framework of thought that Sir Henry Maine produced his work in comparative jurisprudence, extending to the study of law the assumptions and the techniques of his age.

CHAPTER IV

PROGRESS AND LAW:
THE PATTERN OF MAINE'S THOUGHT

The study of law, no less than of anthropology, sociology and philology, was affected by the development of "new and far-reaching ideas in the study of organic nature."¹ Legal theory in the latter half of the nineteenth century was increasingly concerned with the role of law in the social organism and with the development of a sociological jurisprudence. In 1886, Oliver Wendell Holmes, Jr., reflecting upon this trend told students at Harvard University: "If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life."² The study of law, according to this view, transcended the practical and the utilitarian; it transcended the courtroom and became an integral part of a broader study of man and of social change. Speaking of the relationship between law, philology and history, E. A. Freeman noted that "law has ceased to be an empirical trade; language has ceased to be sometimes an empirical trade, sometimes an

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Sir Frederick Pollock, "The History of Comparative Jurisprudence," n.s. 5 Journal of the Society of Comparative Legislation (1903), p. 79.

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Oliver Wendell Holmes, "The Law as a Profession," 20 American Law Review (1886), pp. 741-42.

elegant amusement; and both have taken their place among the sciences. They have risen as history has risen...."³ The object of the study of law in this broader sense was not to solve questions of detail, nor was it to prepare one to better represent a client before a court of law; it was, rather, to prepare the way for a general view of legal evolution and to suggest the general course of jurisprudence from an historical point of view.

The association of law and philosophy or law and history might make a practising lawyer uncomfortable. Jurisprudence differed fundamentally from the normal area of competence for lawyers; it was theoretical rather than practical, conjectural rather than utilitarian. A. V. Dicey's comment that "jurisprudence is a word which stinks in the nostrils of a practising barrister,"⁴ while perhaps an overstatement, did reflect the low esteem which legal theory had among law students. The difficulties which legal theorists such as John Austin or Sir Henry Maine had in securing students from among people trained in case-law would indicate this, as would the reluctance of the Inns of Court or the

³ Edward A. Freeman, "History and Its Kindred Studies," The Methods of Historical Study (London: MacMillan and Co., 1886), p. 53.

⁴ A. V. Dicey, "The Study of Jurisprudence," 5 Law Magazine and Review (1880), p. 382.

Universities to introduce courses in jurisprudence.⁵ Few barristers could have accepted Holmes' dictate on the practicability of anthropology, political economy, ethics and the science of man without grave reservations. The first task of a theoretician was, then, to establish the need for theory.

Although Sir Henry Maine did not accept this apparent dichotomy between theory and practise, he did, in Village Communities, discuss one obvious advantage of theory to the practising lawyer. The function of theory, particularly the function of comparative jurisprudence, was "to facilitate legislation and the practical improvement of law," by showing how the same ends in law could be achieved by widely dissimilar means.⁶ The student of law, particularly that student who had just mastered a difficult and complicated body of positive law such as that of England, and who still believed in "the necessity, and even the sacredness" of all technical rules he had learned, could, by applying himself to a study of the legal theory of other countries, learn "what shorter routes to his conclusion have been followed elsewhere as a matter of fact, and how much labour he might consequently

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For a brief survey of the status of jurisprudence in English legal education, see E. Campbell, "German Influences in English Legal Education," 357 ff. See also Sir Henry Sumner Maine, "The Inns of Court," The Saturday Review, I (1 December, 1855), pp. 76-77.

6

Sir Henry Sumner Maine, Village Communities, pp. 4-5.

have been spared."⁷ Maine devoted his efforts and his writing to tracing out the general course of jurisprudence from an historical and comparative point of view.

Maine was not so much interested in attempting to solve intricate and involved special problems as he was in establishing decisive landmarks in the history of legal development, and in establishing the comparative method as a legitimate and scientific tool in the development of jurisprudence. Thus, his works from Ancient Law to Early Law and Custom have been characterized by Sir Paul Vinogradoff as being deficient in a close study of the evidence and in a thorough knowledge of the literature of the subject. They were, nevertheless, "a monument of creative thought, and an incentive to further investigations."⁸

Of the state of jurisprudence in England prior to the publication of his own Ancient Law, Maine said:

The theories of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken the place of assumption. Theories, plausible and comparative, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found but by that most real and most important influence which, when once

⁷
Ibid., p. 6.

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Paul Vinogradoff, "The Teaching of Sir H. Maine," The Collected Papers of Paul Vinogradoff (Oxford: The Clarendon Press, 1928), II, p. 185.

entertained and believed in, they are enabled to exercise on later stages of jurisprudence.⁹

Maine's work in jurisprudence was an effort to create a juristic theory verified by reference to historical development. He hoped, therefore, to rectify the defects common to preceding theories and to eliminate unquestioned and unverified assumptions. While "sober research into the primitive history of society and law" may be preferable to a priori assumption, it is nevertheless true that research itself depends upon an acceptable intellectual format which may change from generation to generation or even from decade to decade. While Maine obeyed his own strictures and freed himself from previous a priori theories, he was unable to free himself from the intellectual format which characterized his time. In Sir Henry Maine's work there are striking passages which relate him most definitely to prevailing English naturalism. Maine believed in the reality of social progress even though he was unwilling to admit that progress was either universal or inevitable. He accepted the validity of scientific methodology as applied to the study of man, and accepted, as concomitants, the concepts of unilinear evolution, of stages of progress, of the comparative method and of the Aryan world. Because sober investigation depends, ultimately, upon an intellectual framework within which factual

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Sir Henry Maine, Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas (London: John Murray, 1905), p. 3..

material has to be placed, and because fact becomes fact only when meaning is attributed to it, Maine was unable to escape from the realm of theory.

The basis of Sir Henry Maine's methodology and the foundation of his thought was his firm belief in the existence and reality of progress. His was not, however, a simple or enthusiastic conception of progress, but an intellectual one; man could acquire the knowledge which would increasingly enable him to understand, and, through understanding, control nature. Though at one point Maine said of progress that it was a "word of which I have never seen any definition,"¹⁰ he was, himself, to supply one:

Now it is quite true that, if Progress be understood with its only intelligible meaning, that is, as the continued production of new ideas, scientific invention and scientific discovery are the great and perennial sources of these ideas. Every fresh conquest of Nature by man, giving him the command of her forces, and every new and successful interpretation of her secrets, generates a number of new ideas which finally displace the old ones and occupy their room.¹¹

Progress, then, was not only material development but the ideas which material development engendered. Among such new ideas thus stimulated:

...are the never-ceasing discovery of new facts of nature, inventions changing the circumstances and

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Sir Henry Maine, Popular Government, p. 131.

¹¹

Ibid., p. 145.

material conditions of life, and new rules of social conduct; the chief of this last class, and certainly the most important in the domain of law proper, I take to be the famous maxim that all institutions should be adopted to produce the greatest happiness of the greatest number.¹²

Maine's statement is strikingly similar to Mill's "continual causation" except that it was limited to the realm of ideas. The act of progressive social evolution is the replacement of one set of ideas by another set, the latter stemming from and displacing the former. Thus, in progressive societies, one found "everywhere a new morality has displaced the canons of conduct and the reasons of acquiescence which were in unison with the ancient usages, because in fact they were born of them."¹³

Maine emphasized the role of ideas in progress because he considered legal theory, a specialized area of ideas, the cornerstone of law. Looking at the history of western legal development, he found the general pattern to be the gradual substitution of individual obligation for family dependency. As Maine stated it: "Through all its course it Law has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family

12

Sir Henry Maine, Lectures on the Early History of Institutions (New York: Henry Holt and Co., 1888), p. 227.

13

Sir Henry Maine, Ancient Law, p. 149.

as the unit of which civil laws take account."¹⁴ The movement from family dependency to individual obligation could be worded in a somewhat different way--as a movement from status to contract. The definition was undoubtedly the most famous and the most controversial formulation in Maine's entire body of writing. In full, the passage read as follows:

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.¹⁵

This statement serves well as a summary of Maine's conception of social evolution.

The path which progress followed was conceived as a straight line. It was a slow, constant, but gradual shift from one form of idea to another, with no deviation from the central course and with no retrogression.

The advance has been accomplished at varying rates of celerity.... But, whatever its place, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source.¹⁶

¹⁴ Ibid.

¹⁵ Ibid., pp. 150-51.

¹⁶ Ibid., p. 149.

Barring contact with, and absorption of, foreign and contradictory ideas, then, legal progress from status to contract would be consistent among those people fortunate enough to live in a progressive society.

Though Maine believed in the reality of progress, he differed drastically from many of his compatriots, for he questioned both the universality and the necessity of progressive evolution. Some of his most telling criticisms were directed at those who treated the concept in an uncritical fashion. The most frequent misuse was that of the enthusiastic and indiscriminate politician, who used progress as a synonym for change and who justified any variety of political or legislative innovation as progressive. "Political insanity," Maine noted, "takes strange forms," not the least important of which was the modern equation of progress with democratic government and with extensive legislation.¹⁷ Politicians, taking advantage of the prevalence of the notion of progress used the term to describe "the movement which they stimulate as an escape from what is distinctly bad, others as an advance from what is barely tolerable to what is greatly better; and a few, as an ascent to an ideal state, sometimes conceived by them as a State of Nature and sometimes as a condition of millennial blessedness."¹⁸ In any case, the idea

¹⁷Sir Henry Maine, Popular Government, pp. 130-131.¹⁸Ibid., p. 130.

of progress as democracy and legislative innovation was falsely grounded and based not upon science but enthusiasm. Politicians so using the term "appear to employ it for mere aimless movement, while others actually use it for movement backwards, towards a state of primitive nature."¹⁹ Thus, "it is not uncommon to hear a politician supporting an argument for a radical reform by asserting that this is an Age of Progress, and appealing for proof of this assertion to the railway, the gigantic steamship, the electric light, or the electric telegraph."²⁰ Progress was idea, not merely technology; it was limited, not universal or inevitable. The mere existence of new material invention did not alone indicate a progressive society.

The origin of the popular association of progress with democracy and material change was the result of substituting for true science, "the scientific air which certain subjects, not capable of exact scientific treatment, from time to time assume."²¹ Bentham, said Maine, had lent a scientific air to law reform, just as Ricardo had to the study of political economy. Yet, neither Bentham nor Ricardo treated their

¹⁹
Ibid., p. 131.

²⁰
Ibid., p. 145.

²¹
Ibid., p. 146.

subjects in a scientific manner.²² Fortunately, the mania for change in the name of science had not yet found its way into all European societies.

But it has greatly affected the institutions of some of them; even when it is checked or arrested, it is shared by considerable minorities of their population; as when (as in Russia) these minorities are very small, the excessive concentration of the passion for change has a manifest tendency to make it dangerously explosive.²³

Yet, those who dreamed of a mass revolution or of vast public support for innovation in any field overlooked the innate conservatism of the general populace. Change itself, much less progress, had seldom received extensive popular support. Of the facts available, to prove the natural conservatism of mankind, Maine suggested that: "The most remarkable is the relatively small portion of the human race which will so much as tolerate a proposal or attempt to change its usages, laws and institutions."²⁴ He continued:

Vast populations, some of them with a civilization considerable but peculiar, detest that which in the language of the West would be called reform. The entire Mahomedan world detests it. The multitudes of coloured men who swarm in the great continent of Africa detest it, and it is detested by that large part of mankind which we are accustomed to leave on one side as barbarous or savage. The millions upon millions of men who fill the Chinese Empire loathe it and (what is more) despise it.... There is not...the shadow of a doubt that the enormous mass of the Indian population hates and dreads change, as is natural in the parts of

²²

Ibid.

²³

Ibid., p. 129.

²⁴

Ibid., pp. 132-33.

a body-social solidified by caste.²⁵

The exceptions to this general statement were not only very limited, but were of relatively recent development. "To the fact that the enthusiasm for change is comparatively rare," Maine said, "must be added the fact that it is extremely modern. It is known but to a small part of mankind, and that part but for a short period during a history of incalculable length."²⁶ That man was a creature of habit was true insofar as it summed up the vast general experience of mankind. Yet this conservatism was not geographically uniform. "It is strictest in the East. It is relaxed in the West, and of all races the English and their descendents, the Americans, are least reluctant to submit to a considerable change of habit for what seems to them an adequate end."²⁷ In sum, despite the reality of progress and change, Maine argued that there was quite as much evidence for the intense conservatism of the human race as there was for "railways, electric telegraphs, or democratic governments."²⁸

What was true for mankind as a whole was often true, too, of individual genius. Even in the realm of poetry and

²⁵
Ibid.

²⁶
Ibid., p. 134.

²⁷
Ibid., p. 137.

²⁸
Ibid., p. 133.

fiction, where individual intelligence would seem to hold sway, there were but few moments of pure creative effort; the remainder was largely imitative.

From time to time one mind endowed with the assemblage of qualities called genius makes a great and sudden addition to the combinations of thought, word and sound which it is the province of those arts to produce; yet as suddenly, after one or a few such efforts, the productive activity of both branches of invention ceases, and they settle down into imitativeness for perhaps a century at a time.²⁹

Thus, there were more limitations upon human intellect than one would normally admit; these limitations, when reflected in large bodies of men, "translate themselves into that weariness of novelty which seems at intervals to overtake whole Western societies, including minds of every degree of information and cultivation."³⁰

This generally conservative tradition was, finally, evident in the history of institutions. Seldom, according to Maine, had it been possible for institutions of any society to overcome both the conservative instincts of the population and the confining nature of the law. For law, to Maine, was a most conservative and anti-progressive instrument, responsible for much of the stability or the static qualities found in existing societies.

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Sir Henry Maine, Early History of Institutions, pp. 227-28.

³⁰

Ibid.

It is indisputable that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record. One set of usages has occasionally been violently overthrown and superseded by another; here and there a primitive code, pretending to a supernatural origin, has been greatly extended, and distorted into the most surprising forms, by the perversity of sacerdotal commentators; but, except in a small section of the world, there has been nothing like the gradual amelioration of a legal system. There has been material civilization, but, instead of the civilization expanding the law, the law has limited the civilization. 31

The crucial phrase, of course, was "instead of the civilization expanding the law, the law has limited the civilization." Ultimately, Maine was led to suggest that social necessity and social opinion were always more or less in advance of the law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to re-open."³² Thus, in those few cases where progressive societies had existed, progress had depended upon the possibility of narrowing the gap between society and law. "Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed."³³

The law should be responsible for preventing or arrest-

31

Sir Henry Maine, Ancient Law, pp. 20-21.

32

Ibid., p. 22.

33

Ibid.

ing progress among the greater part of mankind was due, primarily, to the early association of law with religion and religious forms. "The rigidity of primitive law, arising from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into systematic form."³⁴ The first such association, evidences of which were found in Homer, involved the use of a personal agent to account for both periodic and sustained applications of law. Thus, in the earliest period of jurisprudence, "when a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration."³⁵ In this early case, the divine agency suggesting awards to kings was best signified by the Greek term Themis, while the awards themselves, divinely dictated to the king, were indicated, in Homeric sources, by the word Themistes which was the plural form of Themis.³⁶ To Maine, the primary characteristic of this particular association of law and religion was that the judgments were arbitrary. The King "is provided with Themistes, but, consistently with the belief in their emanation from

³⁴
Ibid., p. 68.

³⁵
Ibid., p. 4.

³⁶
Ibid.

above, they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments."³⁷ As separate judgments, the most that law could do was to alter individual circumstances; it could not promote social change or adjust to social change. Since law was not of human agency, but of divine, it could not be progressive.

The next step in the evolution of jurisprudence was a refinement of the association of law and religion which allowed of somewhat greater flexibility than the use of Themistes. While the concept of Themis prevailed in an era of heroic kings, it was superceded by customary law prevailing in an historical era of aristocracies. Among "all branches of the Indo-European family of nations," military and civil aristocracies limited the power of the king. In the East, however, "military and civil aristocracies disappear, annihilated and crushed into insignificance between the king and the sacerdotal order; and the ultimate result at which we arrive is, a monarch enjoying great power, but circumscribed by the privileges of a caste of priests."³⁸ Thus, an oligarchy which was either civil or military as in the West, or sacerdotal and religious as in the East, "claims to monopolize the knowledge of the laws, to have the exclusive

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Ibid.

38

Ibid., pp. 9-10. The italics are Maine's.

possession of the principles by which quarrels are decided."³⁹ Law, thus preserved by a privileged minority, "whether a caste, an aristocracy, a priestly tribe or a sacerdotal college," was true unwritten or customary law. Ultimately, said Maine, "before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe could be at all approximated to."⁴⁰ Significantly, however, the purpose of the possessors of law was still to preserve, in as unaltered a form as possible, the customs and traditions of a people. Law was still rigid.

Each step in the development of jurisprudence had, perhaps, its own defect. That of oligarchical domination was the tendency on the part of the oligarchy to perpetuate itself at the expense of society and of social progress. Most often, in order to justify its position in the face of changing social need, the legal oligarchy debased national institutions and corrupted national usages and law. Normally, the usages and laws of a society began as faithful representations of that society's needs, "and if they are retained in their integrity until new social wants have taught new

³⁹
Ibid., p. 10.

⁴⁰
Ibid., p. 11.

practices, the upward march of society is almost certain."⁴¹ When, however, a legal oligarchy remained too long in power, it destroyed the integrity of these usages and grafted on them "an immense apparatus of cruel absurdities."⁴² Some means had to be found to break the hold of the oligarchy. Those societies which found this means continued to progress; those which did not stultified. Ultimately, control of law had to be taken out of the hands of the oligarchy and put into independent, written form before corruption had advanced too far to be corrected.⁴³

The tool used to break the hold of the legal oligarchy was the written code. "inscribed tablets were seen to be a better depository of law, and a better security for its accurate preservation, than the memory of a number of persons however strengthened by habitual exercise."⁴⁴ What was most significant about the change in law to a written form was, to Maine, not so much whether it occurred or not, "for the majority of ancient societies seem to have obtained...it sooner or later," but rather "at what period, at what stage

⁴¹
Ibid., p. 16.

⁴²
Ibid., p. 20.

⁴³
Ibid., pp. 16-17.

⁴⁴
Ibid., p. 13.

of their social progress, they should have put their law in writing."⁴⁵ If, as in the West, a written code could early assail the "oligarchical monopoly" of the legal aristocracy, and break its power, the law code would then protect against the frauds perpetuated by this oligarchy and also prevent "the spontaneous depravation and debasement of national institutions."⁴⁶ If, however, as in the East, the written code did not challenge oligarchical monopoly quickly enough, the result was stagnation and the perpetuation of the rule of a closed caste. Fortunately, for the West, the inheritor of Roman law, the power of the legal oligarchy was broken by the Twelve Tables of Rome.

In Rome, the Twelve Tables were compiled while legal usage "was still wholesome" and before "the mischief had been done by the legal oligarchy."⁴⁷ The Twelve Tables were "merely an enunciation in words of the existing customs of the Roman people," and were undefiled by corrupt interpretations.⁴⁸ Thus, the Twelve Tables freed Roman law from the threat of stagnation. This was not, however, true of the

⁴⁵ Ibid., p. 14.

⁴⁶ Ibid., pp. 15-16.

⁴⁷ Ibid., p. 18.

⁴⁸ Ibid., p. 16.

East, for "the ruling aristocracies tended to become religious rather than military or political, and gained, therefore, rather than lost in power."⁴⁹ While legal codes appeared in the East, these codes consolidated rather than weakened the priestly caste. "Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections, not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed."⁵⁰ Thus, Eastern law codes were not reflections of existing customs, nor of rules actually administered; codes, especially in India, were "in great part, an ideal picture of that law which, in the view of the Brahmins, ought to be the law."⁵¹ "It is," continued Maine, "consistent with human nature and with the special motives of their authors, that codes like that of Menu should pretend to the highest antiquity and claim to have emanated in their complete form from the Deity."⁵²

Because its law remained flexible and able to accommodate itself to social change, western society was progres-

⁴⁹

Ibid., p. 15.

⁵⁰

Ibid.

⁵¹

Ibid., p. 16.

⁵²

Ibid.

sive. In the East, however, where law as static and inflexible, social change was retarded or even halted. Thus, the presence of the Twelve Tables of Rome and the circumstances under which they came into existence, explained why European civilization was superior to that of Asia. "We are not of course entitled to say that if the Twelve Tables had not been published the Romans would have been condemned to a civilization as feeble and perverted as that of the Hindoos," said Maine, "but this much at least is certain, that with their code, they were exempt from the very choice of so unhappy a destiny."⁵³

Having escaped the domination of a caste of legal interpreters by a timely introduction of written law did not, itself, mean that Roman society would continue to be progressive. A written code, too, could become a static, conservative instrument which rapidly ceased to reflect the existing customs of a people. Law, once codified, ceased changing spontaneously; changes were effected "deliberately and from without."⁵⁴ Legal modification after the creation of a code had come about as a result of "the conscious desire

⁵³
Ibid., p. 18.

⁵⁴
Ibid., p. 19.

of improvement."⁵⁵ Only a few societies had felt this desire, and of those few, Rome was the most important. The success with which the Romans changed the Twelve Tables and modified their code to meet changing conditions marks "the distinction between stationary and progressive societies."⁵⁶

The means by which flexibility in law was achieved in Rome was the use of legal fiction, equity and legislation. "A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them."⁵⁷ Only in Rome, and through the agency of Roman law, only in Western Europe, have these three agencies appeared in order and only there have they had the desired effect of keeping law flexible and able to accommodate social change and progress. In effect, Maine argued that social progress was limited to those societies which were influenced by Roman law.

Thus, when discussing the cause of legal evolution and social progress, Maine did not accept the notion of necessary cause. There was nothing equivalent to Spencer's conservation

⁵⁵

Ibid.

⁵⁶

Ibid., p. 20.

⁵⁷

Ibid., p. 22.

of energy or Darwin's natural selection to make such evolution necessary. He relied, instead, upon a specifically historical explanation of why some early societies were able to progress. The existence of strong centralized monarchies in the west and the operation of Roman law combined to destroy the stultifying aspects of law and promote progress.

Two causes have done most to obscure the oldest institutions of the portion of the human race to which we belong: one has been the formation throughout the West of strong centralized governments, concentrating in themselves the public force of the community, and enabled to give to that force upon occasion the special form of legislative power; the other has been the influence, direct and indirect, of the Roman Empire, drawing with it an activity in legislation unknown to the parts of the world which were never subject to it.⁵⁸

Maine treated royal government as a legislative agency responsible for altering and destroying much ancient and accepted custom. It was, therefore, largely responsible for creating, in the legal structure, sufficient flexibility to allow of social change. He concluded that royal judicial authority was "once the most valuable and indeed the most indispensable of all reforming agencies," but that ultimately, "its course was run, and in nearly all civilized societies its inheritance has devolved upon elective legislatures, themselves everywhere in the western world the children of the British Parliament."⁵⁹

58

Sir Henry Maine, Early History of Institutions, p. 11.

59

Sir Henry Sumner Maine, Dissertations on Early Law and Custom (London: John Murray, 1883), p. 191.

Royal authority was important, but of the two causal factors suggested by Maine for social evolution, the most important in the long run was undoubtedly the effect of Roman law. Roman law was not only anterior in time to royal monarchies but the impact of its reforming zeal was felt over a wider area. "We have in the annals of Roman law," said Maine, "a nearly complete history of the crumbling away of an archaic system, and of the formation of new institutions from the combined materials and institutions...."⁶⁰ Some of these institutions had come down to the modern world unimpaired, "while others, destroyed or corrupted by contact with barbarism in the middle ages, had...to be recovered by mankind."⁶¹ The effect of Roman law was to transfer the greatest number of property and personal rights from family law to public law, and in the process, break down status society.⁶² Where Roman law laid hold of early legal usage which supported status society, that usage was everywhere destroyed and distorted. Where the impact of Rome was intangible or negligible, status-oriented usage remained constant and society in a state of barbarism. When speaking of collective ownership, Maine made this distinction:

⁶⁰ Sir Henry Maine, Ancient Law, p. 148.

⁶¹ Ibid.

⁶² Ibid.

The collective ownership of the soil by groups of men either in fact united by blood-relationship, or believing, or assuming that they are so united, is characteristic of those communities of mankind between whose civilization and our own there is any distinct connection or analogy. The evidence has been found on all sides of us, dimly seen and verifiable with difficulty in countries which have undergone the enormous pressure of the Roman Empire, or which have been strongly affected by its indirect influence, but perfectly plain and unmistakable in the parts of the world peopled by the Aryan race, where the Empire has made itself felt very slightly or not at all.⁶³

Thus, when asserting that Irish Brehon law was identifiable with early western customs, he said: "I think I may lay down that, wherever we have any knowledge of a body of Aryan custom, either anterior to or but slightly affected by the Roman Empire, it will be found to exhibit some strong points of resemblance to the institutions which are the basis of the Brehon law."⁶⁴

Maine was, in an age when universal and necessary progress was often taken for granted, a pessimist; the most that he would concede was that despite the almost unshakable conservatism of groups and individuals and the stultifying identification of law and religion which was so characteristic of the East, a part of the world had achieved a measure of progress. The western world had, almost fortuitously, experienced the benefit of a transition from status to contract.

⁶³

Ibid., p. 325.

⁶⁴

Sir Henry Maine, Early History of Institutions, p. 20.

A far cry, from John Stuart Mill's utilitarian faith in "the influence of reason over the minds of men" and his belief in "the consequent, unlimited possibility of improving the moral and intellectual condition of mankind by education."⁶⁵ The difference, however, was one of degree, not of kind. Both Maine and Mill admitted of the reality of progress; their differences focus on the degree of optimism which they were willing to manifest and upon the question of the inevitability of progress. Mill was concerned with emphasizing the existence and development of progress, Maine in sounding a warning note that, while progress existed, it was not an unavoidable condition of man.

Just as Maine shared a belief in progress with many contemporaries, so too did he share a certain enthusiasm for scientific aims and methods. But as with his treatment of progress, his approach to the value and use of science was tempered by reservation and by a distrust of enthusiasm in any form. Maine was convinced that his work was based, as closely as the evidence allowed, upon a scientific attitude and that it utilized a scientific methodology. Though he could occasionally speak of "the truth of history, if it exists,"⁶⁶ Maine was challenging the temperment which accompanied so much of the scientific research of his age, not the

⁶⁵John Stuart Mill, Autobiography, pp. 74-75.⁶⁶Sir Henry Maine, Village-Communities, p. 265.

scientific method itself.

That which attracted Maine to scientific methodology was its impersonal nature and the relative simplicity of its subject-matter. Impersonality contributed to objectivity and accuracy; simplicity of material contributed to precision of observation.

The statements of fact reported by a scientific observer are hardly ever influenced by his passions, and are always controlled by his knowledge that his observations will be confronted with those of others, and will be drawn from them. More than all, the evidence of a scientific witness is not taken at all unless his powers of observation are known to have been tested, and the facts to which he speaks are for the most part simple and ascertained through special contrivances provided for the purpose.⁶⁷

These aspects of science could be applied to any field of study where empirically verifiable information could be obtained. Thus, to Maine, scientific methodology offered advantages to both the social and physical scientist.

His assurance that the study of science and the use of the scientific methodology had united most fields of knowledge is very clear in Maine's speech before the University of Calcutta in March, 1865. Throughout, Maine reflected the basic conviction that there was a unity of knowledge. He noted that "within the last fifteen or twenty years, there

67

Sir Henry Sumner Maine, "Mr. Fitzjames Stephen's Introduction to the Indian Evidence Act," Fortnightly Review, XIX (January, 1873), p. 59. The article was reprinted in Village-Communities, pp. 295-329.

has arisen in the world of thought a new power and a new influence, not the direct but the indirect influence of the physical sciences--of the sciences of experiment and observation."⁶⁸ Maine held it to be incontestable that if truth in any field existed, it had to be scientific truth, and that this was as true of historical as of physical studies.

It is now affirmed, and was felt long before it was affirmed, that the truth of history, if it exists, cannot differ from any other form of truth. If it be truth at all, it must be scientific truth. There can be no essential difference between the truths of the Astronomer, of the Physiologist and of the Historian. The great principle which underlies all our knowledge of the physical world, that Nature is ever consistent with herself, must also be true of human nature and of human society which is made up of human nature. It is not indeed meant that there are no truths except of the external world, but that all truth, of whatever character, must conform to the same conditions; so that, if indeed history be true, it must teach that which every other science teaches, continuous sequence, inflexible order, and eternal law.⁶⁹

So firmly did Maine believe in the uniform application of the scientific method that he warned "if there is any branch of knowledge which refuses to answer to these new attempts to improve it, there is a visible disposition to doubt and question its claims to recognition."⁷⁰ These statements immediately suggest a similarity with Comte's vue

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Sir Henry Maine, Village-Communities, p. 266.

⁶⁹

Ibid., pp. 265-66.

⁷⁰

Ibid., pp. 266-67.

d'ensemble. Maine, too, believed that the phenomena of the human condition were complex rather than simple, manifold rather than detached. He too believed that knowledge was no longer only the dissecting and arranging of phenomena in sequence but an analysis of their "togetherness in space" as well as their "succession in time."⁷¹ There was, to Maine, sufficient justification for a broad view to say "that all truth will, at some time, be shown to be one and indivisible."⁷²

About this assertion of the validity of the scientific method and the consequent unity of knowledge, Maine had two reservations. He was concerned, first of all, lest his emphasis upon the physical sciences lead one to believe that he thought scientific truth could substitute for moral truth. Maine suggested that no one who possessed, with him, "belief in the harmony of all truth, will suppose that I have been exalting the truths of physical nature at the expense of moral or of other truths."⁷³ Ultimately, of course, physical truth could not be exalted above other truths, for all were of a single unity. "The very fact which I have been

⁷¹ John T. Merz, A. History of European Thought, IV, pp. 434-35.

⁷² Sir Henry Maine, Village-Communities, p. 272.

⁷³ Ibid.

impressing upon you, that the methods of physical science are proving to be applicable to fields of thought where they once had no place, is itself an indication that all truth will, at some time, be shown to be one and indivisible."⁷⁴ Thus, at least by implication, contradictions among various truths were more apparent than real. Enchanting and optimistic as this argument sounded, Maine did not attempt to use it as an easy solution to the conflict between religion and revealed truth on the one hand, and physical truth on the other.

Though attempting to strike a balance in the great conflict of his century, Maine leaned more to the new world than the old, more towards empirical than revealed truth. Thus Maine concluded that "no doubt what I have been saying does carry with it the implication that truth of all sorts does admit of intellectual appreciation--that all asserted knowledge must at all events to some extent ring true, when sounded by the intellect."⁷⁵ Truth had to admit of intellectual appreciation, and seldom would revealed truth meet this standard.

The second of his reservations about scientific truth showed Maine at his best. Though he attempted throughout his productive life to apply science to the study of history and jurisprudence, he could yet speak of history--"if it be true."

⁷⁴
Ibid.

⁷⁵
Ibid.

The key to understanding this reservation was that while Maine did not doubt the general validity of the scientific method he was greatly aware of those difficulties encountered when applying that method to the study of history. In part, the problem concerned the nature of the evidence with which the scientific historian had to deal, and in part the pressure under which the historian himself worked. In an article written in 1873, reviewing James Fitzjames Stephen's Introduction to the Indian Evidence Act, Maine dealt at some length with these problems.⁷⁶ Stephen had, in his work, abstracted a large part of John Stuart Mill's account of induction and deduction and had attempted to illustrate the manner in which Mill's principles could be used in judicial inquiries. To these general observations, Stephen had added some comments of his own concerning the advantages which a physical scientist enjoyed in determining evidence as opposed to the judge. Maine repeated these remarks approvingly, adding to the discussion the observation that judge and historian operate with the same disadvantages.⁷⁷

The type of evidence available to both judge and historian was often quite untrustworthy. Both the limited

⁷⁶

Sir Henry Maine, "Mr. Fitzjames Stephen's Introduction to the Indian Evidence Act," 55ff.

⁷⁷

Ibid., p. 56.

number of sources from which material could be drawn and the bias and general unreliability of the sources put them at an immediate disadvantage when compared to the physical scientist.⁷⁸ Great though this disadvantage was, however, it was less encumbering than was the lack of opportunity to conduct experiments.

The greatest of all the advantages which attend inquiries into physical nature is no doubt the possibility of indefinitely multiplying relevant facts, since there is no practical limit to the number of experiments which can be tried. But, on the other hand, this great resource is denied to the judge and the historian, who, in reference to isolated events can seldom or never perform experiments, but are confined to a fixed number of relevant facts which cannot be increased.⁷⁹

Put in this way, there was reason to suggest that one should speak of written history "if it be true". Not that such history could not be true, for all areas of thought subject to the scientific method would, in time, succumb to truth.

In addition to the preceding argument, Maine recognized that the judge and the historian were subject to personal pressures which tended to make impartiality and impersonality difficult. Both persons were subject to the demands of speed and urgency; either "must arrive at a solution promptly, and thus the suspension of judgment which belongs to the duties of the scientific inquirer is impracticable to him,

78

Ibid.

79

Ibid., pp. 58-59.

and his standard of certainty is proportionately lower."⁸⁰ There was, in other words, more room in the realm of social investigation for the human element to distort and willfully construe scientific evidence.

Despite these reservations, Maine insisted that in jurisprudence and the theory of law, the scientific method, combined with historical perspective, should be used in preference to the a priori idealism of his predecessors. With the possible exception of Montesquieu, no jurist had yet been able to "really solve the questions they pretend to dispose of,"⁸¹ because they had not taken into account "what law has actually been at epochs remote from the particular period at which they made their appearance."⁸² Theorists had for long been too concerned with what law should be to discover what law was. To Maine, however, any theory not based upon the scientific methods of observation and induction was not subject to "intellectual appreciation." Such theories could not be said to be true. Of preceding a priori theories, the most important of which were advanced by Bentham and John Austin, Maine said:

Their originators carefully observed the institutions

80

Ibid.

81

Sir Henry Maine, Ancient Law, p. 105.

82

Ibid.

of their own age and civilization, and those of other ages and civilizations with which they had some degree of intellectual sympathy, but, when they turned their attention to archaic states of society which exhibited much superficial difference from their own, they uniformly ceased to observe and began guessing.⁸³

The mistake which these theorists had made was, to Maine, that they had reversed the proper procedure of scientific methodology. Both Bentham and Austin had begun by "contemplating the existing physical world as a whole, instead of beginning with the particles which are its simplest ingredients."⁸⁴ Because of his conviction that all disciplines would sooner or later have to submit themselves to proper scientific method, he went on to observe that "one does not certainly see why such a scientific solecism should be more defensible in jurisprudence than in any other region of thought."⁸⁵ As in other areas of social research, application of the scientific method meant reverting to history, for materials for observation and induction could only be obtained historically. By approaching the study of jurisprudence historically one could obtain adequate information about the particulars of society, and by beginning with particulars and working inductively, one could arrive at an adequate basis for generalization. Maine was suggesting

83

Ibid.

84

Ibid.

85

Ibid.

that, in effect, Mill's Logic be applied to the study of jurisprudence.

It would seem...that we ought to commence with the simplest social forms in a state as near as possible to their rudimentary condition. In other words, we should penetrate as far up as we could in the history of primitive societies. The phenomena which early societies present us with are not easy at first to understand, but the difficulty of grappling with them bears no proportion to the perplexities which beset us in considering the baffling entanglement of modern social organization. It is a difficulty arising from their strangeness and uncouthness, not from their number and complexity.⁸⁶

Thus, scientific history tended to be ancient history. But to Maine, ancient history meant not only "the wonderfully precise history of Greece and Rome," but also "the semi-poetical history of ancient India."⁸⁷ In a rare burst of enthusiasm, Maine summed up his approach to history, historical jurisprudence and to the whole basis of the scientific method by saying:

Ancient history has for scientific purposes the great advantage over modern, that it is incomparably simpler --simpler because younger. The actions of men, their motives and the movements of society are all infinitely less complex than in the modern world, and better fitted, therefore to serve as materials for a first generalization.⁸⁸

It was just because historical investigation gave sufficient

86

Ibid., pp. 105-06.

87

Sir Henry Maine, Village-Communities, p. 269.

88

Ibid., p. 264.

material for the construction of generalizations, and because generalizations so constructed were akin to scientific laws that Maine could discuss the truth of history. "If the question were put," Maine reflected, "why should history be studied? the only answer, I suppose, which could be given is, because it is true: because it is a portion of the truth to which it is the object of all study to attain."⁸⁹ At another point Maine commented that "it will at least be acknowledged that, if the materials for this process are sufficient, and if the comparisons be accurately executed, the methods followed are as little objectionable as those which have led to such surprising results in comparative philology."⁹⁰ Maine's reservations focus, then, not on the scientific method itself, but upon the sufficiency of materials and upon the use to which these materials were put. He realized that in the field of social research, the scientific method, while it could not be wrong, could be improperly used. This realization did not, however, prevent Maine from utilizing a theory of social evolution based upon the scientific method.

As with so many of his contemporaries, Maine was convinced that among a significant portion of the world's

89

Ibid.

90

Sir Henry Maine, Ancient Law, p. 108.

population, societies developed along similar lines and through identical stages. Though some societies in the Aryan world had progressed further than others, all had gone through a certain number of similar steps. Maine concluded from these assumptions that the primitive condition of advanced societies could be studied by observing the present condition of less advanced societies, and that one could obtain a broad, accurate picture of the true state of early society by comparing many societies in the same state of development. Baldly stated in this fashion, the theory would probably have frightened its author, for as before, Maine tended to approach his method slowly, conservatively and with reservations.

Before, however, Maine could establish that society had indeed evolved through a series of stages, he had first to decide to what part of the world he would apply his generalizations. He had to decide whether his generalizations concerning social evolution applied to all societies throughout the world as Henry Morgan and Sir James Frazer insisted, or whether he would restrict himself to that Aryan world conjured into existence by Max Müller and his fellow philologists. Ultimately Maine limited his discussion to only that part of the world in which the societies in question had a demonstrable connection with one another. He discussed social evolution within the framework of the Aryan race.

After observing that many bodies of custom in several

seemingly scattered parts of the world "are strikingly alike in their most important features," Maine said that "there is no room for doubt that they have somehow been formed on some model and pattern."⁹¹ After all that has been achieved in other departments of inquiry," he continued, with obvious reference to the study of philology, "there would be no great presumption in laying down, at least provisionally, that the tie which connects these various systems of native usage is the bond of common race between the men whose life is regulated by them."⁹² The race which most of his comments concerned was the Aryan, whose existence was strongly indicated by philology.

He was, first of all, convinced that evidence for the origin of society was of better quality when limited to the Aryan peoples than when broadened to include non-Aryan groups. Maine argued that work done "beyond the circle of the great races" was filled with "generalizations of much ingenuity and interest," but that these generalizations had not yet satisfactorily settled any question about the origin of the family or about world-wide social progress.⁹³ Could

⁹¹

Sir Henry Maine, Village-Communities, p. 14.

⁹²

Ibid.

⁹³Sir Henry Sumner Maine, "South Slavonians and Rajpoots," The Nineteenth Century, II (December, 1877), p. 796.

one, asked Maine, actually depend upon the evidence available to researchers about non-Aryan societies? Though written records, traditions and law established some facts about non-Aryan society, there did not appear to be enough material to go deeply into pre-history, for "it is just where the sources of evidence can least be depended upon, where history runs into poetry, tradition into legend, a clear and definite law into dimly seen custom, that the connection between barbarous Aryan usage and savage non-Aryan practice has to be established if it really exists."⁹⁴ The evidence for such a connection at this crucial point most often did not exist. To go beyond scientifically verifiable evidence would lead to unsubstantiated generalization. Thus, while not denying that some form of social organization existed among non-Aryan societies, Maine chose not to discuss it, "for at best among the recorded usages of portions of these races, there are obscure indications of another and earlier state of things."⁹⁵

More specifically, Maine asked how the researcher could prove that the common social institutions found scattered throughout the world and among all races were the result of a common pattern of social evolution and not of imitation

⁹⁴

Ibid.

⁹⁵

Sir Henry Maine, Early History of Institutions, p. 66.

and borrowing.⁹⁶

The important lesson is that in sociological investigation it is never possible to discover more than the way in which the type has been formed. If an institution is once successful, it extends itself through the imitative faculty, which is stronger in barbarous than in civilized man. It follows from this that no universal theory, attempting to account for all social forms by supposing an evolution from within, can possibly be true.⁹⁷

Maine was, in effect, arguing that essential differences in patterns of social evolution did exist among the various stocks of the human race. Patterns of consanguinity and kinship relevant to the Aryan world did not necessarily apply to all societies; similarly, the reverse did not need to be true. Ultimately, Maine became quite convinced that the Brehon laws of Ireland confirmed this point:

The study of the Brehon laws leads to the same conclusion pointed at by so many branches of modern research. It conveys a stronger impression than ever of a wide separation between the Aryan race and races of other stocks, but it suggests that many, perhaps most, of the differences in kind alleged to exist between Aryan sub-races are really differences merely in degree of development.⁹⁸

Thus, Maine dissociated himself completely from the school of thought which advocated a universal pattern of social evolution.

96

Sir Henry Maine, Early Law and Custom, p. 285.

97

Ibid.

98

Sir Henry Maine, Early History of Institutions, p. 96.

In addition to finding the concept of race superior for purposes of analysis, Maine used it to explain why human society was, ultimately, so stable and why men for generations resisted the attraction of change and growth. In a passage directed against Montesquieu's view of human society as being subject to the direct influence of external factors, Maine said:

He greatly underrates the stability of human nature. He pays little or no regard to the inherited qualities of race, those qualities which each generation receives from its predecessors and transmits but slightly altered to the generation which follows it.... Many of the anomalies which he parades have since been shown to rest on false report or erroneous construction, and of those which remain not a few prove the permanence rather than the variableness of man's nature, since they are relics of older stages of the race which have obstinately defied the influences that have elsewhere had effect.⁹⁹

Thus, there would appear to be a dual relationship of race to human stability: the "inherited qualities of race" which remain nearly constant from generation to generation, and the institutional anomalies which are "relics of older stages of the race" and constitute a cultural framework difficult to change. What his "inherited qualities" might be Maine did not say; it would appear that here Maine used looser terminology than he was wont to do.

Maine dealt extensively with two Aryan societies, India and Ireland. He devoted attention to India because it

seemed to provide the earliest surviving example of Aryan civilization. Ireland was important as a relatively pure Aryan society in an arrested state of development. —

India, particularly, was useful, for Maine was firmly of the belief that "all things Aryan...are older in India than elsewhere."¹⁰⁰ He spoke of "that earliest home of the Aryan race, the Punjab,"¹⁰¹ thus indicating his contention that Indian examples were best because they were earliest and, perhaps, most extensive. His enthusiasm was almost boundless. About India he said:

India has given to the world Comparative philology and Comparative Mythology; it may yet give us a new science not less valuable than the science of language and folk-lore. I hesitate to call it Comparative Jurisprudence because, if it ever exists, its area will be so much wider than the field of law. For India not only contains (or to speak more accurately, did contain) an Aryan language older than any other descendent of the common mother-tongue, and a variety of names of natural objects less perfectly crystalized than elsewhere into fabulous personages, but it includes a whole world of Aryan institutions, Aryan customs, Aryan laws, Aryan ideas, Aryan beliefs, in a far earlier stage of growth and development than any which survive beyond its borders. There are undoubtedly in it the materials for a new science, possibly including many branches.¹⁰²

India had remained, for centuries, isolated from the change and flux of other societies, thus allowing its Aryan culture to retain a high degree of purity. Even those

¹⁰⁰

Sir Henry Maine, Village-Communities, p. 211.

¹⁰¹

Sir Henry Maine, Early Law and Custom, p. 83.

¹⁰²

Sir Henry Maine, Village-Communities, pp. 211-12.

immigrations which India had endured following the "original Aryan immigration," affected the sub-continent but little. The invasions of Alexander, of the Moslems, even of the British and the French, had left a large bloc in the interior relatively untouched and unchanged.¹⁰³ The caste system, too, helped to preserve the original structure of Indian society. "The common religious sanction binding the various groups of native Indian society together finds an outward and practical expression in the usages of Caste."¹⁰⁴ In this way, "all the old natural elements of society have been preserved under the influence of caste in extraordinary completeness along with the institutions and ideas which are their appendage."¹⁰⁵ In all, the civilization of India provided the very type of evidence which was essential for proper research into the early history of Aryan institutions.

The other Aryan culture with which Maine dealt was Ireland, which he would have liked to treat as an especially pure example of an early Aryan society. He found, however, that this was a particularly trying experience because English tradition had been to compare the "just and honourable law of England" with the "desolation and barbarism in

¹⁰³
Ibid., pp. 211-14.

¹⁰⁴
Ibid., pp. 218-19.

¹⁰⁵
Ibid., pp. 219-20.

Ireland."¹⁰⁶ To now assert that both usages stemmed from the same source required intensive argument and extensive proof. English prejudice about the uncivilized character of Ireland and the primitive status of Irish law was not easily changed. Maine found the solution to this problem in the argument that Irish law was an integral part of Aryan usage, and in answer to those whose prejudices blinded them to the values of Irish law, he said:

Meanwhile, happily, it is a distinct property of the Comparative Method of investigation to abate national prejudices.... I am not afraid to anticipate that there will some day be more hesitation in repeating the invectives of /Edmund/ Spenser and /Sir John/ Davis, when it is once understood that the 'lewd' institutions of the Irish were virtually the same institutions as those out of which 'the just and honourable' law of England grew.¹⁰⁷

Irish law was, without a doubt, similar to all Aryan law and had the added advantage of being "pure from its origin."

Above all, Irish law "has some analogies with the Roman law of the earliest times, some with Scandinavian law, some with the law of the Slavonic races...some (and these particularly strong) with the Hindoo law and quite enough with old Germanic law of all kinds...."¹⁰⁸ Ultimately, the discovery of the Irish Brehon laws allowed Maine to extend the

¹⁰⁶

See especially Sir Henry Maine, Early History of Institutions, pp. 17-20.

¹⁰⁷

Ibid., pp. 18-19.

¹⁰⁸

Ibid., p. 19.

boundaries of the Aryan world from Ireland to India in an almost unbroken line. There was an essential cultural unity in the western world, said Maine, insofar as "these Brehon law tracts enable us to connect the races at the eastern and western extremities of a later Aryan world, the Hindoos and the Irish."¹⁰⁹

Despite occasional lapses into unguarded terminology, Maine was a model of decorum and of scholarly objectivity in his analysis of race when compared to individuals such as Max Müller. At all times conscious of the limitations of any intellectual scheme, Maine said of those who misused the concept of race:

It is to be hoped that contemporary thought will before long make an effort to emancipate itself from those habits of levity in adopting theories of race which it seems to have contracted. Many of these theories appear to have little merit except the facility which they give for building on them inferences tremendously out of proportion to the mental labour which they cost the builder.¹¹⁰

Race was not for the amusement of any single person nor for the masses; it was a tool for the scholar. It was not to develop ideas of racial superiority but to enlighten the academic. Much had yet to be done, Maine thought, before one could use the concept with any great freedom. "Everybody who has a conception of the depth of this ignorance will be on his

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Ibid., p. 21.

¹¹⁰

Sir Henry Maine, Village-Communities, p. 14.

guard against any theory of the development or inter-connection of usage and primitive idea which makes any pretensions to completeness before these societies have been more accurately examined."¹¹¹ It was only because he believed that the basic idea was sound and because he believed that much work would be done with it in the near future that Maine used the idea of race. It was not to show that the use of race "will succeed, but that the undertaking is worthwhile."¹¹²

Once Maine had established to his satisfaction that there existed an essential connection among all Aryan peoples, he went on to suggest that this implied a twofold unity: of history and of space. By historical unity, Maine meant an essential continuity between ancient and modern societies in the Aryan world. "One unquestionable effect of the tendency to regard history as a science of observation," he said, "is to add greatly to the value of ancient, as compared with modern history, and not only to that of the wonderfully precise history of Greece and Rome, but to that of the semi-poetical history of ancient India."¹¹³ The value of ancient history was that it showed how unilinear social evolution was common to all Aryan groups. Civilization was nothing more

¹¹¹

Ibid.

¹¹²

Ibid., p. 211.

¹¹³

Ibid., p. 269.

than the old order of the Aryan world, "dissolved, but perpetually reconstituting itself under a vast variety of solvent influences, of which the most powerful have been those which have, slowly...substituted several property for collective ownership."¹¹⁴ Here, without a doubt, we have a statement of the unity of history combined with an insistence upon unilinear social evolution. The same implications were apparent when he said: "The great difference between the East and West is that the Past of the West lives in the Present of the East. What we call barbarism is the infant state of our own civilization."¹¹⁵ This was the basis of Maine's contention that "the primitive condition of the progressive societies is best ascertained from the observable condition of those which are non-progressive...."¹¹⁶ Thus, it was impossible to leave unexplored those existing Aryan societies in a state of relative barbarism; to do so would "leave a serious gap in our knowledge."¹¹⁷

By unity of space Maine meant that all European peoples who could claim affinity with the Aryan race should reflect

¹¹⁴

Ibid., p. 230.

¹¹⁵

Sir Henry Maine, Early Law and Custom, p. 131.

¹¹⁶

Sir Henry Maine, Early History of Institutions, p. 226.

¹¹⁷

Ibid.

the same cultural background. Slavonic, Germanic, Scandinavian, English, Scottish, and French examples were all intermingled with the Hindu in his discussion of the early village-community.¹¹⁸ When, for example, Maine summarized the evidence available to show that periodic land redistribution among members of a village-community contributed to the decline of that community, he used Russian, Indian, English and German examples to prove his point:

But there appears to be no country inhabited by an Aryan race in which traces do not remain of the ancient periodical redistribution. It has continued in our own day in the Russian villages. Among the Hindoo villagers there are widely extending traditions of the practice, and it was doubtless the source of certain usages...which have survived to our day in England and Germany.¹¹⁹

Thus, to Maine, it did not appear "a hazardous proposition that the Indian and the ancient European systems of enjoyment and tillage by men grouped in village-communities are in all essential particulars identical."¹²⁰ Maine even ventured to reverse the proposition and suggested that descriptions of European village-communities could be utilized to describe their Indian counterparts. "If a very general language were employed, the description of the Teutonic or Scandinavian

118

See especially Sir Henry Maine, Village-Communities, pp. 1-7.

119

Ibid., pp. 81-82.

120

Ibid., p. 103.

village-communities might actually serve as a description of the same institution in India."¹²¹

Maine, like many contemporary anthropologists, combined the ideas of the unity of history and unity of the Aryan race with the concept of stages of evolution. Of the early stage of Aryan development, Maine said:

No doubt the social state there to be observed can only be called Barbarism, if we could only get rid of unfavourable associations with the word; but it is the barbarism either of the very family of mankind to which we belong, or of races which have accepted its chief and most interesting institutions. It is a barbarism which contains a great part of our own civilization, with its elements as yet unseparate and as yet unfolded.¹²²

The past and the present had both great similarity and great differences; the past might contain the birthright of the present, but the two were not identical. While "there is much in common between the Past and the Present," Maine hastened to add that "there is never so much in common as to make life tolerable to the men of the Present if they could step back into the Past." If the past of but a century ago could return, modern man would experience "the most acute suffering."¹²³

A barbaric society could, according to Maine, "be

¹²¹

Ibid., p. 107.

¹²²

Ibid., p. 215

¹²³

Ibid., pp. 289-90.

conceived as a society in which are found existing phenomena of a usage and legal thought which, if not identical with, bear a strong resemblance to certain other phenomena of the same kind which the Western World may be shown to have exhibited at periods here belonging chronologically to the Past."¹²⁴ Thus, scattered throughout his works are constant references to: "primitive tribal society of the Aryan race;"¹²⁵ to "the situation of women in the primitive groups of barbarous Aryans;"¹²⁶ and to societies whose "laws and usages can scarcely be explained unless they are supposed never to have emerged from this primitive condition."¹²⁷

Maine's stages of social evolution were, however, limited to two: an early stage which he called interchangeably savagery and barbarism, and a later stage which he called civilized. That which distinguished the barbaric or savage stage from civilized society was the presence or absence of progress which meant the presence or absence of a contractual society. Without exception, barbaric societies were characterized by family as opposed to individual obligation; thus,

¹²⁴
Ibid., p. 13.

¹²⁵
Sir Henry Maine, Early Law and Custom, p.242.

¹²⁶
Ibid., p. 253.

¹²⁷
Sir Henry Maine, Ancient Law, pp. 118-19.

"the legislation of assemblies and the jurisprudence of courts reach only to the heads of families, and to every other individual the rule of conduct is the law of his home, of which his parent is the legislator."¹²⁸ This condition of individual servitude to a larger group--this condition of status--remained in most savage or barbaric societies, the constant, unchanging, norm. It was thus that "the stationary condition of the human race is the rule, the progressive the exception."¹²⁹

Civilized society, in contrast to savage or barbarian, was progressive society wherein law had not limited civilization but had adopted itself to flux and changing norms. It was society in which new ideas could take root and flourish and in which, though "social necessities and social opinion are always more or less in advance of Law," there was a "degree of promptitude with which the gulf is narrowed"¹³⁰ Civilized society was, finally, a contractual society. It was a society in which "the individual is steadily substituted for the Family as the unit of which civil laws take account."¹³¹ The movement from the stage of barbarism to that

128

Ibid., p. 148.

129

Ibid., p. 21.

130

Ibid., p. 22.

131

Ibid., p. 149.

of civilization had, in Maine's well-known phrase, "hitherto been a movement from Status to Contract."¹³²

What was obviously needed if he were to prove the unity of the Aryan world and the unity of its social evolution was much scholarly work among early Aryan societies. "What we most require," said Maine, "is the actual examination by trained observers of some barbarous or semi-barbarous community, whose Aryan pedigree is reasonably pure."¹³³ The studies which Maine urged "are really aimed at enlarging the domain of history, by collecting materials for it beyond the point at which...law...began to be embodied in writing."¹³⁴ These studies had to "proceed by the examination of the codes of life and social usages of men in a savage, barbarous or semi-civilized condition, and they start from the assumption that the civilized races were once in that state or in some such state."¹³⁵ Though the static quality of ancient societies with their lack of variation and their primitive ideas might appear to be of little interest or of little value, these societies could not be overlooked. Even if study of early societies were more difficult than it was, no pains

¹³²

Ibid., p. 151.

¹³³

Sir Henry Maine, "South Slavonians and Rajpoots," p. 796.

¹³⁴

Sir Henry Maine, Popular Government, p. 143.

¹³⁵

Ibid.

should be wasted in ascertaining the "germs out of which had assuredly been unfolded every form of moral restraint which controls our actions and shapes our conduct at the present moment."¹³⁶

It can be seen, then, that the method of investigation which Maine used was not the intensive examination of a single ancient society. Maine was, in later years, taken to be the founder of comparative jurisprudence. Following upon the dramatic results in comparative philology and comparative mythology, Maine attempted to create similar results by transferring the comparative method to the study of law and society. Maine defined comparative jurisprudence as the examination "of a number of parallel phenomena with the view of establishing, if possible, that some of them are related to one another in the order of historical succession."¹³⁷ It was also the method which allowed the investigator to "take a number of contemporary facts, ideas, and customs, and... infer the past form of those facts, ideas and customs not only from historical records of that past form, but from examples of it which have not yet died out of the world, and are still to be found in it."¹³⁸

¹³⁶Sir Henry Maine, Ancient Law, p. 106.¹³⁷Sir Henry Maine, Village-Communities, p. 6.¹³⁸Ibid., pp. 6-7.

The proper steps in the comparative method were, in Maine's estimation, four in number. One had, first to assume "that the primitive Aryan groups, the primitive Aryan institutions, the primitive Aryan ideas, have really been arrested in India (or elsewhere) at an early state of development...."¹³⁹ Following upon this, one had then to accept the fact that the evidence which primitive societies offered was respectable; one had, for example, to "recognize the Indian phenomena of ownership, exchange, rent, and price as equally natural, equally respectable, equally interesting, equally worthy of scientific observation, with those of western Europe."¹⁴⁰ The third step was the compilation of data from several Aryan societies in the same stage of evolution. This work would not be finished until a "set of economical facts strongly resembling those familiar to Englishmen in India have been collected from Aryan countries never deeply affected by the Roman Empire on the one hand, nor by Mahometanism on the other...."¹⁴¹ The final step was the most important; the persons using the data available in a comparative way should "be able to draw the proper inferences from the close and striking analogies of these widely diffused archaic

139

Ibid., p. 220

140

Ibid., pp. 224-25.

141

Ibid.

phenomena to the ancient forms of the same institutions, social forces, and economical processes, as established by the written history of Western Europe."¹⁴²

Maine expected to find some rather immediate benefits accruing from the application of this method. In general, he hoped that the comparative method would allow Europeans to understand themselves better and, particularly, to understand that "most of the elements of human society, like most of that which goes to make an individual man, came by inheritance."¹⁴³ He hoped, in the end, to show how terribly dependent modern society was upon the "great legacy of ideas and habits of the past,"¹⁴⁴ and to illustrate this dependence with scientific proof, insofar as it was obtainable. "I conceive," he said, "that the investigations of which I have been speaking might throw quite a new light on this part of the social mechanism."¹⁴⁵

More specifically, Maine was attempting to provide an adequate empirical basis upon which he could challenge the supremacy of a priori idealism. Bentham, for example, or others, "lay themselves open to the observation that they

¹⁴²

Ibid.

¹⁴³

Ibid., p. 231.

¹⁴⁴

Ibid., p. 231.

¹⁴⁵

Ibid.,

generalize to the whole world from a part of it; that they are apt to speak of their propositions as true a priori, or from all time; and that they greatly underrate the value, power and interest of that great body of custom and inherited idea...."¹⁴⁶ To prevent such theorizing in law, Maine was attempting to show that his custom and idea were "capable of scientific analysis and scientific measurement."¹⁴⁷

Finally, through the comparative method, Maine hoped to obtain some precise and scientifically verifiable material concerning his status-to-contract generalization. He wanted to prove that individually owned property was a modern innovation, arising out of the gradual dissolution of an earlier form of co-ownership. "Property in Land," he said;

Property in Land, as we understand it, that is, several ownership, ownership by individuals or by groups not larger than families, is a more modern institution than joint property or co-ownership, that is, ownership in common by large groups of men originally kinsmen, and still...believing or assuming themselves to be in some sense kin to one another.¹⁴⁸

These were rather ambitious claims for the benefits of the comparative method; yet, as at almost every preceding step in his complex theory, Maine vouchsafed some reservations about it. Basically, he was aware that the complexity of

¹⁴⁶

Ibid., p. 233.

¹⁴⁷

Ibid.

¹⁴⁸

Ibid., p. 227.

social organization made the application of the comparative method a much less precise technique in the study of early law than it was in early language. It would, he maintained, be "a very idle pretension" for him to suggest that comparative jurisprudence "in point of interest or trustworthiness," be the same as the accomplishments of comparative philology.¹⁴⁹ "To give only one reason, the phenomena of human society, laws and legal ideas, opinions and usages, are vastly more affected by external circumstances than language."¹⁵⁰ Such phenomena were "much more at the mercy of individual volition, and consequently much more subject to change effected deliberately from without."¹⁵¹ The result of such change, effected from without by the will of the legislator or sovereign, was to create among an otherwise uniform system a series of irregularities which made social laws and legal usages very difficult to reduce to rule or specific discussion. Thus, in India, one found an exceptionally stable, custom-ridden society which had, nevertheless, been subject to the central rule that "whatever the sovereign commands is Custom."¹⁵² The conclusion Maine drew from

¹⁴⁹ Ibid., p. 9.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

this recognition was inevitable as it was simple: "The greatest caution must therefore be observed in all speculations on the inferences derivable from parallel usages."¹⁵³

Unfortunately, not all researchers had applied sufficient caution; some examples of comparative research had drawn justifiable criticisms for their lack of adequate evidence. "Unquestionably," Maine said, "these studies are not in a wholly satisfactory stage."¹⁵⁴ They were not satisfactory in large part because "as often happens where the labourers are comparatively few and the evidence is as yet scanty, they abound in rash conclusions and peremptory assertions."¹⁵⁵ What Maine called "the characteristic error" of so many researchers was to observe "unfamiliar social or judicial phenomena" and to "compare them too hastily with familiar phenomena apparently of the same kind."¹⁵⁶ In all, because of the complexity of the data and the fallibility of researchers, Maine was to concede that "an approximation to truth may be all that is attainable in our present knowledge...."¹⁵⁷

153

Ibid.

154

Sir Henry Maine, Popular Government, p. 143.

155

Ibid.

156

Sir Henry Maine, Village-Communities, p. 7.

157

Sir Henry Maine, Ancient Law, p. 103.

To the above statement, however, Maine made an immediate caveat: "but there is no reason for thinking that it [truth] is so remote, or (what is the same thing) that it requires so much future correction, as to be entirely useless and uninformative."¹⁵⁸ His comments were designed not to vitiate the comparative method, but to suggest what he considered to be current limitations to its use. Ultimately, Maine was to say of the method that, despite these weaknesses, "there is much to encourage further attention to the observed phenomena of custom and further observation of customs not yet examined."¹⁵⁹ If many of the studies in the comparative method had been weak in results and if too many and too hasty conclusions had been drawn, these studies had, nevertheless, "increased our knowledge of social states which are no longer ours, and of civilizations which are unlike ours."¹⁶⁰ In addition to the informative aspects of these works, there was also a moral aspect--a lesson to be learned from them. "On the whole, they suggest that the differences which, after ages of change, separate the civilized man from the savage or barbarian, are not so great as the vulgar opinion would have them."¹⁶¹

158

Ibid.

159

Sir Henry Maine, Village-Communities, p. 9.

160

Sir Henry Maine, Popular Government, p. 143.

161

Ibid.

Maine's professional life was devoted to rectifying the errors he noted and to constructing, upon a sound basis, the study of comparative jurisprudence. Though the basic pattern of Maine's thought was already apparent in his first published work, Ancient Law, he continued to add to his conceptual scheme. While, therefore, his works in jurisprudence reflect a consistent argument, each was a specific application of that argument to widely different problems. To obtain a fuller comprehension of his thought, then, his work should be treated historically as well as analytically. The history of Maine's scholarship revolves around his efforts to broaden and to add depth to his original assumptions.

CHAPTER V

FACT AND THEORY:
THE DEVELOPMENT OF MAINE'S THOUGHT

The question of how best to approach an intellectual biography has never been satisfactorily settled. Simple analysis of the whole body of a person's work tends to obscure the element of growth and to deny the possibility of flexibility and change in all segments of thought, while emphasis upon its evolutionary character runs the risk of obscuring those ideas which do, in fact, often remain a constant factor from one work to another. In the case of Sir Henry Maine, an excellent argument can be made for approaching his work from both points of view, analysis and chronology. As for the analytic approach, "an ideal critic of Maine," said Sir Frederick Pollock, "would contemplate his works not only as a whole, but as it were at an equal distance, and on a uniform projection."¹ A similar judgment, perhaps overstated, was passed by one of his more recent critics, who said: "A lifetime's labour did not improve his ideas, though it increased his learning...."² The unique consistency to be found in Maine's published material presents the critic with the almost irresistible

¹Sir Frederick Pollock, "Sir Henry Maine as a Jurist," The Edinburgh Review, CLXXVIII (July, 1893), p. 101.

²J. D. M. Derrett, "Sir Henry Maine and Law in India: 1858-1958," 4 Juridical Review, 43, (1959).

temptation to limit his examination of Maine's work to general analysis.

To succumb to this temptation, however, would be to ignore the fact that Maine was not a static thinker and that Ancient Law (1861), Village-Communities (1871), Early History of Institutions (1874) and Early Law and Custom (1883) were each cast in so unique a manner and shed, severally, so singular a light upon the problems of archaic law that they must be considered individually. Having indicated that, ideally, one should approach Maine's work as a single unit, Sir Frederick Pollock added:

But this attitude is hardly possible to one who made the acquaintance of Ancient Law when it was still a recent book, and who since that time has followed Maine's later work step by step, with admiration increasing as he learnt more and more, from his own experience, to appreciate the difficulties inherent in the historical treatment of archaic institutions. 3

As Maine returned, time and again, to a consideration of the basic problems of archaic law, his knowledge and perception increased, giving added depth to his arguments. Each volume published after 1861 was designed to buttress the basic premises advanced in Ancient Law. At the same time, however, each volume was an extension of those premises into new areas of study, or, alternately, a refinement, with new materials and a new perspective, of previously developed notions.

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Sir Frederick Pollock, "Sir Henry Maine as a Jurist," p. 101.

Maine was not afraid of invading previously unexamined fields; his work in Roman law and Indian civilization, in ancient Irish and Slavonic social institutions and in the patriarchal structure of prehistoric Aryan society was new ground for a popular author. His willingness to utilize the investigations of German scholars, of Indian administrators and of Irish academics showed an adventurousness far exceeding that of most English scholars and was revolutionary in the realm of jurisprudence. The very nature of his interests--law as it functioned in ancient society--drove him to adopt the posture of an intellectual adventurer and an academic radical so different from his socially and politically conservative opinions. The fact that so much of his work involved new material, combined with his own distaste for personal research in depth led Maine to rely upon a wide assortment of literature, much of it of a superficial or biased nature. Ultimately, one must conclude that, while Maine often gave a new and remarkable interpretation to a wide variety of subjects, the materials he used to base these interpretations upon were an inadequate foundation for the kind of scientific scholarship he claimed to be producing. Thus, respect for the originality of Maine's investigations and admiration for both the novelty of his interpretation and grace of his style must be tempered by a recognition that his conclusions should often remain in doubt. Though Maine was frequently more guilty of using suspect sources

and of intruding his own genius into his work than were others who claimed to write scientific history or hoped to find truth through the application of properly guided human reason, his failure casts the shadow of doubt upon the possibility of any author fulfilling these desires. Maine's sources were only relatively less dependable than most, the impact of his personal genius only marginally more than other authors'. Maine's guilt (if it may be so described) is the guilt shared by all scholars at all times and all places.

Ancient Law contained in embryonic form almost all of the ideas which Maine was to spend his life examining. There were, in his first set of published lectures, two basic propositions to which he returned constantly. So basic were they to Maine's thought that Pollock would say, with justice, that: "the roots are the same, the flowers and the fruits various."⁴ Maine first asserted that it was possible to establish a soundly based comparative study of law which would make of jurisprudence a social science, capable of penetration "as far up as we could in the history of primitive societies."⁵ This provided

⁴
Ibid., p. 102.

⁵
Sir Henry Maine, Ancient Law, pp. 105-106.

Maine with the basis for his second premise: that the study of institutions of any kind was unintelligible except in their historical context. This strictly functionalist position led Maine to distrust any treatment of jurisprudence which did not consider law as an integral part of the historical environment in which it existed. It led him, as well, into the vexed question of the original state of society. He suggested that the proper view of "the primaeval condition of the human race"⁶ was one of "separate families, held together by the authority and protection of the eldest valid male descendent."⁷ The patriarchal theory, thus expressed, was crucial, for upon it depended Maine's understanding of the function of law within ancient society and his view of social evolution from status to contract.

Dependent upon the preceding assumptions were two closely related tasks which he set himself in Ancient Law: to discover the conditions out of which contemporary jurisprudence had sprung and to elaborate upon the importance of Roman law as the legal system which had contributed most to evolution away from ancient law. The first of these objectives involved an extensive study of the status of law in all

⁶
Ibid., p. 108.

⁷
Sir Henry Maine, Early Law and Custom, p. 196.

stages of society prior to Rome, and gave to the book its title. The second of the objectives involved an attempt to explain why progress beyond the confines imposed by ancient legal forms was so rare and why the crust of archaic law was so seldom broken. He saw Roman law, with but secondary help from the institution of royal monarchy, as the bridge between primitive custom and civilization, for only Roman law had been able to construct from the formalism of archaic law the legal concepts necessary to make law "at once an organ of stability and an instrument to further the material and moral progress that stability made possible."⁸

To establish his argument, he had first to engage in an extensive study of the history of the East, for he insisted that one should use the existing institutions of Asia to illuminate the previous condition of western history and western law.⁹ Most of his material, however, came from India. His introduction to things Indian can be traced back to his position as Regius Professor of Civil Law at Cambridge. When he assumed his duties, in 1847, the Indian civil service had not yet been annexed to the Universities;¹⁰ candidates

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K. B. Smellie, "Sir Henry Maine," Economica, VIII (1928), p. 67. See Sir Henry Maine, Ancient Law, pp. 21-22.

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Sir Henry Maine, Ancient Law, pp. 106-108.

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G. M. Young (ed.), Early Victorian England (London, New York and Toronto: Oxford University Press, 1934, II, p. 449.

were, instead, trained at Haileybury College. Maine was, nevertheless, soon involved with students preparing to take examinations for the service, thus directing his attention to the existence of the subcontinent and the need to acquire information about it. At the same time, both the new sciences of comparative philology and comparative mythology focused attention on Sanskrit as the basis of their study, and the Sepoy Mutiny of 1857-58 brought India rather forcibly to the attention of the English public. Maine was intimately involved in the controversy surrounding the Mutiny and its aftermath; the articles he wrote for the Saturday Review indicated that he already had acquired, in England, a considerable fund of information about government and society in India.

Most English literature on India before the Mutiny was unorganized and diffuse. Much of it was written in the heat of an ideological battle which signified a contest for the control of the country.¹¹ There were three specific ideological attitudes reflected in Indian literature: romantic, Evangelical and Utilitarian. The romantic attitude, exemplified by the pioneer in the study of Sanskrit and oriental literature, Sir William Jones, was to accept India for its own sake. Jones was less interested in passing moral

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Duncan Forbes, "James Mill and India," The Cambridge Journal, IV (1951), p. 23.

judgment upon a strange culture than in enjoying the achievements of Indian civilization according to Indian standards.¹² The Evangelical and Utilitarian parties, on the other hand, were united only in their hostility to Hindu civilization and to Jones' historical and cultural relativism. William Wilberforce, the Evangelical, judged India by the three-pronged standard of his faith: the desirability of extreme individualism, the ability of the human mind to sustain total transformation, and the need for education to perform this chore. Indian society was lacking in all respects. Indian religious figures particularly, were "absolute monsters of lust, injustice, wickedness and cruelty. In short, their religious system is one grand abomination."¹³ India had to be reformed. The Utilitarians, too, urged the abandonment of the romantic view of India and the total reform of Indian society, though their position tended to be more secular than the Evangelical and less dependent upon Christian missionary work. Perhaps the most impressive and vitriolic attack ever launched upon Hindu society was James Mill's

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Ibid., p. 22.

13

Great Britain, 1 Hansard's Parliamentary Debates, XXVI (1813), p. 164.

The History of British India.¹⁴ Mill claimed that his purpose was not to debunk but to make a philosophic analysis of India and to assess its place in the scale of civilization dispassionately, for "to the people of Great Britain, charged as they are with the government of that great portion of the human species," objective knowledge was "an object of the highest practical importance."¹⁵ Mill's assessment was not, however, dispassionate. The prevalence of despotism and priestcraft in Indian society meant, he thought, that "the Hindus in mind and body, were the most enslaved portion of the human race."¹⁶

It was to these sources that Maine was forced to turn in his effort to acquire material on India. Maine's defense of the East India Company apparently led him to Mountstuart Elphinstone's History of India,¹⁷ to Sir William Jones' translation of the Institutes of Menu,¹⁸ and it led him to the History of British India by Mill. The result

¹⁴

James Mill, The History of British India (London: James Hadden and Piper, Stephenson and Spence, 1858), 5th ed., 9 vols., with notes by W. H. Wilson.

¹⁵

Ibid., II, p. 107.

¹⁶

Ibid., II, p. 132.

¹⁷

See Sir Henry Maine, Ancient Law, pp. 233-34.

¹⁸

J. D. M. Derrett, "Sir Henry Maine and Law in India: 1858-1958," pp. 42-43.

of Maine's reading was to give to his understanding of India a permanent bias which seemed to justify his conviction that Eastern societies retained significant elements of archaic law.

Maine was aware of the dangers of using Mill's History, acknowledging that it had used the strongest language of condemnation for the whole legal and judicial system of India.¹⁹ This recognition did not, however, prevent Maine from retaining and reflecting many of the same attitudes which Mill had earlier expressed. Much of the attractiveness of Mill's work was its semi-official acceptance; it was a standard work for officials of the East India Company and it became, shortly, a textbook for candidates for the Indian Civil Service.²⁰ Since Maine came into contact with the same candidates while he was at Cambridge, it would be difficult to avoid accepting the attitude which Mill conveyed, even if one had specific reservations about his study.

Particularly striking was the common acceptance, by Mill and later by Maine, that modern Indian society was the living incarnation of archaic society. Mill wrote that "in

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See Ibid.

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Duncan Forbes, "James Mill and India," p. 23.

beholding the Hindus of the present day we are beholding the Hindus of many ages past, and are carried back, as it were, into the deepest recesses of antiquity."²¹ "Nor is this all." He went on to say:

Of some of the nations...we acquire a practical... knowledge, by our acquaintance with a living people, who have continued in the same soil from the very times of those ancient nations, partake largely of the same manners, and are placed nearly at the same stage in the progress of society. By conversing with the Hindus of the present day, we, in some measure, converse with the Persians and Egyptians of the time of Alexander. 22

The similarity of this statement to Maine's later observation that "as societies do not advance concurrently, but at different rates of progress, there have been epochs at which men trained to the habits of methodical observation have really been in a position to watch and describe the infancy mankind,"²³ is sufficiently striking to imply that, though Mill may not have suggested the idea, he reinforced Maine's belief in it.

James Mill and Maine were also united in their common conception of Indian law and religion. Maine once observed

²¹

James Mill, The History of British India, II, p. 151.

²²

Ibid.

²³

Sir Henry Maine, Ancient Law, p. 106.

that "there is no system of recorded law, literally from China to Peru which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance."²⁴ If law did not escape this identity with religion, progress was impossible. Indian law, thought Maine, had not escaped. This same notion may be found in Mill's History. Indian religion was chiefly characterized, according to Mill, by superstition and by priestly despotism. The caste system which gave unjustifiable privilege and power to the Brahmins contributed to a static, stultified society. Insofar as the Hindu religion was responsible for creating and maintaining a priest-ridden society, it showed "a remarkable instance of that progress in exaggeration and flattery" which Mill considered "the genius of rude religion."²⁵ This situation, this despotism, accounted for the primitive nature of Indian law which did not distinguish, as did civilized law, between civil and criminal actions or between persons and things.²⁶ These attitudes, taken up by Maine, were extended to become the basis of his understanding, not only of Indian law and

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Sir Henry Maine, Early Law and Custom, p. 5.

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James Mill, The History of British India, I, p. 254.

²⁶

Ibid., I, pp. 154-200.

religion, but of all archaic law and religion, of which the Indian was but a part. Thus, while there were but few references to India or to Hindu Law in Ancient Law,²⁷ a good part of Maine's discussion appears to owe its interpretation and insight to Mill's History.

Working from materials which were often expressions of political and cultural bias, Maine fashioned a thesis concerning the nature of ancient law which changed but slightly during his lifetime. Though he was, as an administrator, from 1862 to 1869, to relent somewhat in his insistence upon the rigidity of ancient law and the tenacity with which Indian society would cling to it, this was a change of degree only, not of kind. When, finally, Maine arrived in India, his previous study had, quite clearly, created a predisposition to accept empirical information which fitted into a preconceived pattern.

Of equal consequence in Ancient Law with Indian materials was Maine's infatuation with Roman law. The central importance which he gave to Roman law in his lectures was unique in nineteenth century English jurisprudence and reflected a rather specific bias. English jurists, until well into the nineteenth century, tended to ignore Roman civil law; for the most part, a student of English law was asked to approach the subject only²⁷ to

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See especially, Sir Henry Maine, Ancient Law, pp. 5-6, 9, 15-16, 21, 231-34 and 249.

familiarize himself in some degree with the successive accretions by which the irregular mass has grown."²⁸ Thus, the English student found that in his studies "his range is practically bounded by the Norman Conquest and the Four Seas."²⁹ A cursory glance at the growth and development of Roman law was deemed sufficient because traces of it in Anglo-Saxon law appeared to be few and English jurists tended to ignore any debt to the Roman tradition.³⁰ Not until John Austin began to teach at the University of London were the advantages of the study of Roman law much noted, and even when Austin's Lectures on Jurisprudence were made available, they did little to stimulate the study because of his almost unreadable style.³¹ As Maine observed, this legal xenophobia reflected a conviction that "every intellectual importation we have received has been instantly coloured by the peculiarities of our national habits and spirit." English jurists seemed to assume that "a foreign

28

Montague Bernard, "Maine on Ancient Law," The Quarterly Review, CX (July, 1861), p. 116.

29

Ibid.

30

Ibid.

31

E. Campbell, "German Influences in English Legal Education," pp. 363 and 365-66.

jurisprudence interpreted by the old English common-lawyers would soon cease to be foreign, and the Roman law would lose its distinctive character with even greater rapidity than any other set of institutions."³² In this context, when Maine suggested that the study of Roman law was essential to the understanding of the evolution of all western law and society, he was advancing a radically new idea.

Only slowly did English resistance to the study of Roman law change under the impact of the growing recognition of the importance of German scholarship, the work of John Austin, and the publication of Maine's Ancient Law.

In Germany, the wholesale reaction against the rationalism of the Enlightenment had produced a renewed emphasis upon the relationship between law and the life of the German people. In the realm of jurisprudence, this newly quickened nationalism contributed greatly to "the awakening and fostering" of German resistance to the French Revolution.³³ At the same time, however, there was a realization that many elements of German law stemmed from ecclesiastical or Roman sources. No one, perhaps, recognized this more clearly than Friedrich Karl von Savigny, whose The History of Roman

³²Sir Henry Maine, Village-Communities, pp. 331-32.³³G. P. Gooch, History and Historians in the Nineteenth Century (Boston: Beacon Press, 1959), p. 41.

Law During The Middle Ages, was an attempt to show how the essentially alien influence of Roman law could continue to exist in Germany when German law was defined as the expression of the innate interests of the people. His study, "one of the most valuable investigations every made...into history,"³⁴ worked upon Roman law as this law survived the barbarian invasions and was transmitted into the Middle Ages. Savigny argued that those aspects of Roman law survived best which best coincided with the life of the tribe adopting them, and in the form which best met these needs. Savigny reconciled his insistence upon a functional folk law with the continued existence of Roman law in urban institutions, local customs, canon law, and the academic studies of the Middle Ages, by concluding that all law "is a piece of public life, bound to all its parts in many ways,"³⁵ and that Roman law had become an integral part of the living traditions of the German people.³⁶

While German jurists were becoming increasingly aware

³⁴
Ibid., p. 47.

³⁵
Friedrich Karl von Savigny, Geschichte des Romischen Rechts im Mittelalter (Darmstadt: Hermon Gentner Verlag, 1956), I, p. x.

³⁶
Franz Zvilgmeyer, Die Rechtslehre Savigny: Eine Rechtsphilosophische und Geistesgeschichtliche Untersuchung (Leipzig: Theodor Weicher Verlag, 1929), pp. 6-7.

of the importance of Roman law, even in the history of customary or traditional law, their English counterparts were slow to follow suit. Though Savigny's The History of Roman Law was available in English translation as early as 1829,³⁷ there was little evidence to suggest that his ideas, or those of any of his German colleagues penetrated into English legal thought before 1826. In that year, John Reddie published a small book, Historical Notices of the Roman Law and of the Recent Progress of Its Study in Germany,³⁸ which brought some fragment of German scholarship before an English audience. Sir William Rattigan and John M. Lightwood, too, reflected interest in various aspects of German jurisprudence,³⁹ but the general attitude of English scholars was best summarized by Viscount Bryce's comment that the Germans were decidedly hard going and that it was doubtful whether the returns were in proportion to

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See Friedrich Karl von Savigny, The History of the Roman Law During the Middle Ages (Edinburgh: Printed for H. Black, 1829), trans. by E. Cathcart. As well, Savigny's Of the Vocation of Our Age for Legislation and Jurisprudence (London: Printed for Littlewood and Co., 1831) had been translated by Abraham Hayward.

38

See John Reddie, Historical Notices of the Roman Law and of the Recent Progress of Its Study in Germany (Edinburgh: Printed for W. & C. Tait, 1826).

39

E. Campbell, "German Influences in English legal Education," p. 389.

the time spent.⁴⁰ Only Savigny was exempted from this critique, largely because he had "opposed his historical method to the abstractions of the contemporary Hegelians."⁴¹ The basis for English rejection of German scholarship was twofold: the slowness with which the English national bias against recognizing the importance of Roman law was overcome and the tendency on the part of English jurists to equate German scholarship with theories of justice, ethics and politics rather than with case law or practical law.⁴² Thus, while German scholarship had contributed greatly to a revived interest in Roman law generally, the effect of this interest in England was limited. Increased activity in German universities might, at best, have provided a realization that the English faculties and Inns of Court were in danger of falling by the wayside unless more attention were paid to the introduction of English

⁴⁰ James Bruce, Studies in History and Jurisprudence, II, p. 177.

⁴¹ Ibid., II, pp. 203-204.

⁴² E. Campbell, "German Influences in English Legal Education," p. 385. See also Sir Frederick Pollock, Oxford Lectures and Other Discourses (London: Macmillan and Co., 1890), pp. 15-16.

students to Roman law.⁴³

A partial exception to the preceding comments was John Austin, whose interest in jurisprudence and whose emphasis upon Roman law stemmed from his acquaintance with German scholarship.⁴⁴ Austin spent the year 1827-1828 at the University of Bonn, during which time he was introduced to the latest German scholarship in Roman law; he also collected a sizeable private library in Roman and Civil law.⁴⁵ The result of his sojourn at Bonn was not so much to make him an admirer of German jurisprudence, however, as to make him enthusiastic about German expositions of Roman law. This enthusiasm was reflected in his lectures published in 1832 as The Province of Jurisprudence Determined.⁴⁶ Drawing upon his German experience, Austin proposed that the ideal English law curriculum should

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See the evidence of G. A. Moriarity in Great Britain, Parliamentary Papers, Vol. X (Reports, Vol. VI), Aug. 25, 1846, pp. 231-45 and 336.

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A. W. Manning, "Austin Today: Or, 'The Province of Jurisprudence' Re-examined," Modern Theories of Law, ed. by Ivor Jennings (London: Oxford University Press, 1933), p. 185.

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Julius Stone, The Province and Function of Law: Law as Logic, Justice and Social Control (Sydney: Associated General Publications Pty., Ltd. 1946), p. 56.

⁴⁶

John Austin, The Province of Jurisprudence Determined, Being the First Part of a Series of Lectures on Jurisprudence, or the Philosophy of Positive Law, 2nd ed., rev., (London: J. Murray, 1861).

include an introduction to the "principles of jurisprudence and legislation, as well as the history of English law and its three sources: Roman, Canon and Feudal law."⁴⁷ Austin was, as Sheldon Amos said, "the first English jurist who commended the study of Roman Law and introduced a familiarity with German Juridical Literature,"⁴⁸ but his impact was limited by his small audience.

The Province of Jurisprudence was largely unread, and Austin's lectures were given only to "a small group of earnest students, who caught the fire of his enthusiasm and appreciated the depth of his great analytical power."⁴⁹ As John Stuart Mill rather delicately put it, Austin was "intolerant of anything short of absolute completeness," and was "apt to overlay his work with an excess of matter."⁵⁰

One of the persevering students who "caught the fire of his enthusiasm" was Maine. Although he was later to become one of the principal critics of Austin's system of

⁴⁷

Ibid., I, pp. 379-82.

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Sheldon Amos, An English Code: Its Difficulties and the Modes of Overcoming Them (London: Strahan and Co., 1873), p. 89.

⁴⁹

J. E. Keller, "Austin's Position in Modern Jurisprudence," 13 Journal of the Bar Association of the District of Columbia, 54 (1946).

⁵⁰

John Stuart Mill, "Austin's Jurisprudence," The Edinburgh Review, CXVIII (1863), p. 448.

jurisprudence, he was also responsible for popularizing Austin's otherwise neglected work. That Maine chose to open his Ancient Law with a criticism of Austin's analysis did much to make that argument known to a broader audience than had hitherto been possible. Maine took from Austin a firm conviction that the study of Roman law was essential to the understanding of modern legal forms. In his essay on "Roman Law and Legal Education," originally published in the Cambridge Essays in 1856,⁵¹ Maine "re-affirmed Austin's contention that Roman law provided a model of vigorous consistency in legal terminology and rule formulation...."⁵² He argued that in addition, Roman law was indispensable to the understanding of the development of law, of moral and political development on the continent, and of international law and of foreign legal systems.⁵³ "We are driven to admit that the Roman jurisprudence may be all which its least cautious encomiasts have ventured to pronounce it," he concluded, "and that the language of conventional panegyric may even fall short of the unvarnished

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The article was republished in Sir Henry Maine, Village-Communities, pp. 330-383.

52

E. Campbell, "German Influences in English Legal Education," p. 367. For a summary, see Sir Henry Maine, Village-Communities, p. 376.

53

Sir Henry Maine, Village-Communities, pp. 376-81.

truth."⁵⁴ That progress beyond the limits imposed by ancient law had occurred at all, suggested Maine, was due to a "lucky legal mutation--the occurrence of the juristic science created by Rome."⁵⁵ No greater importance hath any law.

Thus, Maine's concept of the importance of Roman law in the study of jurisprudence was formed early. Maine's graceful style and suggestive treatment, however, indicated a different fate for his enthusiasm than for Austin's. Though no single book could destroy or even seriously dent the prejudice of centuries, Ancient Law did much to challenge previous ignorance. Maine's argument was repeated, in its essential points, by Viscount Bryce when the latter assumed the Regius Chair of Civil Law at Oxford in 1871,⁵⁶ and by layman, E. A. Freeman, who announced grandeloquently that "Rome is the centre; Rome is the common link that binds us all together..."⁵⁷ and that "the history of Rome is the history of the European world. It is in Rome that all the

⁵⁴

Ibid., p. 383.

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K. B. Smellie, "Sir Henry Maine," p. 67.

⁵⁶

See James Bryce, "Obedience," Studies in History and Jurisprudence, II, pp. 463-502.

⁵⁷

E. A. Freeman, "The Unity of History," Comparative Politics, p. 199.

states of the earlier European world lose themselves; it is out of Rome that all the states of the later European world take their being."⁵⁸

Maine was not able to follow up the success of Ancient Law with another work until eleven years later, when he published Village-Communities in the East and West. Like the earlier work, Village-Communities was a set of lectures given, this time, at Oxford and designed to elaborate one of the basic propositions of Ancient Law. Maine had assumed that the typical structure of ancient Aryan societies, before the advent of Roman law had allowed some branches to progress beyond the primitive state, was essentially similar. His purpose was to examine the materials available for the study of both the eastern and western branches of this ancient society. He had not intended to publish his lectures as early as 1871, but was persuaded to do so in the hope that "their publication might possibly help to connect two special sets of investigations, each of which possesses great interest, but...each--apparently in ignorance of its bearing upon the other."⁵⁹ The one set of researches was concerned with Indian society, the other with early Germanic and continental landholding. Both sets of investigations were dealing with village-communities

⁵⁸

Ibid., p. 211.

⁵⁹

Sir Henry Maine, Village-Communities, p. vii.

which Maine saw as the universal system of ownership before the advent of individual possession.

When Maine turned to the evidence made available to him by field agents in the Indian administration, he found there was little material on the question of land forms and on the village-communities which contradicted his earlier conjectures or the evidences of the mutiny. During Maine's years of office, innumerable questions "regarding the law of tenants and subordinate landholders...were awaiting treatment by the Legislature."⁶⁰ Maine tended to view these cases in the context of his understanding of Indian society as expressed in Ancient Law. Not, indeed, that Maine was entirely blinded by his own prejudices, but the written materials to which Maine had access were "couched in general terms" and described the conditions of the northern section of India where village-communities had indeed prevailed. B. H. Baden-Powell later argued, with great conviction, that both Maine and the authors upon whom he depended, gave too simple an explanation of a very complex society.

Now, such a general typical description cannot be applied at all to one class, and that by far the largest, of Indian villages. The form of village of which it is to a great extent a true representation is confined to India north of the Vindhyan Hill series i. e., to the Punjab, the North-West Provinces, and Oudh, probably in former times including the northern

60

B. H. Baden-Powell, Village Communities in India, p. 34.

part of Bengal known as Bihar. A few villages of the same kind are found in Upper Western India...and there are wide-spread traces of formerly existing shared (or landlord) village estates in the Dakhan and in certain parts of South India. But, broadly speaking, this form of village was never universal; it always implies, as I have said already, the growth of some individual overlordship or some settlement of conquering clans or expansion of families with their own notions of equal right and superiority to inferior races: it never extended generally over the greater part of Eastern, Central, Western and Southern India. 61

The sources which encouraged Maine to extend his notion of joint ownership to cover the entire sub-continent reflected a sharp bureaucratic bias; they "laid stress on one point-- the joint ownership or else on the sense of unity manifested by the villages, peculiarities which were specially important from an official point of view, as making it possible for them to be held jointly liable for one sum of revenue assessed on the whole village."⁶² Missing was evidence of what Baden-Powell called the raiayatwari village, "in which the separate holders (or raiayat) whatever spirit of union they may have possessed, never represented co-sharers in a unit estate nor acknowledged any form of common ownership."⁶³ Though Baden-Powell later did much to develop a comprehensive

61

B. H. Baden-Powell, The Indian Village Community, pp. 7-8.

62

B. H. Baden-Powell, Village Communities in India, pp. 39-40.

63

B. H. Baden-Powell, The Indian Village Community, p. 6.

view of Indian landholding,⁶⁴ and though later official reports uncovered much material which challenged the concept of universal, common holdings,⁶⁵ these studies were unavailable when Maine was in India; nor did Maine give any indication that this material came to his notice at a later date.

Finally, Maine's official duties kept him from extensive travel throughout the country and restricted his area of personal observation to those regions where the classical village-communities flourished. From Calcutta in Bengal to Simla in the Punjab hills, from the winter to the summer capitals of the Government of India, Maine travelled, with occasional trips into the North-West Provinces, Oudh and the Punjab, where

the village system was not only flourishing as, in fact, the prevailing tenure feature of the country, but the villages were held by co-sharing bodies, sometimes of one family, and often of the same tribe or clan; they were of that type which has already been indicated

64

See especially B. H. Baden-Powell, A Short Account of the Land Revenue and Its Administration in British India; with a Sketch of the Land Tenures (Oxford: The Clarendon Press, 1894); and the The Land-Systems of British India; Being a Manual of the Land-Tenures and of the Systems of Land Revenue Administration Prevalent in the Several Provinces (Oxford: The Clarendon Press, 1892), 3 vols.

65

Baden-Powell notes especially the Revenue Settlement Surveys of the Dakhan and the Bombay Presidency. See Village Communities in India, p. 35. Nor were the Survey Reports of the Central Provinces or the District Manuals of Southern India available to Maine. See The Indian Village Community, p. 4.

in general terms as the joint village. 66

Maine was, in effect, misled by the seeming unanimity of the sources which he had at his disposal. Arriving in India with a preconceived notion of the true structure of Indian society, he willingly accepted the supposed evidences of the mutiny, the testimony of a committed field administration and limited personal observation to reinforce this vision. The possibility of accurate analysis depends upon the availability of accurate materials; their lack in India was no fault of Maine's, though he should, perhaps, have realized that field reports were subject to the professional bias of the Indian bureaucrat and that personal observation was valid only for those circumstances actually observed. That he failed to recognize these points weakened considerably the strength of his argument concerning not only India, but the whole nature of ancient society.

The conclusion to which Maine came, that Indian sources indicated a living example of an ancient, traditional society characteristic of all Aryan groups, led him to equate the Indian village-community with the remnants of ancient Teutonic Marks or village democracies being discovered by European scholars. Several lectures in Village-

66

B. H. Baden-Powell, Village Communities in India, p. 34.

Communities were devoted to elaborating this likeness.⁶⁷

When discussing the western village community, Maine could not, as he had done in India, rely upon personal experience; he had instead to rely upon secondary treatises by continental, especially German, scholars. For the most part, Maine indicated a limited acquaintance with this scholarship and was content to restrict his discussion only to the work of Georg Ludwig von Maurer and Erwin Nasse, both of whose works were available in translation or in condensed form.⁶⁸

Maine's interest in Erwin Nasse's work⁶⁹ stemmed from the latter's suggestion that the Mark, which in Germany had "stamped itself plainly on land-law, on agricultural custom, and on the territorial distribution of landed property," was also noticeable in England, "where vestiges of it...were to be found on all sides..."⁷⁰ The Mark "was an organized,

67

Sir Henry Maine, Village-Communities, Chapter III, pp. 65-99 and Chapters IV-V, pp. 131-201.

68

Though Maine did include a more extensive bibliography in an appendix, the discussion in the text was limited to von Maurer and Nasse, See Ibid., p. 398.

69

See Erwin Nasse, On the Agricultural Community of the Middle Ages and Inclosures of the Sixteenth Century (London: 1871), trans. by H. A. Ouvry.

70

Sir Henry Maine, Village-Communities, p. 11.

self-acting group of Teutonic families, exercising a common proprietorship over a definite tract of land...cultivating its domain on a common system, and sustaining itself by the produce."⁷¹ In Maine's estimation, "the village-community of India exhibits resemblances to the Teutonic Township Mark which are much too strong to be accidental."⁷² Maine, however, did not research this matter himself, and relied upon Nasse's study, which "was likely to be made generally accessible through an English translation."⁷³ Thus, despite the fact that he noted that "the work of Professor Nasse appears to me to require some revision from an English professional lawyer"⁷⁴ and despite the fact that Maine acknowledged that the whole subject "is one which presents considerable difficulties,"⁷⁵ he was willing to use Nasse as a source.

Maine's treatment of the research done by von Maurer was both more enthusiastic and more detailed. One of Maine's basic contentions was that "the oldest discoverable

⁷¹
Ibid., p. 10.

⁷²
Ibid., p. 12.

⁷³
Ibid., p. 168.

⁷⁴
Ibid., pp. 11-12

⁷⁵
Ibid., p. 168.

forms of property in land were forms of collective property, and...that separate property had grown through a series...of changes, out of collective property or ownership in common.⁷⁶ To substantiate this generalization in the case of western Europe had, according to Maine, been difficult, for "the forms of collective property which had survived and were open to actual observation were believed to be found exclusively in countries peopled by the Sclavonic race."⁷⁷ Von Maurer's contributions were to provide evidence that such early forms of collective ownership had existed in the Teutonic Mark and to indicate "that the primitive Teutonic proprietary system had everywhere a tendency...to modify itself in the direction of feudalism."⁷⁸ In other words, von Maurer's work provided Maine with evidence of the validity of his status-to-contract generalization in western Europe, and also with evidence that part of the transition of the western village-community was traceable to Roman law.⁷⁹

⁷⁶
Ibid., pp. 76-77.

⁷⁷
Ibid., p. 77.

⁷⁸
Ibid., p. 21.

⁷⁹
Ibid.

Despite the importance of von Maurer's work to the development of Maine's entire scheme, he did not refer directly to any of the German's works; instead, he referred the reader to a condensation and translation by R.B.D. Moirer, the English Chargé d'Affaires at the city of Darmstadt, which appeared in the Cobden Club papers on Systems of Land Tenures in Various Countries.⁸⁰ Quotations used to substantiate arguments on the "ancient form of property" were drawn, not from von Maurer's original work, but from Moirer's paper.⁸¹ Though his sources were thus open to question, Maine was, himself, satisfied that he had, in Village-Communities, illustrated the essential similarities between early land-forms in the eastern and western portions of the Aryan world.

His next step was "to carry further in some particulars the line of investigation pursued by the Author in an earlier work on 'Ancient Law'" in yet another field of

80

See R.B.D. Moirer, "Agrarian Legislation of Prussia During the Present Century," Systems of Land Tenure in Various Countries /Published under the Sanction of the Cobden Club./ (London: Macmillan and Co., 1870), pp.279-327. In the same collection is an essay by George Campbell on "The Tenure of Land in India." pp. 145-227, which gives a synopsis of Indian village communities very much along the lines suggested by Maine and criticized so vehemently by Baden-Powell.

81

See Sir Henry Maine, Village-Communities, pp. 82-83.

investigation hitherto ignored by British scholars. He proposed an extensive examination of the newly discovered and translated Brehon laws of Ireland to discover why these laws did not evolve into a modern form and why they exemplified a case of arrested legal development.⁸²

The results of this research were published as Lectures on the Early History of Institutions in 1875, when Maine was Corpus Professor of Jurisprudence at Oxford. His attention had been drawn to the Brehon laws even before 1871. In his study of Village-Communities, there was passing reference to the evidence provided by the laws of an Irish clan, "apparently a group much more extensive and of much looser structure than the Eastern or Western village-community," but obviously within the Aryan tradition.⁸³ Maine's interest in the Brehon laws had been stimulated by their translation and publication during the preceding decade.⁸⁴ In 1852,

82

Sir Henry Maine, Early History of Institutions, p. viii.

83

Sir Henry Maine, Village-Communities, p. 187.

84

M. J. Gorman, "Ancient Brehon Laws of Ireland," 20 The Canadian Law Times, (1900), pp. 127-128. That there were any manuscript copies of ancient Irish laws and documents was quite accidental. About the year 1700, a Welsh scholar, Edward Lhwyd, toured Ireland, where he obtained twenty or thirty parchment manuscripts, in Gaelic, from various parts of the country. These manuscripts eventually became part of the Chandos collection, and later passed to Sir John Seabright, sometime before 1782.

the Reverend James H. Todd and the Very Reverend Charles Graves, had submitted to the Irish government a proposal to translate and publish the laws and institutes of ancient Ireland.⁸⁵ In November, 1852, a commission was established to superintend the transcription, translation and publication of the manuscripts, together with others in the possession of the Royal Irish Academy, the British Museum and the Bodleian Library at Oxford.⁸⁶ The commission originally employed two Irish scholars, Dr. O'Donovan and Professor O'Curry, to engage in the transcription and translation; both died, however, before the preliminary work was completed

84(cont'd.)

The manuscripts first came to public attention through the efforts of Colonel (later General) Vallancey, whose experience in India and work as an orientalist had led him to investigate what he considered basic similarities between certain words in Gaelic and their counterparts in Sanskrit. While following this interest, Vallancey learned Gaelic and obtained from Sir John Seabright permission to examine his collection of manuscripts. Vallancey was eventually to translate a part of them, but before doing so, he wrote to Edmund Burke, in 1783, pointing out the importance of the manuscripts and the desirability of maintaining them in Ireland. It was largely through Burke's efforts that Seabright presented the manuscripts to Trinity College, Dublin, in August, 1783. For the next seventy years they were unnoticed and almost forgotten.

85

See W. Neilson Hancock, "Preface," Ancient Laws and Institutes of Ireland, Vol. I, Introduction to Senchus Mor...or, Law of Distresses, as Contained in the Harleian Manuscripts (Dublin: Alexander Thom, 1865), n.p.

86

M. J. Gorman, "Ancient Brehon Laws of Ireland," p. 128.

and the work was given to Dr. Neilson Hancock, Dr. Thaddeus O'Mahony and Dr. Alexander Richie. It was at this point that Maine came into contact with the laws, for it was Dr. O'Mahony, professor of Irish at the University of Dublin, who allowed Maine access to the as yet unpublished translations.⁸⁷

The use which Maine made of the Irish laws differed considerably from the original intent of the publishing commission. His concern with Irish law had little to do with the legal history of Ireland as such; rather, he considered Irish law as an example of an archaic legal system. Maine proceeded "to ascertain...the stage of early progress to which...[Irish law] belongs, the mode of its development, its analogies to other bodies of primitive law, its peculiar features, and the causes of those peculiarities."⁸⁸ The instructiveness of the Brehon laws, according to Maine, was that they proved that "the primitive notion of kinship, as the cement binding communities together, survived longer among the Celts of Ireland and the Scottish Highlands than

87

Sir Henry Maine, *Early History of Institutions*, p. viii. See Ancient Laws of Ireland, Vol. II, Senchus Mor, Part II: Law of Distress (completed); Laws of Hostages-Sureties, Fosterage; Saer-Stock Tenure, Daer-Stock Tenure, and of Social Connexions (Dublin: Alexander Thom, 1869), and Ancient Laws of Ireland, Vol. III, Senchus Mor (concluded)...or, Customary Law and the Book of Aicill (Dublin: Alexander Thom, 1873).

88

T. E. Cliffe Leslie, "Maine's Early History of Institutions," Fortnightly Review, XXIII (1875), p. 306.

in any Western society, and that it is stamped on the Brehon law even more clearly than it is upon the actual land-law of India."⁸⁹

Maine's treatment of the Brehon laws was an exercise in interpreting the significance and meaning of a group of early manuscripts whose importance was suspected but unknown. So persuasive was his argument that Dr. Nielson Hancock's introduction to the latter volumes of the series, especially volume III, was almost exclusively an examination of the implications of Maine's thesis.⁹⁰ Whether or not these documents had a significance independent of that imputed to them by Maine became a moot point. They became what Maine made of them.

Unlike his preceding studies, Maine's last series of lectures, Early Law and Custom, were a rather miscellaneous collection "which formed part of various other courses given by him at Oxford."⁹¹ The book was concerned with three somewhat distinct problems. The first lectures attempted to elaborate upon "that close implication of early law with ancient religion which meets the inquirer

89

Sir Henry Maine, Early History of Institutions, pp. 18-19.

90

See W. Neilson Hancock, "Preface," Ancient Laws of Ireland, III.

91

Sir Henry Maine, Early Law and Custom, p. vi.

on the threshold of the legal systems of several societies which have contributed greatly to modern civilization."⁹² Then followed chapters on the influence of royal authority upon legal evolution, with heavy emphasis upon medieval monarchy and, finally, a series of lectures on the evolution of land-forms in ancient society.⁹³

The problem of what social organization and land-holding form had prevailed in ancient society was one from which Maine could never fully escape. It was, in reality, the basis of his crucial status-to-contract theory. While most criticism of the latter part of this formulation--that modern society was a contractual society--has arisen since Maine's death,⁹⁴ the same cannot be said of his emphasis upon status. Forced, as he was, to deal with the highly conjectural question of the form of early society--society as it existed before written records--Maine found that the hypotheses advanced in Ancient Law were immediately challenged by other anthropologists. Maine, in his Early Law and Custom dealt extensively with two subjects upon

92

Ibid.

93

Ibid.

94

See, for example, Wolfgang W. Friedmann, "Some Reflections on Status and Freedom," Essays in Jurisprudence in Honor of Roscoe Pound, ed. by Ralph A. Newman (New York: The Bobbs-Merrill Co., Inc., 1962).

which he had been challenged: the "great steps in the scale of transition" from bodies of actual kinsmen tilling the land to merely assumed kinsmen tilling common land,⁹⁵ and the validity, then, of the patriarchal theory which he had advanced over twenty years earlier. In both cases, he re-examined his original statements and offered substantially the same interpretation he had originally advanced, though he did recognize the tentative nature of these interpretations.

The basis of both problems lay in the nature of Maine's thesis. His concept of status involved a denial that primitive peoples "ever united on the basis of territorial grouping,"⁹⁶ but were united only on the basis of kinship, real or imagined. The fact, however, that there was a vast array of evidence to suggest that there were "cultivating groups in every stage, from that which they are actually bodies of kinsmen, to that in which the merest shadow of consanguinity survives,"⁹⁷ brought up the question of what stages these groups had gone through in this process of

⁹⁵
Sir Henry Maine, Early History of Institutions,
p. 78.

⁹⁶
Robert H. Lowie, The History of Ethnological Theory
(New York: Farrar and Rinehart, 1937), p. 50.

⁹⁷
Sir Henry Maine, Early History of Institutions,
p. 78.

transition. What, Maine asked, was the pattern of change from true kinship to assumed kinship? "The great steps in the scale of transition seem to me to be marked by the Joint Family of the Hindoos, by the House-Community of the Southern Sclavonians and by the true village-community...."⁹⁸ Maine had already, in his second set of lectures, dealt with the village-community. The question of the House-Community as an earlier stage of social evolution between the Hindu joint-family and the village-community did not occur in Maine's works until the publication of his Early History of Institutions, where it was discussed briefly.⁹⁹ In Early Law and Custom he returned to the subject and elaborated upon it with the aid of newly amassed information from the Balkan region.

Maine was apparently aware at a fairly early date that information concerning the structure and function of house-communities was rare. The suggestion that the Balkans would prove a fruitful area of investigation came from E. A. Freeman. During a trip to the Balkans, Freeman wrote to Maine from Ragusa on 12 October, 1875:

But what brought you into my head while I was up there was that I hear that, besides state-lands and private lands, there are communal lands, both pasture and

⁹⁸
Ibid.

⁹⁹
Ibid., pp. 7 and 79-80.

forest, but, I understand, no tillage. So pray turn your mind to Montenegro. I have no books to refer you to, but one may be sure that some German professor has taken that in hand, like everything else. 100

For once, the German scholar was not forthcoming; instead Maine found the work of Professor Bogasić, a native of Ragusa and a professor at the University of Odessa, whose work was "only known to me through some German translations of passages in them, and through a summary of a portion of them by M. Fedor Demelic."¹⁰¹ On the basis of the information thus obtained, Maine reconstructed what he believed to be the pattern of the house-community.

The Balkan Slavs were, in Maine's estimation, the one people who retained "in greatest completeness," the house community, "one of the oldest institutions of the Aryan race--probably, with the exception of the Family, the very oldest."¹⁰² The existence of house-communities among the Slavs provided Maine with evidence of a suspected but hitherto unproven form of social organization.

The importance of these House-Communities is easily understood by the student of what I may perhaps venture to call social and political embryology. They are a living form, very near to us and constantly

100

W.R.W. Stephens, The Life and Letters of Edward A. Freeman (London: Macmillan and Co., 1895), I, p. 100.

101

Sir Henry Maine, Early Law and Custom, p. 242.

102

Sir Henry Maine, "South Sclavonians and Rajpoots," p. 798.

brought nearer, of an institution rather hinted at than revealed in the most ancient records of a singularly large number of civilized nations. The Roman law, which supplies the only sure route by which the mind can travel back without a check from civilization to barbarism, shows us society organized in separate families, each ruled by the 'Pater familias,' its despotic chief. But it also exhibits vestiges of an institution not wholly forgotten, the gens, an association of related families which still have something in common, and may once have had a common life. 103

The house-community was, simply, "an extension of the Family: an association of several and even of many related families, living together substantially in a common dwelling or group of dwellings, following a common occupation, and governed by a common chief."¹⁰⁴ Though still based upon blood ties, "the tradition has become weak enough to admit of considerable artificiality being introduced into the association...through the absorption of strangers from outside."¹⁰⁵ If allowed to develop naturally, the transition of the house-community would "be into the Village-Community. It has almost universally assumed this form in the Russian

103

Ibid., p. 799.

104

Sir Henry Maine, Early Law and Custom, p. 241.

105

Sir Henry Maine, Early History of Institutions, p. 80.

territories."¹⁰⁶

The house-community was not, however, the oldest form of social organization. To Maine, an earlier and purer form was the patriarchal family. As early as Ancient Law, Maine advanced the idea that the patriarchal organization of society was the earliest form of familial, social and political life.¹⁰⁷ The theory stated that the origin of society was "in separate families, held together by the authority and protection of the eldest valid male ascendant."¹⁰⁸ He returned to the subject again and again, whenever he was led to a discussion of the historical development of social origins.¹⁰⁹ Drawing from Biblical authority, Greek sources and Roman law, from Bodin, Pufendorf, Locke and Blackstone, Maine continued to assert that the patriarchal family was the oldest form of family and social organization.

Opposed to his patriarchal theory were those of the American anthropologist, Lewis Henry Morgan, the Swiss

¹⁰⁶
Sir Henry Maine, "South Sclavonians and Rajpoots," pp. 809-810.

¹⁰⁷
Sir Henry Maine, Ancient Law, pp. 108-111, 119-29, and 208.

¹⁰⁸
Sir Henry Maine, Early Law and Custom, p. 193.

¹⁰⁹
See Sir Henry Maine, Village-Communities, pp. 78-79 and 107, and Early History of Institutions, pp. 115-118, 310-315, and 379.

jurist, J. J. Bachofen, and the Scottish lawyer, John Ferguson McLennan. All combatants were agreed upon the basic premise that there was an evolutionary scale through which early social forms progressed and that early ties were exclusively by blood rather than geography.¹¹⁰ In question was the structure of this earliest system of kinship organization. Morgan, for example, argued that the family headed by a patriarch, was a late development, belonging to the later period of barbarism, leaving at least three ethnical periods unaccounted for. The patriarchal family could not, then, be the earliest form of social organization.¹¹¹ J. J. Bachofen's Das Mutterrecht¹¹² established the concept of matrilineal descent, using largely the same kind of classical materials that Maine had utilized in establishing his patriarchal theory.¹¹³ Maine's reaction to conjectures such as these was essentially passive:

110

Robert Lowie, The History of Ethnological Theory, pp. 50-51.

111

Lewis Henry Morgan, Ancient Society, pp. 393-94.

112

See Johann Jakob Bachofen, Das Mütterrecht; eine untersuchung über die Gynaikokratie der altern Welt nach ihrer religiösen und rechtlichen Nature (Basel: B. Schwabe, 1897).

113

Robert Lowie, The History of Ethnological Theory, p. 44.

in his Early History of Institutions, he was content merely to repeat the assertions made by Morgan without comment, and he chose not to mention Bachofen by name.¹¹⁴

The same equanimity was much more difficult to maintain in the face of "the combative, logical scotch lawyer,"¹¹⁵ John Ferguson McLennan. McLennan's posthumous study, The Patriarchal Theory, was a vitriolic attack upon Maine's early assertions. McLennan noted that "a sound theory of the origin of society should explain at least the leading facts connected with the growth of societies easily and effectually; and this...the Patriarchal Theory cannot do"¹¹⁶ He spoke of the patriarchal theory as being a "stumbling block" to Maine, and of any use of the concept by Maine as "a thing utterly surprising and unintelligible."¹¹⁷ "The conclusion we are brought to," said McLennan truculently, "is that...there is really no evidence to show that the Patriarchal Family, as Sir Henry Maine described it, was

114

Sir Henry Maine, Lectures on the Early History of Institutions, p. 68.

115

Robert Lowie, The History of Ethnological Theory, p. 44.

116

John Ferguson McLennan, The Patriarchal Theory (London: Macmillan and Co., 1885), p. 24.

117

Ibid., pp. 24-25.

primeaval and universal."¹¹⁸ The alternative to which McLennan turned was similar to Bachofen's emphasis upon matrilineal descent; certainly those groups which practice "endogamy, or marriage within the group, gave birth to non-patriarchal institutions based on Mother-Right."¹¹⁹ Since he saw many such groups in the Aryan world, McLennan concluded that "there are many rude societies now existing in which the family is radically different from the Patriarchal Family...."¹²⁰

Maine answered his critics twice: first in the chapter on "Theories of Primitive Society" in Early Law and Custom, and later, in 1886, in an anonymous article on "The Patriarchal Theory" in the Quarterly Review.¹²¹ In the earlier of his essays, the tone was mild, established by the admission that "I am not satisfied that the investigation has advanced far enough to admit of a very confident

¹¹⁸

Ibid., p. 354.

¹¹⁹

J.E.G. de Montmorency, "Sir Henry Maine," The Social and Political Ideas of Some Representative Thinkers of the Victorian Age, ed. by F.J.C. Hearnshaw (London: George G. Harrap and Co., 1933), p. 91.

¹²⁰

John Ferguson McLennan, The Patriarchal Theory, p. 27.

¹²¹

See See Sir Henry Maine, "The Patriarchal Theory," The Quarterly Review, CLXII (1886).

opinion."¹²² His conclusion at that point was that both the patriarchal theory and the alternatives put forward by McLennan and Morgan "each explain well a certain number of ancient social phenomena," but that "both are open to considerable objection as universal theories of the genesis of society."¹²³ He also admitted that the patriarchal theory was supported by inadequate evidence--that it could be interpreted to mean that primitive peoples were evolving into a patriarchal form from some earlier organization.¹²⁴ There existed, in these passages, a spirit of conciliation and a tendency to approach the entire question with an open mind. This conciliatory attitude was missing three years later in his review of McLennan's book. In that most scathing review, Maine exchanged truculence for truculence, barb for barb.

Maine began the review with the observation that McLennan's book was "most absurdly controversial" and that it was made up wholly of "argument and cavil" against "a small portion, perhaps a score of pages in all," of Maine's

¹²²

Sir Henry Maine, Early Law and Custom, p. 196.

¹²³

Ibid., pp. 203-204.

¹²⁴

Ibid., p. 204.

work.¹²⁵ Maine accused McLennan of adopting a set of theories concerning ancient society which were "at least premature" and of displaying "the utmost impatience of any denial, direct or indirect, of his own special hypothesis."¹²⁶ The weakness of McLennan's theory was, basically, that it was the result of an improper use of the comparative method. Instead of stating the theory which he was attempting to develop and selecting from a defined area of evidence, the author chose indiscriminantly from a wide selection of material, much of which could not be shown to be relevant.¹²⁷ Of such indiscriminate selection Maine said:

A man may go to Australia for one usage, to the Caucasus for another, to Tibet for yet another, and to Southern India for one more. Out of these he may construct a theoretical series of institutions, one growing out of the other. The theory may be so plausible as to settle on the brain of some gentlemen, and persuade them that, wherever there is evidence of one of these customs, the remainder are present, or must have been present of old. Yet there may be no real connection between these practices; some may belong to the yesterday of time; others may be a morbid growth of isolation among a few score of families left to themselves for centuries. 128

125

Sir Henry Maine, "The Patriarchal Theory," p. 181.

126

Ibid., pp. 181-82.

127

Ibid., pp. 197-98.

128

Ibid., p. 201.

Because of his failure to discriminate in his selection of material, McLennan had not presented a plausible alternative to the patriarchal theory. The evidence "is extraordinarily various, and has all degrees of cogency, from extremely slight to reasonably strong."¹²⁹ Strangely, however, despite the fact that he had gone the world round to find evidence, McLennan had not paid sufficient notice to the clues to be found in Roman law. He had "the strange obstinacy" of "refusing to learn anything from the Roman law." The result was very much as if a philologist "were forbidden to look at Sanskrit."¹³⁰

The outcome of this acidic exchange was inconclusive. Undoubtedly stung by the vehemence manifested by McLennan, Maine not only retaliated in harsher terms than he was accustomed to, but he was also more defensive in his treatment of the patriarchal theory, restating it in stronger terms than he had previously done. Before the exchange could develop further, Maine had transferred his allegiance from Oxford to Cambridge and his interests from ancient society to international law.¹³¹

129

Ibid., p. 202.

130

Ibid.

131

Sir M. E. Grant-Duff, Sir Henry Maine, p. 48.

While he continued, throughout his productive life, to adhere to the methodological framework enunciated first in Ancient Law, Maine was constantly looking for new proofs. In his search, he opened investigations into many new and interesting topics. Maine's use of evidence from India, his emphasis upon the crucial position of Roman law, his recognition of the importance of continental scholarship, broadened the perspective of English jurisprudence. Even his extended disputation over the question of primitive social organization fostered the opinion that a functional approach to jurisprudence was more profitable in the study of legal development than speculation. What Maine overlooked was that functionalism did not eliminate speculation. The functionalist who wishes to avoid conceptualization is apparently trapped. He must impute to his material a speculative principle. Before a "fact" is identified as such or a series of "facts" connected in sequence, a principle of order and value already exists in the mind of the observer. Though Maine believed he had found an objective, scientific standard, he could not escape his own preconceptions. When he tried to apply this supposedly objective standard to Indian administration, to the study of politics and of jurisprudence, he could not help but bring his own personal values to bear.

PART III

THE APPLICATION

CHAPTER VI

FACT VERSUS THEORY:
MAINE'S JURISPRUDENCE

In 1861, John Stuart Mill, discussing the work of John Austin and Sir Henry Maine in The Edinburgh Review, noted that their volumes were "exclusively speculative" and that, while useful to anyone "who wishes to understand the law of England as a liberal profession and not as a mere trade," they were of little use to the practising barrister. Indeed, he concluded, "probably neither of them will ever attain the distinction, so much coveted by most legal writers, of being quoted as an authority in a law court."¹ Mill's comment pointed out an important distinction in the study of law between practical legal exposition and theoretical jurisprudence. The first, it was thought, "acknowledges no call to rise to first principles, or to proceed to ultimate analysis," while the second "attributes value to the abstract and the general rather than to the concrete and the particular."² This distinction had led to a general disregard for theory, particularly among lawyers working in the Anglo-Saxon legal tradition. As early as 1855, Maine noted this phenomenon: "The fault of our legal system is,"

¹ John Stuart Mill, "English Jurisprudence," The Edinburgh Review, CXIV (1861), p. 460.

² Sir John Salmond, Jurisprudence, 8th ed. (London: Sweet and Maxwell, Ltd., 1930), p. 3.

he said, "that it is exclusively practical. To acquire dexterity, to get practice, to lead the bar, and to rise to the Bench, are the only aims of English lawyers. With us, law is not a science."³

If law has any claim to being a science, even in the very broad meaning of science as "the systematized knowledge of any subject of intellectual inquiry,"⁴ then this distinction, so clear to Mill and so forcefully castigated by Maine, is fallacious. In order to organize systematically any body of knowledge, however practical or utilitarian, there needs to be a theoretical framework within which these rules are logically fitted and correlated. If this framework is consciously enunciated and deliberately constructed, so much the better for the sake of consistency and accuracy. This is the role of jurisprudence: it is "to supply that theoretical foundation of which the art of law is careless."⁵ Rather than a distinction between substantive law and theory there is--or should be--correlation; rather than argument, agreement. Jurisprudence, in the words of Sir John Salmond, "is the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques

³ Sir Henry Main, "The Inns of Court," p. 77.

⁴ Sir John Salmond, Jurisprudence, p. 1

⁵ Ibid., p. 3.

of the law in the light derived from present knowledge in disciplines other than the law,"⁶ In sum, the object of jurisprudence "is not to teach the rules of practice. Its object is to supply sound ways of grouping these rules...."⁷

Jurisprudence, defined in this manner, is essentially the study and understanding of law, but it presents problems more relevant to the philosopher than to the barrister-- and therein lies the nub of the problem. Any effort to create a conceptual scheme for legal rules must, of necessity, be tentative and imperfect. As Justice Oliver Wendell Holmes noted, jurisprudence ultimately endeavours to show "the rational connection between your fact and the frame of the Universe."⁸ Thus, jurisprudence must lead to a discussion of "ultimate beliefs whose inspiration comes from outside the law itself."⁹ All thought about the end of law is based, in the final analysis, upon conceptions of man "both as a thinking individual and as a political being."¹⁰

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Ibid., p. 25.

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Frederic Harrison, "The Historical Method," p. 80.

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Oliver Wendell Holmes, Jr., "The Law as a Profession," p. 742.

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Wolfgang Friedmann, Legal Theory, 3rd. ed. (London: Stevens and Sons Ltd., 1953), p. 4.

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Ibid., p. 3.

Theoretical jurisprudence must deal with materials not only of law and juristic order, but also with ultimate conceptions and the formal studies of professional philosophy.¹¹

The question with which jurisprudence can deal are without end; in the last analysis, however, the principle focus of theoretical jurisprudence has revolved around the question of stability versus change. The major schools of thought in jurisprudence have attempted to reconcile stability and change and "to make the legal order appear something fixed and settled and beyond question, while at the same time allowing adaptation to the pressures of infinite and variable human desires...."¹² The quandry facing all theoretical jurists is, perhaps, best expressed by Dean Roscoe Pound, who said:

Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of engendering security. Thus the legal order must be flexible as well as stable. 13

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See Huntington Cairns, Legal Philosophy from Plato to Hegel (Baltimore: The John Hopkins Press, 1949), pp. 561-62.

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Roscoe Pound, Interpretations of Legal History (New York: Macmillan Co., 1923), p. 2.

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Ibid., p. 1.

No system of jurisprudence, however detailed, and however widely accepted at any given moment, has for long succeeded in reconciling these irreconcilables. And in the contemporary world, rent by conflicting nationalisms, by hostile ideologies and by ever-growing economic antagonisms, each society is pluralistic rather than homogeneous and is much less likely to achieve a single, lasting notion of reconciliation like that of the Middle Ages or even of the Enlightenment. This profusion of conflicting interests, complex enough by itself, is compounded by the fact that no system of theoretical reconciliation "disappears when the next comes into favor."¹⁴ Thus, not only is the contemporary world divided horizontally by a number of conflicting legal philosophies reflecting existing national, ideological and economic distinctions, but also vertically by a number of earlier juristic theories which have retained a part, at least, of their validity in the contemporary world.¹⁵ The

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Ibid., p. 2.

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For an introduction to schools of jurisprudence, past and present, see C. K. Allen, Law in the Making, 6th ed. (London: Oxford University Press, 1961); Wolfgang Friedmann, Law in a Changing Society (Berkeley: University of California Press, 1959); and Law and Social Change in Contemporary Britain (London: Stevens and Sons, Ltd., 1951); Carl Joachim Friedrich, The Philosophy of Law in Historical Perspective (Chicago: The University of Chicago Press, 1958); Julius Stone, The Province and Function of Law: Law as Logic,

resulting plethora of theoretical juristic statements are enough to discourage a professional philosopher and to drive a practising barrister to despair.

The publication of Maine's Ancient Law, in 1861, was a noteworthy event, not only because of the specific ideas which he advanced, but also because it marked the advent of a new school of jurisprudence standing in sharp contrast to the systems of juristic theory then in vogue in England. Maine chose to call his system of jurisprudence "comparative jurisprudence" or "historical jurisprudence" in accord with the comparative historical method he attempted to employ; we have suggested that it might also be called naturalistic jurisprudence, to refer to the set of philosophic and methodological assumptions underlying his method. Whatever the name employed, the system of jurisprudence which Maine developed was a fundamental departure from juristic precedent.

Before the publication of Maine's works, the principal schools of jurisprudence had been grouped under three headings: the metaphysical or a priori, the historical and the analytical. The term "metaphysical" is exceptionally broad, covering not only medieval juristic thought but also that of

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Justice and Social Control (Sydney: Associated General Publications Pty., Ltd., 1946); and Sir Paul Vinogradoff, Outlines of Historical Jurisprudence (Oxford: University Press, 1920). Less enlightening, because of its strong Hegelian bias, is Roscoe Pound's Interpretations of Legal History.

the Enlightenment. Whatever differences existed, there was a common basis in their efforts to investigate "the abstract ideas of right and law in their relation to morality, freedom and human will. Law becomes the expression of an idea."¹⁶ In the Middle Ages, it was customary to "regard divine law as superior to human law, the law of man being simply a part of the larger scheme of the universe;" in the Enlightenment a concept of Natural Law was substituted for divine law but for the same purpose.¹⁷ In reaction to metaphysical jurisprudence, an historical school developed, largely German in origin, and associated with the development of German romanticism and nationalism. The historical jurist saw law as a product of time, of unconscious development and of national character. In England, a similar reaction to the jurisprudence of the Enlightenment as well as to the near-blind worship of tradition manifested by William Blackstone led to the development of so-called analytic school, which stressed existing legal data, attempted to define and classify it and explained the connotations and meaning of this data in terms of rigid deductive logic. While both kinds of metaphysical jurisprudence were common to the whole of Europe in the nine-

¹⁶Edwin M. Borchard, "Jurisprudence in Germany," 12 Columbia Law Review 308 (1912)¹⁷Ibid., pp. 308-309.

teenth century, the development of the historical school in Germany and the analytic in England led to a growing distinction between English and continental, particularly German, jurisprudence. Though some cross-fertilization existed, "the fact was that the language of both was different, and effective communication between English and German legal theorists became increasingly difficult."¹⁸

Into this arena of conflicting ideas, Maine introduced a fourth school: that of comparative jurisprudence, the assumptions and methods of which set it apart from any system then in existence. When Maine applied the pattern of naturalistic thought to jurisprudence, the effect was to create an entirely new approach to the study of law and to the basic problems of jurisprudence. His comparative method introduced a concern with space as essential as was the historical school's concern with time. And his concept of the stages of evolutionary development, expressed in his status-to-contract formulation, was a distinctly new effort to grapple with the problem of reconciling change and stability. Ultimately, Maine's jurisprudence was an effort to call to the aid of the theoretical jurist the unimpeachable evidences of science--to found jurisprudence upon fact and empirically verifiable evidence rather than upon a priori statement or conjectures. His failure was not,

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Ibid.

perhaps, so much evidence of his own weakness as of the weakness of Man himself. There is, now, a growing awareness that the evidences of science are not unimpeachable and that permanence in any theoretical statement, however, founded, is impossible. Finally, an awareness, early expressed by Sir Frederic Maitland, Sir Frederick Pollock and Sir Paul Vinogradoff,¹⁹ that Maine's lack of objectivity, as well as flaws in his scholarship, detracted from the veracity of his findings, has also served to diminish confidence in his work.

That Maine's comparative method or his naturalistic jurisprudence conflicted with both metaphysical and analytic jurisprudence seems conclusive; Maine devoted several pages of his work elaborating these differences. That his work conflicted with the German historical school is less obvious. Except for an occasional passing reference, Maine did not acknowledge a debt to it, nor did he specifically compare his naturalism with its historicism. Although later

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See Frederic William Maitland, "English Law is Not Written," Collected Papers (Cambridge: Cambridge University Press, 1911), I, pp. 480-97; "English Legal History," Collected Papers, II, pp. 1-60; Sir Frederick Pollock, "Notes on Maine's 'Ancient Law'." 21 Law Quarterly Review 165-178, 274-293 (1905) and 22 Law Quarterly Review 73-92 (1906); "Sir Henry Maine as a Jurist," The Edinburgh Review, CLXXVIII (1893), pp. 100-121, Sir Paul Vinogradoff, Introduction to Historical Jurisprudence (London: Oxford University Press, 1920; and, "The Teaching of Sir Henry Maine," 20 Law Quarterly Review 119-133 (1904).

scholarship is exceptionally mixed on this point,²⁰ it is apparent that there does exist a profound gulf between the two schools of jurisprudence. Though both schools appealed to history, they did so, on different bases and in entirely different ways. Maine's interest was not focused upon the development of national law, and only incidentally did he develop any concept approximating that of the German's "Volk;" his primary aim was to indicate the growth of law in civilized states from status to contract. Upon this assertion, ultimately, his specific argument, if not his method, must stand or fall. That law in otherwise civilized countries was as contractually-oriented in 1861 as he maintained is doubtful; that law in these same countries has continued on the pathway to contract simply is not true. One can conclude either that Maine was in error or that the benefits of civilization have fled the shores of the western world.

I. Metaphysical Jurisprudence

Metaphysical jurisprudence is a generic term applied to those systems of legal theory which posit a fundamental natural law as the model for, and the sustaining power of, political and legal realities. Natural law is conceived in

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See E. Campbell, "German Influence in English Legal Education," pp. 378-79.

a Platonic sense as a universally valid norm which governs, or at least should govern, all positive law.²¹ When any positive law is clearly at variance with the ideal of law, it is according to Grotius, understood to be "contrary also to the law of nature, that is, to the nature of man."²² Of the two terms applied to this conception of legal theory--metaphysical or a priori--either is acceptable, for these terms indicate the essentially philosophic nature of the concept. It says little about what law is, but, rather, what law should be. It serves, as Maine noted, to keep before the eyes of any society "simplicity, and symmetry..as the characteristics of an ideal and absolutely perfect law."²³ Thus, though the natural law of the Christian Middle Ages²⁴ and that of the secular Enlightenment reflected considerably

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See Ernst Cassirer, The Philosophy of the Enlightenment, pp. 234-40.

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Hugo Grotius, Prolegomena to the Law of War and Peace, trans. by Francis W. Kelsey (New York: The Liberal Arts Press, 1957), pp. 9-10.

23

Sir Henry Maine, Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas, introduction and notes by Sir Frederick Pollock, (Boston: Beacon Press, 1963), p. 75.

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See Ernst Cassirer, The Philosophy of the Enlightenment, p. 41; John B. Morrall, Political Thought in Medieval Times (New York: Harper and Brothers, 1962), pp. 19-20, 119-120; and Otto Gierke, Political Theories of the Middle Ages translated by Sir Frederick Maitland (Boston: Beacon Press, 1958), pp. 73-87.

variant points of view, and should not be confused one with the other, they had one essential ingredient in common-- a reliance upon a rigid but abstract concept of right. Nowhere is this point better made than by Roscoe Pound:

Primarily the theory of natural law as a juristic doctrine was a theory of making law. The old materials were to be tested by the ideal and were to be reshaped to conform to it or, if this was not possible, were to be rejected. If there were gaps to be filled, they were to be filled in conformity with the ideal plan. Yet it tended to become also a theory of law because of pressure of the interest in the general security. Thus it happened presently that a new authority was set up thereby--a philosophical authority of the "nature of things" or of the "nature of man." Once more the legal order was the revelation of a god. The new juristic god was called "Reason," and was represented as hostile to authority. But this hostility extended only to the authority of gods other than himself. Once the legal world had been made over in his image the lines were to be as rigid and the legal structures as firmly fixed and the doctrines as unbending as under the reign of nature gods or religious gods or political gods. For the philosophical revelation extended only to an ideal picture of society. The details were filled in by lawyers, chiefly from the materials of the law which had been taught them, and once filled in got all the authority of the ideal plan. 25

Maine's critique of metaphysical jurisprudence avoided mention of Medieval Christian thought and concentrated instead upon the Roman and eighteenth century French and American schools. Maine approached his critique of natural law with an ambivalent attitude: at one time, in Rome and

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Roscoe Pound, Interpretations of Legal History, pp. 5-6.

in the founding of international law, it had proved useful, but in recent years, the notion of a higher law had proven to be immensely harmful. Concepts of natural law had, in France, reduced "the intellectual flower of a cultivated nation" to "a condition of downright mental imbecility."²⁶ The harm wrought by the modern notion of natural law Maine put under two headings: it prevented a proper appreciation of the historical or comparative examination of functional law, and it had become, in the hands of publicists such as Rousseau, not so much a legal as a political or constitutional notion which justified the overthrow of the political order and promoted social chaos. In his opposition to modern notions of metaphysical or a priori concepts of law, Maine reflected two of his most significant convictions: his functional approach to law and his political and social conservatism.

The Roman conception of natural law, Maine thought, served well in that it helped avoid the "two special dangers [to] which law and society...appear to be liable in their infancy":²⁷ that law develop too quickly or that it stultify and not develop at all. Though Roman law was so firmly based upon positive law that there was little danger of it

²⁶Sir Henry Maine, Popular Government, p. 75²⁷Sir Henry Maine, Ancient Law, 1963 ed., p. 72.

ever developing too swiftly, the Romans were additionally protected by their conception of natural law. While natural law served in a general way to stimulate changes in law, no Roman judge would think to use an appeal to it in any particular case. Natural law occupied a very balanced position, then, in Roman law. The benefit of natural law "arose from its keeping before the mental vision a type of perfect law, and from its inspiring the hope of an indefinite approximation to it, at the same time that it never tempted the practitioner or the citizen to deny the obligation of existing laws which had not yet been adjusted to the theory."²⁸ Similarly, natural law kept before Roman jurists "a clear rule of reform" which prevented Roman law from falling into that tired stagnation which characterized Hindu law and which contributed, therefore, to the superiority of Roman law.²⁹

Thus, when used with circumspection and deliberation as in the Roman experience, the a priori conception of higher law served a useful function. The problem, however, was that when later jurists adopted the concept, they tended to confuse the sharp distinction made by Roman law between

²⁸Ibid., pp. 73-74.²⁹Ibid., pp. 75-76.

natural and positive law. It was difficult, said Maine, to say whether students of seventeenth century international law, such as Grotius, were "discussing law or morality--whether the state of international relations they describe is actual or ideal--whether they lay down that which is, or that which, in their opinion, ought to be."³⁰ The notion that sovereign states are subject to the dictates, not of a common lawgiver but of "the primaeval order of nature," allowed international law to escape from the notion of independent lawless states having no outside check or control upon their national behavior. Insofar as international law was to benefit in guiding the political evolution of the western world it, too, illustrated the positive side of metaphysical or a priori notions of law.

Despite these brief acknowledgements of the beneficial qualities of natural law--which in the section on international law read much like an obligatory encomium--Maine was one of the most severe critics of the eighteenth century concepts to appear in Victorian England. His primary criticism--that natural law was not historical--is an almost classical example of a legal functionalist confronting legal philosophy. As one recent author noted, the historical and the speculative approaches to jurisprudence

³⁰Ibid., pp. 93-94.

"cannot but appear as fundamentally contradictory. The very notion of historical function is hardly compatible with that of a permanent value."³¹ While Maine's historical approach could recognize the temporary validity of natural law in any particular time and place, and show how such a priori ideals helped to shape institutions, the result of such investigations invariably led to an awareness of the relative and impermanent nature of all such theories.³² John Stuart Mill's critique of Maine's analysis was that: "He appears to think...that when he has succeeded in giving the history of a system or a theory, he has done with it."³³ Maine did appear to believe that he had refuted all theories of the law of nature after that of Rome by tracing their geneology. Again, Mill summarized Maine's argument against, not only natural law but all a priori legal theories very succinctly when he said:

Mr. Maine says in substance this: There is no such thing as Natural Law, because you would not have thought of it if it had not been for the theories of Rousseau; who adapted to his own purposes the language current amongst the lawyers of his day; who inherited their views from earlier lawyers; who, to serve a

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A. P. d'Entreves, Natural Law; An Introduction to Legal Philosophy (London: Hutchinson's University Library, 1951), p. 113.

³²

Ibid., pp. 113-14.

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John Stuart Mill, "English Jurisprudence," p. 482.

temporary purpose, twisted certain theories of Roman Law; which theories had at an earlier period been compounded out of the notions of certain Greek philosophers and certain doctrines about an older ius gentium which meant something altogether different from what you understand by Natural Law. 34

In this confrontation between faith and history, all that Maine did was to prove to his satisfaction that natural law had no eternal validity. He could not convince the faithful, who could say, with Mill, "the manner in which I came by this opinion has nothing whatever to do with its truth."³⁵

Another example of relative historical criticism which Maine levelled at a priori theories of law was his discussion of what happened to an a priori ideal when transmitted unto future generations:

No durable system of jurisprudence could be produced in this way. A community which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of particular cases, would only, if it bequeathed any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted. It would amount at best to a philosophy, marked with the imperfections of the civilization under which it grew up. 36

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Ibid., pp. 482-483.

35

Ibid., p. 483.

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Sir Henry Maine, Ancient Law, (1963 ed.,) p. 73.

Here was the impasse: Maine considered the notions of natural law to be the product of one particular time; the exponents of a priori jurisprudence considered them eternal.

Finally, Maine was well aware that those who held to eternal values in law could not subscribe to the notions of the primacy of functional law or to the sense of changing or relative values which this implied. Of the a priori school he said:

I believe...that it is still the greatest antagonist of the Historical Method; and whenever (religious objections apart) any mind is seen to resist or condemn that mode of investigation, it will generally be found under the influence of a prejudice or vicious bias traceable to a conscious or unconscious reliance on non-historic, natural, conditions of society or the individual. 37

So far, Maine's objections to a priori jurisprudence in general and natural law in particular had been based upon broad but irreconcilable differences of philosophic perspective. His comments, while sharp, were not unreasonable. He reserved his most vociferous and outrageous remarks for the eighteenth century exponents of natural law, focusing particularly on Jean-Jacques Rousseau, but taking a side-swipe at Thomas Jefferson as well. Rousseau was Maine's bête-noire, "the founder of a sect,"³⁸ and the parent of a host of phrases and associated notions" which

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Ibid., p. 87

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Ibid., p. 299. See Also Popular Government, pp. 75 and 152-53.

"are beginning to have serious effect in this country, as the democratic element in its Constitution increases."³⁹ Rousseau, Maine thought, was primarily responsible for ally- ing what had been a limited notion of jurisprudence to broader and more general questions of political and social development. Maine objected to the assumption made by Rousseau that "because you can successfully reform juris- prudence on certain principles, you can successfully reform Constitutions on the same principles."⁴⁰ He acknowledged that it was often desirable to disentangle laws from "idle forms, technicalities, obscurities and illogicalities." If the attempt were successful, the quality of law improved; if the attempt failed, it might "lead to disappointment, but it can scarcely lead to danger."⁴¹ Reforms of the con- stitution were another matter, for "simplification of political institutions leads straight to absolutism, the absolutism not of an expert judge, but of a single man or of a multitude striving to act as if it were a single man."⁴² Again, reform of the constitution involved the entire popula- tion of a nation, whereas legal reform affected only "the

³⁹ Sir Henry Maine, Popular Government, p. 158.

⁴⁰ Ibid., p. 168.

⁴¹ Ibid., pp. 168-69.

⁴² Ibid., p. 169.

small part of a nation which actually 'goes to law'." A "mistake in constitutional innovation," he argued, "directly affects the entire community and every part of it. It may be fraught with calamity or ruin, public or private. And correction is virtually impossible."⁴³

If there were any accuracy in the concepts used to remodel state and society, the danger would, perhaps, be minimal. But natural law, as proclaimed in the eighteenth century, was demonstrably in error. Particularly was this true of Rousseau's concept of the social contract.

The natural conditions from which it starts is a simple figment of the imagination.... The process by which Rousseau supposes communities of men to have been formed, or by which at all events he wishes us to assume that they were formed, is again a chimera. No general assertion as to the way in which human societies grew up is safe, but perhaps the safest of all is that none of them formed in the way imagined by Rousseau.⁴⁴

Upon such false premises as these, exponents of natural law were urging the transfer of sovereignty to the people, thus making the mass the sole source of all legitimate power, and creating "the omnipotent democratic State, rooted in natural right," having at its "absolute disposal everything which individual men value."⁴⁵

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Ibid.

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Ibid., p. 159.

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Ibid., 158.

The effect of modern natural law had, then, been an unqualified failure. In the hands of irresponsible publicists, it had been applied to social and political questions for which it was not originally intended and developed to justify a form of political absolutism and social equalitarianism which threatened the whole foundation of western civilization. In summary, Maine's judgment of natural law in the modern world was that "it helped most powerfully to bring about the grosser disappointments of which the French Revolution was fertile."

It gave birth...to the vices of mental habit all but universal at the time, disdain of positive law, impatience of experience, and the preference of a priori to all other reasoning. In proportion too as this philosophy fixes its grasp on minds which have thought less than others and fortified themselves with smaller observations, its tendency is to become distinctly anarchical. 46

The criticism which Maine made of metaphysical or a priori jurisprudence was, at first glance, of the stand-off variety. Beginning with functionalist and historicist assumptions, he criticized a school of thought which would have accepted neither. The result was an impasse, because there was no common ground for argument. Had Maine stated his case and stopped at that point, his position would have been stronger, and to the mind of his audience a century

later, quite acceptable.⁴⁷ Maine brought to his argument, however, a quality of righteousness and an utter conviction which prevented him from matching his account against that of the metaphysicians and acknowledging that both might have value. The dogma of truth associated with the scientific method prevented him from manifesting that flexibility of attitude which is the hall-mark of a really good scholar. Ultimately one must acknowledge that, however much one's predilection might be for a functionalist interpretation, a priori jurisprudence or legal philosophy also has something to say on the subject which continues to be constructive and valuable.

As for his diatribe against Rousseau and contemporary concepts of natural law, Maine simply allowed his politically conservative bias to run away with him. His comments reflect far more his fears for the future than they do an analysis of the past performance of natural law. And to focus upon Rousseau to so great an extent suggests that Maine was setting up a straw-man rather than engaging in considered analysis. There is, in all of Maine's juris-

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The victory of relative over concepts of absolute a priori right is, today, by no means complete. In the field of literature, Kathleen Nott has found it necessary to castigate several prominent figures, such as T. S. Eliot, Graham Greene and C. S. Lewis, who were so obtuse as to retain a metaphysical position. See Kathleen Nott, The Emperor's Clothes (Bloomington: Indiana University Press, 1958).

prudence, a slight political configuration; never far away from the jurist lurks the political and social conservative, ever ready to marshal the forces of scientific analysis, the historical and comparative method and functionalist jurisprudence behind the cause of responsible social evolution.

II. Analytical Jurisprudence

Disillusioned with the state of legal studies in England, Maine insisted that "next to a new history of law, what we most require is a new philosophy of law."⁴⁸ Though few Englishmen as yet had shown a penchant for the exposition of legal philosophy, Maine believed that "if our country ever gives birth to such a philosophy," it would be the result of a legal system "which for many purposes may be considered indigenous," and of "the growing familiarity of Englishmen with the investigations of the so-called Analytical Jurists, of whom the most considerable are Jeremy Bentham and John Austin."⁴⁹ The analytic school of jurisprudence, to which Maine referred, insisted that "how-
ever widely...[one]...may be inclined to extend the limits of the province of Jurisprudence, the ultimate analysis of

⁴⁸ Sir Henry Maine, Early History of Institutions, p. 342.

⁴⁹ Ibid., pp. 342-43.

every positive law inevitably resolves it into a command of a particular nature, addressed by political superiors, or Sovereigns, to political inferiors, or subjects."⁵⁰

The proper study of jurisprudence, according to this view, was to examine the ramifications of this singular fact. Despite Maine's own introduction to jurisprudence under the tutelage of John Austin, he was later to undertake an extensive analysis and critique of Austin's approach to law and to find it wanting. As with his criticism of metaphysical jurisprudence, so too with the analytic school; juristic analysis was based on an abstraction, removed from event and subject to degeneration "into an idle exertion of curiosity" because it was guilty of "omitting to call in the assistance of history."⁵¹ Members of the analytic school "take no account of what law has actually been at epochs remote from the particular period at which they made their appearance."⁵²

As often happens in the dialectical interplay of ideas, analytical jurisprudence came into being in reaction

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Sir Henry Maine, Sovereignty: Its Conception and Its Importance, ¶ 1 Juridical Society Papers 26 (1855).

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Sir Henry Maine, Ancient Law, 1963 ed., p. 310.

⁵²

Ibid., p. 114.

to existing theories. It rejected the concept of natural law and the assumption "that reason applied to a particular situation would provide an answer generally acceptable."⁵³ As well, it attempted to counter the notion, advanced by Blackstone, that English customary law was "more ancient, more sacred, than any legislation, and in some sense superior to or independent of legislation."⁵⁴ Bentham, who heard Blackstone's lectures in 1763, as a student at Lincoln's Inn, was repulsed by this notion--a repulsion which he expressed in his Fragment on Government.⁵⁵ This was followed by a more extensive and systematic refutation of Blackstone's notion of the mysterious science of the law⁵⁶ in Bentham's Limits of Jurisprudence Defined.⁵⁷

⁵³ Julius Stone, The Province and Function of Law, p. 271.

⁵⁴ John Stuart Mill, "Austin's Jurisprudence," pp. 26-27

⁵⁵ See Jeremy Bentham, "A Fragment on Government; or a Comment on the Commentaries: Being an Examination of What is Delivered on the Subject of Government in General, in the Introduction to Sir William Blackstone's Commentaries, with a Preface in which is given a Critique on the Work at Large," The Works of Jeremy Bentham, ed. by John Bowring (Edinburgh: William Tait, 1859), I, pp. 221-295.

⁵⁶ The phrase is Daniel Boorstin's. See his The Mysterious Science of the Law (Boston: Beacon Press, 1958).

⁵⁷ Jeremy Bentham, The Limits of Jurisprudence Defined (New York: Columbia University Press, 1945).

John Austin, a close friend,⁵⁸ neighbor and colleague of both Bentham and James Mill, continued the study. Appointed to the Chair of Jurisprudence and the Law of Nations at the University of London in 1827, Austin gave a series of lectures in jurisprudence which John Stuart Mill attended in 1828 and 1829, and which Sir Henry Maine also attended.⁵⁹ In 1832, Austin's lectures were published as The Province of Jurisprudence Determined.⁶⁰

Both Bentham and Austin were conscious of the need for legal reform, English law at this time "was confused and encumbered by obsolete rules created for a feudal land system and a pastoral agriculture and petty industrial economy."⁶¹ The answer to this anomalous situation appeared to be the creation of a system of legal theory which would enable the reformer to cut through the tangled skein

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See Janet Ross, "John Austin," Atlantic Monthly, LXIX (1892), pp. 765-66. See also John Stuart Mill, Autobiography, pp. xi, 45, and 51-53.

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Sir William Markby, Elements of Law Considered with Reference to Principles of General Jurisprudence, 5th ed. (Oxford: Clarendon Press, 1896), p. 6.

60

See John Austin, The Province of Jurisprudence Determined, Being the First Part of a Series of Lectures on Jurisprudence, or the Philosophy of Positive Law, 2nd ed., rev., (London: J. Murray, 1861).

61

Julius Stone, The Province and Function of Law, p. 274.

of law as developed by Blackstone and at the same time develop the notion of a sovereign power adequate to deal with the problem of reform in the face of old constitutional and legal conservatism.⁶² Thus, analytical jurisprudence in the hands of Bentham became a means of "arranging a body of law in a logically interdependent system. It belongs neither to any actual society, nor to any actual law, but to the critique of legal propositions by reference to their logical consistency."⁶³ And, too, it accounts for

62

Ibid., pp. 274-77.

63

Ibid., p. 61. Austin's analysis was not, however, totally divorced from descriptive reality. Few conceptual schemes are. As Lord Bryce noted: "Austin wrote as a jurist, professing to describe the normal and typical State. He was therefore bound to have some regard to facts, and to present a theory of the State which would have explained and correlated the facts, putting them in their natural and true connexion." James Bryce, Studies in History and Jurisprudence, I, pp. 536-37. The emphasis which analytical jurists put upon the role of the sovereign in law left the school open to charges that overlooked innumerable exceptions when discussing the origin of law; it left them open, as well, to the charge that in a modern, pluralistic society, one often has difficulty in identifying the sovereign. See John Dewey, "Austin's Theory of Sovereignty," Political Science Quarterly, IX (1894), pp. 31-52. But, just as Austin's conceptual scheme was not designed to be divorced from reality, neither did it achieve complete descriptive accuracy. As a series of formal postulates, Austin's statements were designed to serve the same role as an economist's model; they were to be taken as generally valid and approximate statements. As such, Austin's analysis need not account for all exceptions to the rule, nor account for the precise location of sovereignty in all societies. Nor, do they, as such, "threaten democracy, insult primitive communities, or support the case of Hobbes, Bodin and Machiavelli for the growth of a supreme central authority." See Julius Stone,

the basic proposition of this theory that the sovereign is the sole source of "all powers of actual command in the state and is free from any material or forcible impediment in changing these commands at will."⁶⁴

Frederic Harrison demonstrated, in 1919, the striking parallel to be found between the terms and concepts of sovereignty used by Bentham and Austin and those used by Hobbes and Bodin.⁶⁵ Insofar as Hobbes, too, insisted that law "is not Counsell, but Command,"⁶⁶ and that "Command is, where a man saith, Doe this, or Doe not this, without expecting other reasons than the Will of him that sayes it,"⁶⁷ this intellectual lineage was accurate. But whereas Hobbes, and Bodin as well, were dealing primarily with

63(cont'd)

The Province and Function of Law, p. 61. For an interesting example of this last charge, see H. R. MacGuigan, "Law, Morals and Positivism," 14 University of Toronto Law Journal 1-28 (1961)

64

Frederic Harrison, "Austin and Maine on Sovereignty," p. 27.

65

Frederic Harrison, "Austin and Maine on Sovereignty," On Jurisprudence and the Conflict of Laws (Oxford: Clarendon Press, 1919).

66

Thomas Hobbes, Leviathan (Cambridge: Cambridge University Press, 1904) p. 189.

67

Ibid., p. 182.

abstract social and political problems, Bentham and Austin were attempting to construct a formal legal theory from which all reference to ideal social and political considerations was to be abstracted and attention focused exclusively upon law.⁶⁸

Thus, the analysts' task was two-fold: they attempted to mark off the province of jurisprudence from the study of political ethics and also from the study of positive law as it was actually found in a given political community. Theirs was an effort to advance a series of formal postulates, relevant to any advanced political community, which would enable them to examine the source, administration and enforcement of developed systems of law.⁶⁹ Given a political community, they argued, "there is in that community an existing body of law providing for and recognizing either positively by injunction or negatively by silence, certain rights, duties, persons, and things necessarily found in every such community."⁷⁰ The responsibility of the jurist was to analyze these laws, and to classify

⁶⁸
Julius Stone, The Province and Function of Law, p. 61.

⁶⁹
Julius Stone, The Province and Function of Law, p. 61.

⁷⁰
See [Frederic Harrison], "Modern Phases of English Jurisprudence," The Westminster Review, n.s. XXVI (1864) p. 263.

them, together with "the several subjects and objects with which they are conversant."⁷¹

It was, then, in this sense of a general proposition concerning all advanced legal societies that Bentham made the categorical statement that the source of all law in a community must be the sovereign.

Now by a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience; and that in preference to the will of any other person. Suppose the will in question not to be the will of a sovereign, that is some sovereign or other, in such case, if it come backed with motives of a coercive nature, it is not a law, but an illegal mandate: and the act of issuing it is an offence. ⁷²

And, in the same vein, John Austin advanced his famous definition of sovereignty:

If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. To that determinate superior the other members of the society are subject; or on that determinate superior, the other members of the society are dependent. The position of its other members towards that determinate superior, is a state of subjection, or a state of dependence. The mutual relation which subsists between that superior and them, may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection. ⁷³

⁷¹

Ibid.

⁷²

Jeremy Bentham, The Limits of Jurisprudence Defined, pp. 101-102.

⁷³

John Austin, The Province of Jurisprudence Determined, I, pp. 220-21.

Since Maine was to pay a great deal of attention to this definition of sovereignty, his interest in analytic jurisprudence may have stemmed from his student days when he attended Austin's lectures. He was to become the most famous critic of Austin, and the critic whose commentary set the tone of future analyses of analytic jurisprudence for the next century.⁷⁴ It was Maine, even, who was responsible for attributing the name "analytic jurisprudence" to Austin's system.⁷⁵ Certainly Maine's career was curiously tied to Austin. Over a twenty year period, Maine presented a formal commentary on Austin's jurisprudence at least four times: on 16 April, 1855, he read a paper before the Judicial Society which may be taken as his first extensive critique;⁷⁶ in 1856, Maine's essay on

74

So pervasive has Maine's criticism been that one author recently began a comment on a very good analysis of Austin with the following remark: "Professor Manning in his lecture on Austin has done what one scarcely thought possible today. He has discussed John Austin through forty-six pages without following any of the traditional modes of appraisal." Especially commendable was his "strenuous and usually successful attempt to get away from Maine, on the one hand, and...Maitland...on the other...." See Julius Stone's untitled book review in 47 Harvard Law Review 721-27 (1934). The reference was to C.A.W. Manning, "Austin Today," in Modern Theories of Law, edited by Sir Ivor Jennings.

75

Gustav Radbruch, "Anglo-American Jurisprudence Through Continental Eyes," 52 Law Quarterly Review 537 (1936)

76

See Sir Henry Maine, "Sovereignty: Its Conception and Its Importance."

"Roman Law and Legal Education" appeared in The Cambridge Essays, wherein he reaffirmed Austin's contention concerning the value of Roman law;⁷⁷ in 1861, Ancient Law began with a comparison of Austin's strictures on sovereignty and early law;⁷⁸ and in 1874, he published two lectures at the conclusion of his Lectures on the Early History of Institutions which summarized his attitude and which must be taken, for lack of a later, as the definitive statement of his analysis.⁷⁹

The connection between Maine and Austin was in the nature of a dialogue. Part of Maine's tie with Austin was sympathetic understanding of what Austin was trying to do and recognition that Austin had been responsible for the expanding interest in jurisprudence in England. Part, however, of his tie with Austin was negative; though he retained the greatest respect for him, Maine felt the need to find a wider basis for jurisprudence than "the purely analytic method allowed."⁸⁰ The criticism which Maine brought to bear on analytic jurisprudence was that of a functional-

77

Reprinted in Village-Communities, pp. 330-383.

78

Sir Henry Maine, Ancient Law, pp. 6-8.

79

Sir Henry Maine, Early History of Institutions, pp. 342-400.

80

Frederic Harrison, "The Historical Method," p. 77.

ist, supported by scientifically verifiable empirical knowledge directed against a system of logical analysis. From this perspective Maine made two charges which he felt undermined the analytic position: that the analysts' definition of sovereignty was an overstatement which ignored alternate sources of law; and, specifically, that the analysts had ignored the overwhelming importance of custom in a developing society.

Maine was, himself, quite conscious of the discrepancy in outlook between the analytic and the historical or comparative method. When he said that "there is, in truth, nothing more important to the student of jurisprudence than that he should carefully consider how far the observed facts of human nature and society bear out the assertions which are made or seem to be made about sovereignty by the Analytical Jurists,"⁸¹ Maine was confronting theory with fact. He cautioned his reader that there "is a point which, of all others, it is practically most important to bear in mind, because it does most to show what the Austinian view of Sovereignty really is--that it is the result of abstraction."

It is arrived at by throwing aside all the characteristics and attributes of Government and Society except one, and by connecting all forms of political superiority together through their common possession of force. The...operation of throwing them aside for purposes of classification is, I need hardly say, perfectly

81

Sir Henry Maine, Early History of Institutions, p.357.

legitimate philosophy, and is only the application of a method in ordinary scientific use. 82

While good philosophy and even good deductive technique, thought Maine, analysis did violence to history. To one who defined jurisprudence as "the science of positive law,"⁸³ and who said of philosophy--especially moral philosophy--that "it is certainly neither desirable nor possible that it should be taught apart from its history,"⁸⁴ the degree to which analytic abstraction violated historical fact was exactly the degree to which abstraction was invalid. Thus, Maine observed:

The procedure of the Analytical Jurist is closely analogous to that followed in mathematics and political economy. It is strictly philosophical, but the practical value of all sciences founded on abstractions depends on the relative importance of the elements rejected and the elements retained in the process of abstraction. 85

Since different practical experiences and changing national or regional laws created a fluid historical environment within which rigid analysis was applied, Maine

82

Ibid., p. 359.

83

Ibid., p. 344.

84

Sir Henry Maine, Village-Communities, p. 342.

85

Sir Henry Maine, Early History of Institutions, pp. 360-61.

argued, one could only say that "the theory is perfectly defensible as a theory, but its practical value and the degree in which it approximates to truth differ greatly in different ages and countries."⁸⁶ The analysts ignored the whole question of how any society decided "in what person or group the power of using the social force is to reside;" they also ignored how each community decided in the course of development how the sovereign was to exercise its power. In the process of rejection, the analysts disregarded "the whole enormous aggregate of opinions, sentiments, beliefs, superstitions, and prejudices, of ideas of all kinds, hereditary and acquired, some produced by institutions and some by the constitution of human nature...."⁸⁷ Not only, however, did the analysts thus discard the essential elements of any developing society but they were also "betrayed into speaking or writing as if the materials thrown aside in the purely mental process were actually dross."⁸⁸ This was what compounded their original sin: far from being dross, historical material was the essence of any valid system of jurisprudence.

⁸⁶Ibid., p. 364.⁸⁷Ibid., p. 360.⁸⁸Ibid., p. 361.

The analysts' disregard of custom in early society was particularly misleading in the case of eastern nations. To illustrate his case, Maine used the example of the Sikhs of India, whose ruler took revenue, harried villages and executed great numbers of men, levied armies and reflected "all material power and exercised it in various ways."

"But," said Maine, "he never made a law."

The rules which regulated the life of his subjects were derived from their immemorial usages, and these rules were administered by domestic tribunals, in families or village-communities--that is, in groups no larger or little larger than those to which the application of Austin's principles cannot be effected, on his own admission, without absurdity. 89

This situation was universal in all early communities. "In the first place," Maine argued, this example "may be taken as a type of all Oriental communities in their native state." Secondly, such Oriental examples were "a far more trustworthy clue to the former condition of the greatest part of the world than is the modern social organization of Western Europe, as we see it before our eyes."⁹⁰ Thus, the specific charge against the analysts, that their definition of led them to slight the role of custom and tradition, was applied forcibly by Maine with an argument substantiated by reference to a situation common to all societies in an early

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Ibid.

90

Ibid., pp. 382-83.

state of development. For this reason, though analytic jurisprudence was "indispensable, if for no other purpose than to clear the head,"⁹¹ and that it furnished the jurists "with a rigidly consistent terminology,"⁹² it did not stand the test of functional accuracy.⁹³

The ultimate judgment which Maine made of the analytic school was the same which he made of all systems of abstraction: that were it not for a specific sequence of historical events, it would not even have emerged as a theory. Only because, said Maine, the western world had undergone social and political changes which allowed of the exercise of sovereignty, were the analysts capable of constructing their system.⁹⁴ Analytic jurisprudence "could not have been conceived in the brain of its authors till the time was fully ripe for it."⁹⁵

Maine was suggesting that the historically relative nature of the analytic system of logical analysis robbed it

⁹¹
Ibid., p. 343.

⁹²
Ibid., p. 369.

⁹³
Ibid., p. 387.

⁹⁴
Ibid.

⁹⁵
Ibid., pp. 395-95.

of validity. Relying upon the immutable facts of history rather than upon the ever-changing character of abstraction he could escape this dilemma and present an effective, truthful corrective to analysis. Maine was incapable of seeing the real irony of his position: that however frequent his reference to history and however scientific the technique used, he, too, was unable to escape the charge of relativism. For it can also be said of scientific history and of a system of legal functionalism based upon historical evidence that they "could not have been conceived in the brain of...their authors till the time was fully ripe for it." There was no refuge for Maine in the facts of history.

Again, the implication that historical relativity deprived analysis of its validity ignored the possibility of any such intellectual scheme having a general validity in its own time. Maine seemed to forget that an appeal to history and a discussion of law as it had developed was precisely what the analysts, particularly Bentham, had been trying to escape. Blackstone's history and Lord Eldon's worship of Common Law were the very things which the analysts wished to avoid. For the apparent needs of the moment, analytic jurisprudence can be said to have been valid--if by validity one means effectiveness in promoting a new or different view of law or in promoting changes in a body of law which had apparently reached a state of stagnation in the face of changing social and economic realities.

To say of any system of jurisprudence that it must have an eternal validity based upon anything other than a belief in its validity is to ask the impossible. Finally, Maine did not account for the possibility of altering the conceptual framework in order to bring it into a closer alignment with changing circumstances and to preserve its usefulness as an analytic tool.

It was, perhaps, the ultimate irony that Maine was, through the intensity of his criticisms and the grace of his style, largely responsible for resurrecting Austin's work and in making one interpretation of Austin's Province of Jurisprudence Determined public property. "It is a curious circumstance," said one modern commentator, "that Maine, though one of Austin's most damaging critics, did more than any other man to commend to English lawyers the real merits of Austin's searching legal analysis." 96
Maine's critique of Austin's work marked the beginning of "that wide and deep influence over English jurisprudence which up to that time he had not had." 97

III. Historical Jurisprudence

The third school of jurisprudence dominant in Europe during Maine's lifetime was that of the German romantic

96

J. E. Keller, "Austin's Position in Modern Jurisprudence," p. 54.

97

Sir William Markby, Elements of Law, p. 6.

movement. Historical jurisprudence as devised and developed by Karl Friedrich von Savigny during a lengthy period of productive scholarship, came in time to dominate much of continental juristic thought, even in France where it found a favorable hearing despite the previous dominance of natural law.⁹⁸ The similarity of title--both the continental jurists and Maine laid claim to the name "historical jurisprudence"--and the fact that both did indeed appeal to history as the ultimate tribunal in their discussions has created a rather difficult problem. The question constantly arises concerning the intimacy of Maine's connection with Savigny and the German school. The problem is made more difficult because Maine wrote no convenient critique of historical jurisprudence, and because of his reticence in documenting materials. Only twice in Ancient Law did he make passing mention of Savigny,⁹⁹ and nowhere is there a clear reference to any of the speculations of this school.

Sir Paul Vinogradoff probably did more than any other scholar to suggest an intimate connection between Savigny and Maine, stating that Maine "first approached the study of law mainly under the guidance of the German school of

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See, for example, E. Lerminier's treatment of historical jurisprudence, an excerpt of which appeared very early in the United States. See E. Lerminier, "The German School of Jurisprudence," 14 American Jurist 43-62 (1835-36).

99

Sir Henry Maine, Ancient Law, pp. 281-82 and 247.

historical jurisprudence....¹⁰⁰ Vinogradoff felt that both treated of the general development of law and of the specific questions of the laws of testament, contract and possession in such a way as to "leave no doubt" about the close association.¹⁰¹ Sir Carlton Kemp Allen suggested that there seemed to be little evidence of direct connection with Savigny, but often treated of Maine and Savigny as reflecting the same basic outlook.¹⁰² Roscoe Pound, Dean of the Harvard Law School, rather confused the issue when he put Maine, with more difficulty than might have been necessary, into a Hegelian context; to Pound, Maine's status-to-contract formulation was similar to Hegel's realization of and idea.¹⁰³

There is no ultimate solution to the controversy, of course; any precise attribution of influence is impossible.

100

Sir Paul Vinogradoff, "The Teaching of Sir Henry Maine," Collected Papers, II, p. 180.

101

Ibid.

102

See Sir C. K. Allen, Law in the Making, pp. 109-126. As recently as 1962, Edgar Bodenheimer noted that Maine "was strongly influenced by Savigny's historical approach to the problems of historical jurisprudence...." See Edgar Bodenheimer, Jurisprudence: The Philosophy and Method of the Law (Cambridge: Harvard University Press, 1962), p. 132.

103

Roscoe Pound, Interpretations of Legal History, pp. 53-54 and 74-75.

It is, however, possible to show that, though Maine may well have been aware of the work being done by the German historical school, he did not incorporate it directly into his own system, and that Maine's concept of historical jurisprudence differed radically from that on the continent. The basic distinction was that Maine developed a concept of jurisprudence based upon scientific functionalism as opposed to Savigny's romantic nationalism. Following from this distinction were several specific differences involving the method of legal evolution, the proper method of investigation, and the role of nationalism. Sir Paul Vinogradoff's association of Maine and the German jurists would appear to be essentially misleading.

Historical jurisprudence was not legal history. Whatever difficulties of conceptualization the legal historian encounters, legal history at least purported to be descriptive rather than critical or analytical. The function of historical jurisprudence, like that of natural law or analytical jurisprudence, was to examine the way in which law had developed, to identify significant changes in law, and to analyze the forces which promoted change.¹⁰⁴ Though the ultimate appeal was to history, it was an appeal designed to substantiate the validity of an analytic tool.

104

William Seal Carpenter, Foundations of Modern Jurisprudence (New York: Appleton-Century-Crofts, Inc., 1958), p. 21.

In this respect at least, both Austin's and Savigny's jurisprudence were similar.

The growth of historical jurisprudence in Germany was synonymous with the rise of romantic nationalism. The one was but a specialized application of the other.¹⁰⁵ One can find scattered references to the need for the historical study of law throughout the eighteenth century. Though Montesquieu, for example, Edward Gibbon and Edmund Burke treated of the need for historical perspective,¹⁰⁶ the impetus to historical jurisprudence came from the rise of comparative folk-lore and the early development of comparative philology in Germany. All were part of the romantic reaction to the rationalism of the Enlightenment and to the French Revolution and Napoleonic conquest. Insofar as historical jurisprudence was part of this movement, it "was a passive, restraining mode of thought on legal subjects by way of reaction from the active, creative juristic thought of the era of the French Revolution...."

More immediately, it was a reaction from two phases of the natural-law thinking in its last stages: from the paper constitution making and confident disregard

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See especially Leonard Krieger, The German Idea of Freedom: History of a Political Tradition (Boston: Beacon Press, 1957, pp. 174-215.

106

For the historical method in Montesquieu, see E. Ehrlich, "Montesquieu and Sociological Jurisprudence," 29 Harvard Law Review 582-600 (1915-1916). Montesquieu, Gibbon and Burke are all treated in Frederic Harrison, "The Historical Method," pp. 71-79.

of traditional and political institutions and conditions of time and place...and from the belief in the power of reason to work miracles in legislation....¹⁰⁷

Among the first jurists to turn away from natural law to the study of the history of law was Johan Stephan Pütter, an instructor in law at the University of Göttingen, who sought to explain contemporary law as the result of German national history.¹⁰⁸ Pütter's emphasis upon the relationship of law to the history of a people was taken a step further by one of his students Karl Friedrich Eichhorn, who equated the growth of law with the life of the German people and with the instinctive sense of right and justice possessed by every national group.¹⁰⁹ His conjectures succeeded in identifying the new interest in historical jurisprudence with the development of German nationalism. "No jurist and few historians contributed so heavily to the awakening and fostering of the spirit of nationality."¹¹⁰

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Roscoe Pound, Interpretations of Legal History, pp. 12-13.

¹⁰⁸
Franz Zvilgmeyer, Die Rechtslehre Savigny, pp. 2-4.

¹⁰⁹
See G. P. Gooch, History and Historians of the Nineteenth Century, pp. 40-41.

¹¹⁰
Ibid., p. 41.

Eichhorn's researches laid the foundation for the growth of historical jurisprudence as a fully-developed scheme of juristic thought; Karl Friedrich von Savigny established it as the dominant school of jurisprudence on the continent. Savigny was led to the formulation of his theory by a proposal advanced by a professor of Civil Law, Thibaut of the University of Göttingen, to codify the statutes and customs of the various German states in a logically coherent system on the pattern of Roman jurisprudence and the Civil Code of France. Though Thibaut's call, in 1814, was undoubtedly made for the most patriotic of motives--the creation of a law code common to all the German states as an aid to eventual unification--¹¹¹ it evoked a reply from Savigny which reflected the intensity of feeling against France and things French.¹¹² The little volume which resulted from this dispute, On the Vocation of Our Age for Legislation and Jurisprudence contained the synopsis of von Savigny's argument.

111

John Walter Jones, Historical Introduction to the Theory of Law (Oxford: Clarendon Press, 1940), p. 48.

112

On 4 June, 1814, when Napoleon's empire was collapsing about his ears, Savigny wrote a letter to his publisher, stating that: "the thrice happy events of the last few months have made it all the more important and opportune to express such general views on jurisprudence and legislation." Quoted in H. Kantorowicz, "Savigny and the Historical School of Law," 53 Law Quarterly Review 336 (1937).

The basic contention of historical jurisprudence was that there existed a necessary connection between the present and the past; only through history could the true nature of contemporary law be grasped. Savigny started his argument with the conviction that:

There is no perfectly detached and isolated stage of human existence. The present existence of every individual and that of the State develops with imminent necessity from elements furnished by the past. There is no question of choice between good and bad, in the sense that the approval of a given thing could be called good, the rejection bad, but that the latter was nevertheless possible. Rejection of what is given is, strictly speaking, an impossibility; we are inevitably dominated by it, and we can only err in our judgment, but not change the fact itself. 113

The major vehicle of history was not only the nation but the nation's people. Savigny maintained that a nation's law, like its language, originated in the popular spirit. Law had already attained its fixed and stable character--a character peculiar to a people--long before the period of authentic history began. In the prehistoric era, law, language, manners, and political institutions were completely united in a nation, representing the particular faculties and tendencies of the people. There was an inward necessity in the conception of legal development, "excluding all notion of an accidental or arbitrary origin."¹¹⁴ The "Volksgeist" which Savigny thus described

113

Sir Paul Vinogradoff, Introduction to Historical Jurisprudence, p. 29.

114

Friedrich Karl von Savigny, Of the Vocation of Our

was the foundation of the nation's entire legal development and manifested itself through legal custom. Law, in this sense, was found, not made. Therefore, the notion of a law code and of rationally devised law was impossible. The "Volksgeist" did not, however, create law unaided; no modern, complex system of law could be accounted for solely by the prehistoric impact of national character upon law. Savigny insisted that in a more developed society, the jurists--or legal specialists--were the particular representatives of that "Geist" and were responsible for carrying the "Volk" law into more specialized fields.¹¹⁵ Thus, law had two essential elements: a broad customary base which reflected the life of the community, and the specialized branches which lay in the hands of the jurist.

So long as a nation and a people were growing and developing, contact between the law and the Volk should not be lost, he argued. When, however, a people had reached the zenith of its development--when there was a perfect harmony between the populace and its law--and when the jurists had attained a sufficient grasp of the technical prerequisites for codification and sufficient insight for the degree of precision required, then, only, could codification be considered. ¹¹⁶

¹¹⁴ (cont'd)
Age for Legislation and Jurisprudence, p. 130.

¹¹⁵ Ibid., p. 28.

¹¹⁶ Ibid., p. 60.

He so hemmed in his concession that codification might, at some future moment, be possible that "the impression left... is that in Savigny's view only the most extraordinary coincidence could produce the right code at the right time in the right way."¹¹⁷ Thus, while Savigny kept open the possibility of future codification, his arguments were highly influential in deferring the adoption of a code in Germany until 1896....¹¹⁸

Savigny's historical approach came to dominate German jurisprudence. Though its victory was not easy nor complete,¹¹⁹ historical jurisprudence found adherents in all quarters.¹²⁰ Even in England, where German jurists did not often receive an extensive hearing, his work stimulated interest in the study of Roman law and contributed to the historical orientation of these studies.¹²¹ English

¹¹⁷ Julius Stone, The Province and Function of Law, p. 435.

¹¹⁸ Edwin W. Patterson, "Historical and Evolutionary Theories of Law," Essays on Jurisprudence from the Columbia Law Review, ed. by Board of Editors, 1962-63 (New York: Columbia University Press, 1963), p. 686.

¹¹⁹ H. Kantorowicz, "Savigny and the Historical School of Law," pp. 333-34.

¹²⁰ Ibid., pp. 336-37.

¹²¹ E. Campbell, "German Influences in English Legal Education," p. 389.

interest in Savigny, however, was limited to his specific research and did not extend to the philosophical framework within which his research was couched. English works describing German scholarship, such as John Reddie's Historical Notices of the Roman Law, or John Austin's use of German sources in The Province of Jurisprudence Determined, could not "be described as vehicles of ideology or legal philosophy."¹²²

John Austin's contact with German jurisprudence reflected this selective process. While Austin was led to a heightened awareness of the importance of Roman law as a result of this contact, he was, at the same time, only vaguely aware of the subtleties of Savigny's work. He overlooked the romantic mysticism of Savigny's concept of "Volk", reduced Savigny's emphasis upon custom to a notation that law should be responsive to the public, and generally assumed "that the empirical foundations of English jurisprudence were also the foundations of German legal thought...."¹²³ John Reddie's Historical Notices of the Roman Law and of the Recent Progress of Its Study in Germany continued this selective process, recognizing

122

Ibid. See, for example, John Reddie, Historical Notices of the Roman Law and of the Recent Progress of Its Study in Germany (Edinburgh: Published for W. and C. Tait, 1826).

123

E. Campbell, "German Influences in English Legal Education," pp. 375-77.

Savigny's work in Civil law but ignoring its philosophical framework. Even James Reddie's Inquiries Into the Science of Law, explicitly based on Savigny's jurisprudence, effectively eliminated most of the romantic and nationalistic elements in the German's work.¹²⁴

English aversion to German philosophy may well have derived from the latter's theories of the origin and development of legal systems, particularly the tendency to associate juristic ideas with political nationalism.¹²⁵

John M. Lightwood, an admirer of Maine, indicated that the basis of this association, in the mind of a practical Englishman anyway, was the Germans' unwillingness to maintain a sharp distinction between law and morality which allowed extra-legal considerations a much broader scope than analytical jurisprudence or even pragmatic considerations would admit.¹²⁶ This tendency to consider law as a supplement to morality was intensified, thought Lightwood, by the effort of German jurists to discuss morality as that

124

See James Reddie, Inquiries into the Science of Law, 2nd ed. (London: Stevens and Norton, 1847).

125

A.H.F. Lefroy, "Jurisprudence," 27 Law Quarterly Review 180 (1911).

126

John M. Lightwood, The Nature of Positive Law (London: Macmillan and Co., 1883), pp. 254, 263-64 and 295-300.

which the community as a whole subscribed to, and to find the sanction for law, not in the sovereign's will but in popular acceptance.¹²⁷ In so emphasizing the role of the "Volk", German jurists developed an ideology of nationalism along with their jurisprudence, intermingling juristic and political ideas. None of this coincided with Austin's announced object of isolating law from all associated fields of inquiry or with the overwhelmingly practical concerns of most English jurists.¹²⁸ Nor, one might add, did it coincide with Maine's emphasis upon the need for a dispassionate, scientific approach to jurisprudence.

The focus of the differences between Maine's jurisprudence and that of Savigny lay, however, not only in these specific conflicts of views, but in a more fundamental clash of philosophic assumptions. Lightwood put his finger on it when he noted that English jurisprudence was oriented around the "Real", whereas German jurisprudence was concerned with the "Ideal".¹²⁹ The basic distinction between the jurisprudence of Savigny and that of Maine was the conflict between romanticism and positivism. Savigny's jurisprudence was based upon an appeal to emotion and a mystical reference to the "Volk", upon an idealistic mode of thought. Maine's

¹²⁷

Ibid., pp. 253-54.

¹²⁸

Ibid., pp. 353-69.

¹²⁹

Ibid., p. 262.

appeal to the empirically given and to the scientifically verifiable was almost diametrically opposed.¹³⁰

There was, however, a point of contact between the two otherwise contradictory views: both were grasping for reality. Romanticism sought to achieve reality by subjective methods while positivism attempted to build upon objective observation. Both turned to history for evidence, although their conceptions of historical meaning differed considerably. Harold Höffding argued that:

Their common assumption is that any ideal which stands altogether outside reality is necessarily false. Hence, thinkers of both schools turned away from the eighteenth-century criticism of the understanding, and gave themselves with enthusiasm to the study of the great process of evolution in Nature and history. The concept of development is no less predominant in romanticism than in positivism. Both were concerned to trace out the continuous interconnection of history which had been so rudely interrupted by the Enlightenment and the revolutionary period. A thorough understanding of past times and of the conditions of the development of intellectual life are an essential element of these two schools, which have played so important a part in the history of thought. 131

It is this limited similarity of view which had so misled those who would make of Maine a successor to Savigny in the realm of historical jurisprudence. Forgotten was the distinction between romanticism and positivism; forgotten, too,

130

Harold Höffding, A History of Modern Philosophy, trans. by B.E. Meyer (New York: Dover Publications Inc., 1955), II, p. 293.

131

Ibid.

were the major points of Maine's theory to which his positivism led.

Maine sought to establish, by comparative methods, what similar notions of law could be found in widely-separated systems of law; Savigny was led to an emphasis upon the unique qualities of a single national law. These positions were incompatible.¹³² Even Sir Paul Vinogradoff, who tended to equate Maine's work with that of Savigny, recognized this when he said that "if every social individuality is very much alone by itself, there would be hardly room for comparison, general inferences, and anything in the nature of historical law."¹³³ Maine and Savigny were, thus, making a common recourse to history but in quite dissimilar ways and for totally different purposes.

Maine also departed from Savigny's romantic historicism by his belief in stages of evolution. Maine insisted that, in the course of historical development, primitive notions of law could be cast aside; that was, indeed, the whole basis of his distinction between primitive and modern societies, between East and West and between legal stagna-

132

See A. K. Kuhn, "Functions of the Comparative Method in Legal History and Philosophy," 13 Tulane Law Review 355-56 (1939).

133

Sir Paul Vinogradoff, "The Teaching of Sir Henry Maine," Collected Papers, II, p. 181.

tion and progress. It was the basis for his entire status-to-contract formulation which portrayed western society as leaving behind in its historical past a previous status-oriented organization in favor of one increasingly conscious of the role of the individual. Savigny's concept of the "Volksgeist", by contrast, was characterized by its changelessness and constancy. It affected all foreign elements, including Roman law, that came into contact with it; once formed, the "Volksgeist" bent all to its immutable will, lending a peculiar cast to the law which was unchanging throughout the centuries.

This latter distinction is closely related, finally, to a difference, not so much of method or technique, but of attitude. Savigny's identification of law and "Volk", his hesitancy to admit of legislated change or of codification of the law, gave to German historical jurisprudence a fatalistic quality which it was difficult to overcome. Maine, however, early recognized, not only the constantly changing nature of law--which he equated with progress, however limited it might be--but recognized that innovation and conscious legislation were an integral part of this change, especially in modern society.¹³⁴ Though Maine was a conservative, both in law and politics, he was

¹³⁴ Julius Stone, The Province and Function of Law, p. 460.

not a fatalist. There is a line between conservatism and stagnation which Maine recognized more clearly than did Savigny. On the eternal problem of jurisprudence--that of reconciling change with stability--Maine and Savigny found different answers.

That there has been such a tendency to equate Maine and Savigny, or Maine with other branches of European philosophy, may, perhaps, be attributed to the tendency on the part of English jurists to recognize Savigny's work only as work in history and civil law, while ignoring the philosophic intricacies in which this work was dressed. By this view, it is enough that Maine and Savigny both appealed to history in their search for truth. It is enough to look only at the externals rather than the fundamentals of philosophic presupposition. When, however, one does compare, not only the work but also the philosophies of the two, their essential incompatibility and mutually exclusive natures become apparent.

IV. Status to Contract

Maine's famous generalization concerning the movement of progressive societies from status-to-contract has exercised the imagination of the legal fraternity for over a century. That most who have written critiques of Maine's dictum have found fault with it is due to several factors: the lack of precision in Maine's original definition, the

misuse to which it was put by his more enthusiastic contemporaries, and the factual, historical inaccuracies to which any such broad generalizations are subject. The first two criticisms do not themselves cripple Maine's functionalist and scientific jurisprudence. Maine's whole approach to jurisprudence was characterized by the broadest and most suggestive conceptualizations presented to the reader with grace and charm rather than precision. Yet, stylistic weaknesses do not, alone, obviate the validity of scientific jurisprudence. Nor could Maine be blamed for the excesses of another's interpretation of his statement. The factual and historically inaccurate aspects of the criticism are more telling, for they suggest that the scientific functionalism of Maine's jurisprudence was ultimately of no greater service to his efforts to find the true nature of law than was Austin's analysis or Savigny's romantic history. All were based upon intellectual conceptualizations; Austin admitted as much, but Maine, as most positivists, sought to deny the abstract nature of his work by what he considered an impartial appeal to fact. That Maine's formulation was factually inaccurate, that it reflected more what he wanted to see than what had, indeed, occurred, indicates the weakness of positivism when applied to the study of society. The seeming neutrality of simple fact was betrayed by the commitment of the author.

Though quoted before in another context, Maine's formulation is sufficiently important to justify its repetition. When speaking of "Primitive Society and Ancient Law," Maine closed his remarks with the following lengthy observation:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organization can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is contract.

.....

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract. 135

In support of this statement, Maine noted that in western Europe, the status of slave was replaced by a contractual relationship between master and servant, that the status of "Female under Tutelage," other than that of her husband, had ceased, and that "from her coming of age to her marriage all relations she may form are relations of contract." Finally, the status of "Son under Power" had given way to a relationship "to which only contract gives...legal validity." Even the exceptions proved the rule: a child under guardianship or a lunatic retained their non-contractual position "on the single ground that they do not possess the faculty of forming a judgment in their own interest; in other words that they are wanting in the first essential of an engagement by Contract."¹³⁶

The status-to-contract generalization, as it appeared in Ancient Law, quite clearly limited itself to the condition of persons and to a description of the changing mode of determining the relationship of persons, one to another. The statement also seemed to suggest a definition of "status" to mean "biologically bred, temporal, order-of-birth status in an objectively determinable genealogical table."¹³⁷ It did not, then, refer to the division of a

¹³⁶

Ibid., p. 164.

¹³⁷

F.S.C. Northrup, "Comparative Philosophy of Comparative Law," 45 Cornell Law Quarterly 624 (1960).

contractual society into social groups as a result of greater or lesser success within the social structure.

The apparent simplicity of this definition was, however, obscured by the implication throughout all of Maine's work, that because civilization appeared to be progressing toward contract the future of civilization was somehow dependent upon the continued development of freedom of contract, that "freedom of contract would itself solve the problem of social organization."¹³⁸ Maine was tempted to equate freedom of contract with a much broader and more stereotyped concept of individualism. In this broader context, then, Maine's statement may be taken to mean:

...that the rights and duties, capacities and incapacities of the individual are no longer being fixed by law as a consequence of his belonging to a class, but those former incidents of status are coming more and more to depend for their nature and existence upon the will of the parties affected by them; and the remedy for breach of those incidents is becoming increasingly contractual in nature. ¹³⁹

A product of Victorian England with its classical, competitive economics, reinforced by post-Darwinian concepts of a struggle for existence, Maine tended to broaden his own carefully limited initial definition into a belief that

¹³⁸

K. B. Smellie, "Sir Henry Maine," p. 76.

¹³⁹

R. H. Graveson, "The Movement from Status to Contract," 4 Michigan Law Review 261 (1941).

freedom of contract was the essential basis of civilization. He equated the individualism of a contractual society with a social struggle for existence and allied both to social progress. On this question, he said:

The motives, which at present impel mankind to the labour and pain which produce the resuscitation of wealth in ever - increasing quantities, are such as infallibly to entail inequality in the distribution of wealth. They are the springs of action called into the activity by the strenuous and never-ending struggle for existence, the beneficent private war which makes one man strive to climb on the shoulders of another and remain there through the law of the survival of the fittest. 140

Throughout his political thought ran a deep sympathy for an institution which would act as a conservator of contract. One of the advantages he saw in the American constitution, for example, was that it denied to the states the right to make laws impairing the obligation of contracts. There was, in his estimation, "no more important provision in the whole constitution,"¹⁴¹ It was this provision which "secured full play to the economical forces by which the achievement of cultivating the soil of the North American Continent was performed," and it was the "bulwark against democratic impatience and Socialist fancy."¹⁴²

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Sir Henry Main, Popular Government, p. 50.

141

Ibid., p. 247.

142

Ibid., p. 248.

It was the rule of democracy and socialism which was the greatest threat to the rule of free contract. First, democracy threatened to deprive individuals of the fruits of their labors as garnered in contractual society. The honest competition of individuals inevitably resulted in a structured society, but not in a status-oriented society. This stratification was threatened by the redistribution of "the stock of good things" among the whole population-- by a crowd "gorging themselves on the meat and intoxicating themselves with the liquors."¹⁴³ The inevitable result was a return to a primitive communal society, in which property was held in common by all. It was a return to that very type of society from which the western world had been fortunate enough to escape.

Maine's dual treatment of the status-to-contract formulation--as a strict personal definition and as a broad economic and political question--was the source of most of the confusion regarding his statement. One modern authority has acknowledged that "if we confined our examination to the modern definition of the family, we might arrive at a vindication of Maine's thesis." But, he hurriedly added: "an examination of status in the wider sense might lead us

¹⁴³Ibid., p. 46

to a rather different conclusion."¹⁴⁴

If Maine's own understanding of his formulation was marked by indecision, that of his contemporaries was not. "Status-to-contract" became a slightly specialized shorthand for referring to a very pervasive Victorian article of faith: the world was in the process of change from an old, established feudal system to a new dynamic industrial and individualistic society. John Stuart Mill's comment that "mankind have outgrown old institutions and old Doctrines"¹⁴⁵ was recognition of the fact that society was in the process of transition. The past was the Middle Ages. It was the dominance of medieval institutions and medieval doctrines that was being broken. The rule of church, king and nobility, the existence of fixed classes, the prevalence of village agriculture and town guild all belong to the "old European system of dominant ideas and facts" which was being destroyed.¹⁴⁶ "Society," said Edward Dowden, "founded on the old feudal doctrines, has gone to wreck in the storms that have blown over Europe in the last hundred

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Wolfgang W. Friedmann, "Some Reflections on Status and Freedom," Essays in Jurisprudence, ed. by Ralph A. Newman, p. 226.

¹⁴⁵

John Stuart Mill, The Spirit of the Age, p. 6.

¹⁴⁶

Matthew Arnold, "Heinrich Heine," Essays in Criticism, First Series, Works (London: Macmillan and Co., 1903), III, pp. 186-87.

years."¹⁴⁷ While the feudal past had ended, the future was only just becoming clear: "a new industrial...period has been inaugurated."¹⁴⁸ The new age saw the development of industry and of commerce, drawing men off the land and opening new careers dependent upon talent rather than birth. It was this which had destroyed the feudal structure of society.¹⁴⁹ The old system of fixed regulation and rigid custom had given way to the new principles of laissez-faire. Mill summed up the transition succinctly when he said:

For what is the peculiar character of the modern world--the difference which chiefly distinguishes modern institutions, modern social ideas, modern life itself, from those of times long past? It is, that human beings are no longer born to their place in life, and chained down by an inexorable bond to the place they are born to, such favorable chances as offer, to achieve the lot which may appear to them most desirable. Human society of old was constituted on a very different principle. All were born to a fixed social position, and were mostly kept in it by law, or interdicted from any means by which they could emerge from it. As some men are born white and others black, so some were born slaves and others freemen and citizens; some were born patri- cians, others plebeians; some were born feudal nobles,

147

Edward Dowden, "Victorian Literature," Transcripts and Studies, 2nd ed. (London: Kegan Paul, Trench, Trübner and Co., 1896), p. 159.

148

Ibid.

149

John Stuart Mill, "M. de Tocqueville on Democracy in America," Dissertations and Discussions, II, pp. 62-71.

others commoners and courtiers. A slave or serf could never make himself free, nor, except by the will of his master, become so. 150

What better summary of Mill's description than Maine's status-to-contract generalization? There seems little doubt that Maine, too, partook of this reasoning, that he, too, was convinced that the western world was in the process of change, that the old was status, the new contract.

Finally, there is more than a slight suggestion that Maine overlooked several relevant facts in his construction. Maine's work, for example, was primarily in Roman and early Aryan law; he had little to do with Anglo-Saxon common law.¹⁵¹ Unfortunately, Maine's thesis "will not fit the phenomena of the Common Law."¹⁵² This flat statement by Roscoe Pound has been amply supported by more recent scholarship, which suggests that, while Maine's dictum might prove true as far as domestic status is concerned, "state interference in the terms and conditions of employment in industry has given rise to a new type of personal condition

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John Stuart Mill, "The Subjection of Women," On Liberty, Representative Government and the Subjection of Women: Three Essays by John Stuart Mill (Oxford: Oxford University Press, 1933), pp. 445-46.

151

R. H. Graveson, "The Movement from Status to Contract," p. 261.

152

Roscoe Pound, Interpretations of Legal History, p. 56.

which bears many of the features of a status."¹⁵³ The protection of weaker members of society from economic exploitation, regulation of the terms and conditions of employment, the responsibility imposed upon the community as a whole for support of those stricken by old age, ill-health and unemployment, compensation for accident, and the standardization of commercial contracts are but a few examples wherein modern Common Law treated groups within society as units rather than individuals, and restricted the absolute freedom of contract.¹⁵⁴ Changing social requirements indicated that there would be many different attitudes toward the function and substance of contract. The concentration of industry and business, the substitution of collective for individual bargaining in the new industrial society, the expansion of welfare and social service by the state and the growing demand for economic security have all promoted changes in the nature of contract.¹⁵⁵

¹⁵³

R. H. Graveson, "The Movement from Status to Contract," p. 267.

¹⁵⁴

Ibid., pp. 268-71. See also Wolfgang Friedmann, Law and Social Change in Contemporary Britain, and Legal Theory, especially pp. 145-46 and Roscoe Pound, Interpretations of Legal History, pp. 61-66 and 109.

¹⁵⁵

Wolfgang Friedmann, Law and Social Change in Contemporary Britain, pp. 44-45.

Though Maine could not be blamed for not being able to foresee future developments, he overlooked trends in his own day which were a taste of things to come. A. V. Dicey's classical analysis of the recoil from contract to status clearly indicated how mixed were the legislative and legal developments of the nineteenth century. Individualism and freedom of contract did not triumph completely at any moment; there was always a tension between what Dicey called Individualism and Collectivism.¹⁵⁶ Neither clearly dominated, though there were tides of Individualism till the middle of the century, and of Collectivism after. Thus, "the current of opinion had for between thirty and forty years been gradually running with more and more force in the direction of collectivism, with the natural consequence that by 1900 the doctrine of *laissez-faire*...had more or less lost its hold upon the English people."¹⁵⁷

156

A. V. Dicey, Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century, 2nd ed., pp. 211-17. See especially his discussion of "The Trend and Tendency of Benthamite Legislation," and the comparison between this and chapters VII and VIII on collectivism. Though Dicey tended to use the 1870's as the turning point, the transition was obviously less marked than Maine's thesis would have us suppose.

157

Ibid., pp. xxx-xxxii. Interestingly, Dicey has, himself, been accused of seeing the distinction between state coercion and individual freedom "in unrealistically sharp contrast." See W. L. Burn, The Age of Equipoise: A Study of the Mid-Victorian Generation (London: George Allen and Unwin, 1964), pp. 133-136.

Thus, Maine's thesis was but marginally true in 1861 and has not been proven a particularly accurate prediction of future developments.

So far as the Common Law is concerned that feature of status is predominant in both the past and present times. Historically it is impossible to say that in the Common Law the movement of English society, which we assume to have been progressive, has been from status to contract.

.....

...Maine's celebrated dictum was far from true in 1861 when he published Ancient Law, and it is even less true today. The limitations which he placed upon his maxim rendered it much less a brilliant generalization than has been commonly realized, for this exclusion of status based upon agreement eliminated every personal legally imposed condition which was based on some other ground than natural incapacity. The Common Law is, in various senses, a peculiar thing; and a principle based upon the evolution of Roman family law is hardly likely to apply perfectly to a system based fundamentally on the evolution of feudal land tenure. 158

Unless one accepts Maine's argument that status-oriented societies are primitive societies, and that, consequently a return to a form of status is a retrogressive step in social progress, one has to conclude that Maine's dictum was essentially fallacious.

Status-to-contract was--and is--however, a convenient conceptualization. It provided one of the major elements of analysis in Dicey's treatment of the nineteenth century.

158

R. H. Graveson, "The Movement from Status to Contract," pp. 271-72.

It lurks beneath the surface of most modern political controversy.¹⁵⁹ But it is a conceptualization, not a dispassionate statement of empirically verifiable fact. Though Maine thought to take refuge in the fortress of fact, science and functionalism to repel the attacks of natural law and analytic jurisprudence, he was not able to do so. His fortress did not exist; his refuge was an illusion. In the last analysis, Maine was matching, as we must always match, one conception against another.

159

A good portion, for example, of the dichotomy between liberal and conservative, as seen by Barry Goldwater, seems centered on the distinction between status and contract. See Barry Goldwater, The Conscience of a Conservative (New York: Hillman Books, 1961), passim.

CHAPTER VII

FACT VERSUS COMMITMENT: MAINE'S POLITICS

"It had always been," said Maine in the Preface to his political essays, "my desire and hope to apply the Historical Method to the political institutions of men."¹ This hope came true with the publication of four virulent attacks upon the assumptions and weaknesses, past and present, of democracy and of democratic institutions in the Quarterly Review.² Republished as Popular Government: Four Essays, Maine's critique became one of the standard conservative references, making his name stand beside those of Herbert Spencer, Thomas Carlyle, George Cornwall Lewis, John Ruskin, Matthew Arnold, James Fitzjames Stephen and W. E. H. Lecky as major critics of popular government and electoral reform.

Maine's excursion into political theory was marked by two general characteristics: it was the work of a jurist attempting to elaborate the political ramifications

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Sir Henry Maine, Popular Government, p. vi.

2

See Sir Henry Maine, "The Prospects of Popular Government," The Quarterly Review, CLV (1883), pp. 551-576; "The Constitution of the United States," The Quarterly Review, CLVII (1884), pp. 1-31; "The Nature of Democracy," The Quarterly Review, CLVIII (1884), pp. 297-333; and "The Age of Progress," The Quarterly Review, CLIX (1885), pp. 267-98.

of his legal theory, and it was the work of a philosophic positivist, bringing to bear an historically-oriented functionalism upon what he felt to be the evils of a priori idealism. Neither characteristic was new. Because the philosophic ramifications of jurisprudence cover the full range of problems involved in social and legal evolution, no jurist could avoid political analysis, at least by implication. Savigny's historical jurisprudence, and that of Bentham and Austin too, had political implications, the one conservative, the other potentially reformist. Similarly, Maine's positivistic legal analysis was part of a broader scheme. So neatly did Maine's concept of legal evolution fit into the pre-existing laissez-faire mentality that its application seemed to bear out the essential economic and political truths of this doctrine and to support the maintenance of a limited government in the face of Democracy.

If Maine's political analysis was not new, neither was it as scientific as he would have had his readers believe. One of the characteristics of Maine's functionalism was that it was based as much upon preconceptions and drawn as much from existing thought patterns as any of the a priori conceptualizations he assailed. His positivism and his emphasis upon a functional analysis of political as well as legal institutions, his status-to-contract

theory and indeed all his acquired political biases were but ideals given the false sanction of science.

The publication of Popular Government opened a polemical hornets' nest. Maine called down upon himself the righteous indignation and furious wrath of democratic exponents on both sides of the Atlantic; his book was the subject of bitter correspondence in the journals. John Morley and E. L. Godkin, particularly, cried "shame" and "unfair;" often rightly, but almost as often, blindly. Similarly, Popular Government elicited support, just or unjust, expounded with similar violence. From its publication in 1885 to the end of the century, Popular Government was cited frequently in support of arguments against almost any change in the social or institutional structure of England.

The controversy over the best or proper form of government into which Maine plunged is eternal and unanswerable. To dismiss his case as untenable because his method of analysis was not as he thought it was, is impossible. Though his technique was not scientific, the warnings he sounded have, in retrospect, proven partly valid. As happens with disconcerting frequency in the polemical works of political conservatives, Maine was able to focus upon the less savory aspects of democracy, to foresee the eventual disillusionment which democracy was to bring even to its staunchest supporters, and to indicate the general

trend of social and political evolution after the advent of universal suffrage. In some ways, Maine, looking to the past, was able to see the future more clearly than the advocates of democratic progress. The changes which Maine predicted in social organization, political structure and economic development have often proven out. The nub of the matter is this, however: despite the apparent validity of much of his conjecturing, the world has not yet ended in confusion, revolution and general chaos. The world that he knew is indeed gone, but to say that the new world is better or worse is a matter of preference only. What has occurred is change; what has not occurred is disaster. As so often happens in the political theorizing of conservatives, Maine would have equated one with the other.

In the light of recent and more sympathetic research, few of our facile generalizations concerning Victorian England have retained their validity. Whether a poor, blind, complacent people,³ or a people torn by religious doubt,⁴ whether crass materialists or lamentable idealists

³ See H. H. Asquith, Some Aspects of the Victorian Age (Oxford: The Clarendon Press, 1918), p. 6 .

⁴ See H. V. Routh, Towards the Twentieth Century: Essays in the Spiritual History of the Nineteenth (New York: Macmillan and Co., 1937), p. ix.

nostalgic for the past,⁵ whether conformist⁶ or ruggedly individualistic, we can no longer tell. The Victorian frame of mind--to use W. E. Houghton's phrase--would seem to have been a plural frame of mind. There appear to have been several minds, often in competition and conflict, several attitudes, even within the same person, not always consistent with one another.⁷ Part of the confusion may be explained by the then new and almost universal conception of the period as one of transition. "Never before had men thought of their own time as an era of change from the past to the future."⁸ The past was the feudal past, the future an industrial and non-aristocratic future, and in between was uncertainty. To a certain extent the transition was intellectual, the abandonment of one set of beliefs for another. John Stuart Mill lamented the fact, however, that the change was incomplete, and that "no fixed new opinions have yet generally established themselves in the place of those which we have abandoned...." Certain it was "that no new doctrines, philosophical or social, as

⁵
Ibid., p. 45.

⁶
See A. C. Ward, Twentieth Century Literature, 1901-1940, 7th ed. (London: Methuen and Co., 1940), pp. 2-3.

⁷
See Jerome H. Buckley, The Victorian Temper: A Study in Literary Culture (New York: Vintage Books, 1964), pp. 1-13.

⁸
W. E. Houghton, The Victorian Frame of Mind, p. 1.

yet command, or appear likely soon to command, an assent at all comparable in unanimity to that which the ancient doctrines could boast of while they continued in vogue."⁹ Consequently, "few except the very penetrating, or the very presumptuous, have full confidence in their own convictions,"¹⁰ leaving the masses of the people without intellectual leadership.¹¹

This transition was not, however, seen as exclusively intellectual; basically the flux of Victorian life was ascribed to economic change which then had social, institutional and political repercussions. Thomas Arnold's enthusiasm for the Birmingham Railway was indicative of the importance given even the most unsightly manifestation of economic growth. "I rejoice to see it," he said, "and think that feudality is gone forever."¹² Mark Pattison, too, argued that in the application of science to the arts, in industrialized society, commercial enterprise, organization of credit, geographical discovery, and consequent

⁹ John Stuart Mill, The Spirit of the Age, p. 12.

¹⁰ Ibid., p. 13.

¹¹ Ibid., p. 17.

¹² Arthur Penrhyn Stanley, The Life and Correspondence of Thomas Arnold (New York: Charles Scribner's Sons, 1889), II, p. 353.

colonization, the achievements of no age can for a moment compare with those of our own."¹³ George Eliot's somewhat more gentle description of the impact of industrialization upon the "respectable market-town" of Treby Magna¹⁴ was a fictional counterpart to Thomas Carlyle's more florid prose in Sartor Resartus: "...cannot the dullest hear Steam-engines clanking around him?"

Has he not seen the Scottish Brassmith's IDÉA (and this but a mechanical one) travelling on fire-wings round the Cape, and across two Oceans; and stronger than any other Enchanter's Familiar, on all hands unweariedly fetching and carrying: at home, not only weaving Cloth; but rapidly enough overturning the whole old system of Society; and, for Feudalism and Preservation of the Game, preparing us, by indirect but sure methods, Industrialism and the Government of the Wisest? ¹⁵

Mark Pattison would have used "the same fancy nomenclature which named the eighteenth century 'seculum rationalisticum cum'," to "propose the epithet 'realisticum' for the nineteenth,"¹⁶ for the changes involved were based on the apparently realistic qualities of economics.

13

Mark Pattison, "The Age of Reason," The Fortnightly Review, XXVII (March, 1877), p. 356.

14

George Eliot, Felix Holt (New York: Harper and Brothers, 1906), pp. 54-57.

15

Thomas Carlyle, Sartor Resartus: The Life and Opinions of Herr Teufelsdröckh (London: Chapman and Hall, 1871), pp. 82-83.

16

Mark Pattison, "The Age of Reason," p. 356.

As economic development brought change--as Treby Magna "took on the more complex life brought by mines and manufactures"¹⁷--there was an increasing consciousness that, perhaps, established social and political conventions and institutions were outdated and in need of alignment.

Matthew Arnold indicated this awareness when he said:

Modern times find themselves with an immense system of institutions, established facts, accredited dogmas, customs, rules, which have come to them from times not modern. In this system their life has to be carried forward; yet they have a sense that this system is not of their own creation, that it by no means corresponds exactly with the wants of their actual life, that, for them, it is customary, not rational. The awakening of this sense is the awakening of the modern spirit. The modern spirit is now awake almost everywhere; the sense of want of correspondence between the forms of modern Europe and its spirit, between the new wine of the eighteenth and nineteenth centuries, or even of the sixteenth and seventeenth, almost everyone now perceives; it is no longer dangerous to affirm that this want of correspondence exists; people are even beginning to be shy of denying it. To remove this want of correspondence is beginning to be the settled endeavour of most persons of good sense. ¹⁸

Traditional social organization, said John Stuart Mill, was one of the phenomena which most required change. "The social relations of former times and those of the present, not only are not, but cannot possibly be, the

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George Eliot, Felix Holt, p. 56.

¹⁸

Matthew Arnold, "Heinrich Heine," p. 174.

same."¹⁹ "Feudality," he continued:

Feudality, in whatever manner we may conceive it modified, is not the type on which institutions or habits can now be moulded. The age that produces railroads, which, for a few shillings, will convey a labourer and his family fifty miles to find work; in which agricultural labourers read newspapers, and make speeches at public meetings called by themselves to discuss low wages,--is not an age in which a man can feel loyal and dutiful to another because he has been born on his estate. Obedience in return for protection is a bargain made only when protection can be had on no other terms. Men now make that bargain with society, not with an individual. The law protects them and they give their obedience to that. 20

In the realm of politics, this condition of flux meant that "the popular respect for the higher classes is by no means the thing that it was" and that "the power of the higher classes, both in government and society, is diminishing, while that of the middle and even the lower classes is increasing, and likely to increase."²¹ It appeared to Mill that the present trend of political change was from "the government of a few, to the government, not indeed of the many, but of many--from an aristocracy with a popular infusion, to the regime of the middle class."²²

19

John Stuart Mill, "The Claims of Labor," Dissertations and Discussions, II, p. 284.

20

Ibid., pp. 284-85.

21

John Stuart Mill, "M. de Tocqueville on Democracy in America," Dissertations and Discussions, II, p. 93.

22

Ibid., p. 99.

This transition, one of the features of progressive civilization, "one of the incidental effects of the progress of industry and wealth,"²³ was signified by the legislative innovations which characterized the period between the the Reform Acts of 1867 and 1884-85.

The special character of the political life of this period was determined by two factors: the Reform Act of 1867, which deprived the Radicals of the most important grievance against the existing social order, and the long period of economic prosperity which lasted until 1880, confirming "both the popular belief in the inexorable march of progress and the economic supremacy of the aristocracy and the middle class."²⁴ The period began with a near-accidental reform of the political structure of the country. Beginning with a proposal for moderate reform, Benjamin Disraeli soon found that he was sponsoring "by far the most radical measure that had been proposed by any government."²⁵ Gladstone, initially a moderate reformer, sponsored so

²³ John Stuart Mill, "On Liberty, Representative Government, The Subjection of Women: Three Essays, pp. 141-42.

²⁴ H. J. Hanham, Elections and Party Management: Politics in the Time of Disraeli and Gladstone (London: Longmans, Green and Co., 1959), p. 9.

²⁵ W. E. Lunt, History of England, 3rd ed. (New York: Harper and Brothers, 1945), pp. 694-95.

many liberal amendments to the bill that an opponent described it as "the result of the adoption of the principles of Bright at the dictation of Gladstone."²⁶ While the reform measure continued the principle laid down in 1832 of transferring seats from small to large boroughs and counties, the effect of these transfers was slight; the radical portion of the bill was the extension of the franchise.²⁷ The number of voters nearly doubled, giving the vote to nearly all landowners, tenant farmers and middle-class householders, and the borough vote to almost all established householders.²⁸

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John Morley, The Life of William Ewart Gladstone (London: Macmillan and Co., 1903), II, p. 235.

27

H. J. Hanham, Elections and Party Management, p. x. Although there were fifty-three cases of redistribution, little was done to remedy existing inequities in representation. There were still more than seventy boroughs with a population less than 10,000, while at the same time there were over sixty constituencies with the population over 200,000. Thus, Partlington, with less than 3,000 people and 140 electors, was equally a borough with Liverpool, which had 500,000 people and 60,000 electors; Rutland, with a population of 22,000 had the same parliamentary power as South-East Lancashire with a population of 403,000.

28

Ibid., p. ix. See The Statutes of the United Kingdom of Great Britain and Ireland, vol. 107, 30 and 31 Vict., c. 102, pp. 527-555. The franchise was extended to all adult males in a borough who owned a dwelling or who were tenants in a dwelling on which they paid the local poor tax, or who occupied a dwelling worth £10 to £5. Tenants paying £12 a year were also enfranchised. Interestingly, the Reform Act, by treating the citizenry as

Though the Reform Act of 1867 enfranchised the greater part of the urban working class, it created almost as many problems as it solved; the process of change was far from complete. The Act withheld the franchise from the working-class householders in the counties and from those who occupied or rented buildings for only a short time or as a condition of employment, so that further changes in the composition of the electorate could be expected. Secondly, the newly created democracy had yet to be freed from coercion and bribery; for the most part the new voters were still economically dependent upon the previous voters for their livelihood and had not yet begun to act independently in political matters.²⁹ Finally, the Reform Act intensified the distinctions between county and borough constituencies. "The counties became the strongholds of the old order; the boroughs, or rather the larger boroughs, became the field for experimentation in 'democratic' political organization."³⁰ It was toward the rectification of these remaining problems that the reforms after 1867 were directed.

28 (cont'd.)

members of economic units rather than as individuals, retained a strong flavor of status legislation.

29

Sir David Lindsay Keir, The Constitutional History of Modern Britain, 1485-1951, 5th ed. (London: Adam and Charles Black, 1955), p. 466.

30

H. J. Hanham, Elections and Party Management, p. xi.

The seventeen years after 1867 saw scarcely a break in political activity, even during the Conservative ministry of 1874-1880.³¹ Despite the flurry of legislative innovation, however, social and economic decisions remained largely in the hands of the upper-middle class and the aristocracy. Continued prosperity had meant the continuation of a relatively stable political environment. By 1880, however, the preceding fifty years of prosperity were coming to an end; though the working class was not, at first, affected, the landlord, the industrialist and the churchman were in difficulty. Prosperity had "sustained the old hierarchical society which in the forties had

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Reformers tended to concentrate upon the issue of electoral corruption and mismanagement, though in Popular Government, Maine did not give them credit for their concern with this problem. In 1868, control over disputed elections was transferred from Parliamentary committee to the Court of Queens Bench. See Charles Seymour, Electoral Reform in England and Wales (New Haven: Yale University Press, 1915), pp. 423-27, and the Statutes of the United Kingdom of Great Britain and Ireland, vol. 108, 31 and 32 Vict., c. 125, pp. 624-641. In 1872, Gladstone was able to carry a bill supporting the secret ballot. See The Public General Statutes, 35 and 36 Vict., c. 33, pp. 193-236. Electoral corruption and coercion continued to be a problem, however. Between 1867 and 1885, four boroughs--Beverley and Bridgewater in 1870 and Macclesfield and Sandwich in 1885--returning six members were disfranchised for corrupt practices. See Sir David Lindsay Kier, Constitutional History, p. 467. It was not till 1883 that Gladstone's second government succeeded in putting the electoral process under law. See Charles Seymour, Electoral Reform in England and Wales, pp. 442-45.

seemed doomed to decay."³² The end of prosperity threatened its social and economic pre-eminence just as the Reform Acts of 1884 and 1885 threatened its political dominance. The Franchise Act of 1884 extended household suffrage to the counties, almost tripling the electorate.³³ The Redistribution Act of 1885 merged all boroughs of under 15,000 into their counties, brought representation of one member each to all boroughs over 50,000 and provided larger boroughs with members in proportion to their size.³⁴

The results of these reforms were dramatic. The House

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H. J. Hanham, Elections and Party Management, p. xvi.

33

Charles Seymour, Electoral Reform in England and Wales, p. 465.

34

Ibid., pp. 513-518. See "The Representation of the People Act," The Public General Statutes, 48 and 49 Vict., c. 15, pp. 28-89; and "The Redistribution Act," The Public General Statutes, 48 and 49 Vict., c. 23, pp. 128-213. Altogether, some 72 boroughs disappeared and 36 others lost one member. From these and other disfranchisements, 142 seats were available for redistribution. Boroughs of 50,000 to 165,000 received two members each. Those which were larger received three members or more on the basis of one additional member for each additional 50,000 voters. All other constituencies--except Oxford, Cambridge and Dublin, plus the Scottish universities--were single-member constituencies. The grossest exception was perhaps the Ramford division of Essex which returned one member for 217,000 inhabitants, the same as Durham City with only 15,000 people. Despite these inconsistencies, a rough average of one member for each 54,000 people was achieved.

of Commons, after 1867, had continued to be dominated by territorial and aristocratic influence, exerted through a restricted electorate and the preponderance of small, agricultural boroughs. The Act of 1884 destroyed the first and that of 1885 the second; the buttresses of aristocratic power had fallen. The Redistribution Act of 1885, especially, meant the end, not only of the age-old predominance of southern over northern constituencies, but also of agricultural interests over all others.³⁵

Everything was in a condition of change and flux. In 1839, before the impetus of reform had really begun, Thomas Arnold spoke gloomily of "the fearful state in which we are living," and could just avoid "despair that the remedy may be found and applied; even though it is the solution of the most difficult problem ever yet proposed to man's wisdom and the greatest triumph over selfishness ever yet required by his virtue."³⁶ Only six years later, however, John Stuart Mill could report that:

Reforms have still to encounter opposition from those whose interests they affect, or seem to affect; but innovation is no longer under a ban, merely as innovation. The existing system has lost its prestige: it has ceased to be the system which Tories had been

³⁵ Charles Seymour, Electoral Reform in England and Wales, p. 518.

³⁶ Arthur Penrhyn Stanley, The Life of Thomas Arnold, pp. 514-15, from a letter to Mr. Justice Coleridge, 25 September, 1839.

taught to venerate, and has not become that which Liberals were accustomed to desire. When any widespread social evil was brought before minds thus prepared, there was such a chance as there had not been for the last two hundred years, of its being examined with a real desire to find a remedy, or at least without a predetermination to leave things alone. 37

By 1885, however, it was becoming increasingly apparent that the tide of reform was outrunning public support. James Fitzjames Stephen's Liberty, Equality, Fraternity³⁸ and even Maine's Popular Government reflected the outrage of the old order at the new and frightening state of affairs, while Carlyle's Sartor Resartus, Past and Present, Chartism, and his Latter Day Pamphlets³⁹ revealed his own intense aversion to these changes. Supporters of the old order were not, however, the only persons fearful of the direction which events appeared to be taking. John Stuart Mill, though often in the forefront of liberal thought, attempted to forestall some of the most obvious disadvantages of popular government in his On Liberty (1859) and

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John Stuart Mill, "The Claims of Labour," Dissertations and Discussions, II, p. 267.

38

See James Fitzjames Stephen, Liberty, Equality, Fraternity (New York: Henry Holt and Co., 1873).

39

See Thomas Carlyle, Sartor Resartus; Miscellaneous Essays (London: Chapman and Hall, 1872); and Latter Day Pamphlets (London: Chapman and Hall, 1872).

Considerations on Representative Government (1861).⁴⁰

Even Walter Bagehot, in his sympathetic analysis of The English Constitution (1867) was anxious to see that the new voters were completely educated and capable of filling their new role.⁴¹

The rapidity with which change was occurring and the momentous proportions of this social, economic and political upheaval gave to Edward Dowden's reflection on the nature of his age special significance. "Our age is, and has been," he said, "in a far profounder sense that the term can be applied to the age of Milton, **an age of revolution.**"⁴² That the old order had passed was apparent; what the new trend of affairs foretold was not yet so clear.

Society, founded on the old feudal doctrines, has gone to wreck in the storms that have blown over Europe during the last hundred years. A new industrial and democratic period has been inaugurated; already the interregnum of government by the middle classes has proved its provisional character. But the social and political forms suitable to this new epoch are as yet unorganized, and perhaps have not as yet been conceived.⁴³

⁴⁰

See John Stuart Mill, Utilitarianism, Liberty and Representative Government (London: J. M. Dent, 1929).

⁴¹

See Walter Bagehot, The English Constitution (Garden City, New York: Doubleday and Co., n.d.).

⁴²

Edward Dowden, "Victorian Literature," p. 159.

⁴³Ibid.

What was needed, above all, to find one's way in the endless and apparently clueless sea of change was a system of thought and of analysis which would serve as a guide.

"What we want before all else is a true thought, or body of organic thoughts, large and reasonable, which shall include all the conditions of our case."⁴⁴

This crying aloud for secular salvation indicated the conditions for which the study of jurisprudence was devised. Juristic studies hover constantly about the dual questions of change and stability--the very questions with which the Victorian age was becoming increasingly concerned. English jurisprudence in the nineteenth century had always been intimately concerned with the question of change, not only legal change, but social, economic and political. A. V. Dicey showed how Bentham's originally individualistic doctrine had paved the way for the legislative changes of the later nineteenth century. Bentham's doctrine of the greatest number was "big with revolution," implying that "the whole aim of legislation should be to promote the happiness, not of the nobility or the gentry, or even of artisans and other wage earners."⁴⁵ Bentham's theory of sovereignty, and that, too, of Austin, proved to be

⁴⁴

Ibid., p. 160

⁴⁵

A. V. Dicey, Law and Public Opinion, p. 305.

"an instrument well adopted for the establishment of democratic despotism,"⁴⁶ insofar as it focused attention upon the crucial role of the House of Commons. Finally, Bentham's demand for an effective, highly developed public administration led to the creation of the efficient service state. "The legislative tendency was the constant extension of the mechanism of government."⁴⁷ To this extent, then, Bentham's efforts to promote needed reform in the face of a legislature encrusted in past tradition and under the influence of the terror of the French revolution was successful.⁴⁸

Bentham's very success, however, signalled a change in the general tenor of jurisprudence as it applied to politics. The trauma of the Reform of 1832, followed slowly but with apparent invincibility by legislated change, provoked increasing unease among jurists. The prospect of change became the spectre of chaos. Even John Austin, who had so carefully put Bentham's jurisprudence into impeccable logical order, became wary of the revolutionary implications of his work and adopted an increasingly hostile attitude toward reform. "Certainly the modes

⁴⁶
Ibid., pp. 305-306.

⁴⁷
Ibid., p. 306.

⁴⁸
See the comments in W. S. Holdsworth, "Gibbon, Blackstone and Bentham," 52 Law Quarterly Review 58 (1936).

of thinking of his latter years," said Mill of Austin, "...were more Tory in their general character than those which he held at this time."⁴⁹ Austin had, "in his old age, become an enemy to all further Parliamentary reform."⁵⁰

By the end of the century, jurists were warning of the harmful effects of legislated change; Bentham's sovereign Parliament had somehow to be checked, perhaps by custom. James C. Carter wrote, in 1891:

Legislation should never attempt to do for Society that which society can do, and is constantly doing, for itself. As custom is the true origin of law, the legislature cannot...absolutely create it. This is the unconscious work of society. But the passage of a law commanding things which have no foundation in existing custom would be only an endeavour to create custom and would necessarily be futile.... The function of legislation...is to catch the new and growing, but imperfect, customs which society is forming in its unconscious effort to repress evils and improve its condition--customs of the existence of which the judges are uncertain and at variance, or which are so different from former precedent that they cannot declare them without inconsistency--and to give to these formal shape and ratification. 51

This was a very limited definition of the functions of legislation compared with that of Bentham. But the era had changed, as had the problem; the stultification of the

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John Stuart Mill, Autobiography, p. 126. "This time" refers to the years from 1830 to about 1840. See also A. V. Dicey, Law and Public Opinion, p. 164.

50

John Stuart Mill, Autobiography, p. 182.

51

James C. Carter, "The Ideal and the Actual in the Law," 24 American Law Review 775 (1890).

post Revolutionary period had given way to the dizzy pace of legislative reform after 1867. The problem was to encourage stability where once it had been to stimulate reform.

Thus, when Maine deliberately set out to warn against the dangers of too rapid change, and to use arguments derived from his studies in jurisprudence, he was following in an already-established tradition. He crossed the thin, almost invisible line between jurisprudence and the theory of political action just as had Bentham, Austin and even Savigny, and as would many other justists in the future. When Maine set out to attack those who thought that popular government, "has spread and is still spreading over the world," and was "destined to last forever, or, if it changes its form, to change it in one single direction,"⁵² he was engaging in a political exercise by no means strange to jurists.

When Maine sought to apply the historical method to the realm of politics, here too he was following an established approach. Edward Dowden's cry that what was wanted was "a true thought or a body of organic thoughts" to serve as a guide to the understanding of his century was repeated by John Stuart Mill who pointed out that beneath any system of political analysis there had to be a social philosophy.

⁵²

Sir Henry Maine, Popular Government, p. 5.

There had to be "a study of agencies lying deeper than forms of government...."⁵³ Mill was urging political theorists to look beneath the facade of governmental forms to the deeper causes of political evolution. This was, of course, what the historical method was designed to do. Mill, himself, used a positivistic and historical method in his Consideration on Representative Government,⁵⁴ just as had Alexis de Tocqueville in his study of Democracy in America.⁵⁵ Thus, when Maine argued that the best approach to the understanding of the political world was a "little better knowledge of the true lines of movement which the political affairs of mankind have followed,"⁵⁶ he was consistent not only with his own scheme of jurisprudence, but also with previous efforts at political analysis.

⁵³ John Stuart Mill, "Armand Carrel," Dissertations and Discussions, I, p. 234.

⁵⁴ Mill concluded that the proper functions of government were not fixed eternally but were different in different states of society. Though the form of government was relative to the historical stage of social development, Mill suggested that the powers of government were generally broader in a backward than in an advanced state of social organization. See John Stuart Mill, Utilitarianism, Liberty and Representative Government, pp. 231-309 passim.

⁵⁵ See George Wilson Pierson, Tocqueville in America, abridged by D. C. Lunt (Garden City, New York: Doubleday and Co., 1959), pp. 11-12, 19, and 107-112. See also Iris W. Mueller, John Stuart Mill and French Thought (Urbana, Illinois: University of Illinois Press, 1956), pp. 137-39.

⁵⁶ Sir Henry Maine, Popular Government, pp. 78-79.

Maine's historical method had the same impact upon English reforming zeal as had Savigny's upon German political life. Both acted as conservative forces in their respective societies. As A. V. Dicey noted:

To Maine and his disciples the study of law had as its aim, not the reform of legislation, but the knowledge of legal history as one of the many developments of human thought....As research becomes more important than reform, the faith that legislation is the noblest of human pursuits falls naturally into the background, and suffers diminution. By this change science may gain, but zeal for advancing the happiness of mankind grows cool.

.....

Historical research, further, just because it proves that forms of government are the necessary outcome of complicated social conditions, first, indeed, leads to the true conclusion that the wisest legislation can do far less than both philanthropic philosophers and the ordinary public suppose, for the immediate benefit of mankind, but next suggests the less legitimate inference that it is a waste of energy to trouble one's self greatly about the amendment of law. 57

Maine's conservatism, stemming from his use of the historical method, was reinforced by his reliance upon the concepts of the struggle for existence and of the survival of the fittest borrowed from Darwin. Darwin himself, though guarded in his references to fields other than his own, had believed that man had achieved a higher degree of civilization through struggle, "and, if he is to advance still

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A. V. Dicey, Law and Public Opinion, pp. 459-61.

higher, it is to be feared that he must remain subject to a severe struggle. Otherwise he would sink into indolence, and the more gifted men would not be more successful in the battle than the less gifted."⁵⁸ Herbert Spencer⁵⁹ and Walter Bagehot⁶⁰ had also applied the concepts of struggle and of survival of the fittest to politics, so that evolutionary thought had "become not merely a theory but a creed, not merely a conception by which to understand the universe, but a guide to direct us how to order our lives."⁶¹

The notion of struggle and of survival play an important but secondary role in Maine's work. He argued vociferously that one of the dangers of democratic government was that it would be economically equalitarian. It was

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Charles Darwin, Descent of Man, p. 618.

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See Herbert Spencer, Social Statics, passim. For specific applications of the theory of politics, see "From Freedom to Bondage," A Plea for Liberty: An Argument Against Socialism and Socialistic Legislation, ed. by Thomas Mackay (New York: D. Appleton and Co., 1891), pp. 1-26; and The Man Versus the State.

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Walter Bagehot, Physics and Politics: or Thoughts on the Application of the Principles of 'Natural Selection' and 'Inheritance' to Political Society, (Boston: Beacon Press, 1956).

⁶¹

David G. Ritchie, Darwinism and Politics (London: Swan Sonnenschein and Co., 1889), p. 2.

"perfectly possible" that the newly enfranchised electorate would "revive even in our day the fiscal tyranny which once left even European populations in doubt whether it was worth while preserving life by thrift and toil."⁶² Equalitarianism, Maine thought, would be disastrous, for "the motives, which at present impel mankind to labour and pain which produce the resuscitation of wealth in ever-increasing quantities, are such as infallibly to entail inequality in the distribution of wealth."

They are the springs of action called into activity by the strenuous and never ending struggle for existence, the beneficent private war which makes one man strive to climb on the shoulders of another and remain there through the law of the survival of the fittest.⁶³

Thus, while Maine did not go so far as to make struggle and survival the core of his evolutionary scheme, he did consider them important for the economic and moral development of the state. These notions helped establish the framework within which Maine conducted his attack upon the new, threatening democracy.

Maine's criticism of popular government focused upon four general propositions: that democratic government, viewed historically, was not inevitable and that, on the basis of past experiments in democracy, it did not appear

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Sir Henry Maine, Popular Government, p. 49.

⁶³

Ibid., p. 50.

likely that the new democratic tendencies would ever be permanent; that democracy was, by definition, potentially despotic government, a threat to privilege and traditional freedoms, and needed curtailment; that democratic government did not represent progress but reaction, for the general public, as a rule hated and resisted change and modern innovation; and that, given the existence of a wide-spread electorate, England would be wise to establish a series of institutional controls to check the excesses of democracy, controls which had already come into existence in the United States.

The first of Maine's propositions, that the instability and short-lived nature of past experiments in democracy augured ill for the future of democracy in England, rested almost entirely upon historical evidence. His purpose was to establish "whether it is really true that the expectation of virtual permanence for governments of the modern type rests upon solid grounds of historical experience as regards the past, and of rational probability as regards the time to come."⁶⁴ The history of popular government in modern times Maine thought to have been characterized by extreme fragility. In France, for example, the government had been very unstable since the destruction of the monarchy

⁶⁴Ibid., p. 6.

in 1789. It was overthrown by the army three times: in 1797, 1799 and 1851; it was overthrown by foreign invasion three times: in 1814, 1815 and 1870; and it was three times overturned by the Paris mob: in 1792, 1830 and 1848.

"In all, putting aside the anomalous period from 1870 to 1885, France, since she began her political experiments, has had forty-four years of liberty and thirty-seven years of stern dictatorship."⁶⁵ Similarly, the history of Spain since the introduction of popular government in 1812 had been characterized by continual revolution. From 1812 to 1885, "there have been forty military risings of a serious nature, in most of which the mob took part. Nine of them were perfectly successful, either overthrowing the constitution for the time being, or reversing the principles upon which it was administered."⁶⁶ Outside the continent of Europe, the record of popular government was even more dismal, especially in Latin America where the history of rulers and revolutions was so complex as to defy summarization. "It may be enough to say of one of them, Bolivia ...that out of fourteen Presidents of the Bolivian Republic, thirteen have died in exile or have been assassinated."⁶⁷

⁶⁵
Ibid., p. 14.

⁶⁶
Ibid., p. 13.

⁶⁷
Ibid., pp. 18-19.

So turbulent had Latin American history been that Maine did not even compare it to France; indeed, "the crimes and disorders of the French Republic were repeated in caricature."⁶⁸

Only infrequently had instances of stability in popular governments occurred, argued Maine, and these in small nations such as Holland and Belgium or in nations with well-established traditions of political freedom such as the Scandinavian countries.⁶⁹ That contemporary democratic enthusiasts had overlooked both the frequency of political instability and the infrequency of successful political experiments stemmed from the fact that "they assume their principle to have a sanction antecedent to fact. It is not thought to be in any way invalidated by practical violations of it, which merely constitute so many sins the more against imprescribable right."⁷⁰ The sober "student of history," on the other hand, knew better, and would know, in fact, "that since the century during which the Roman Emperors were at the mercy of the Praetorian soldiery, there has been no such insecurity of government

⁶⁸

Ibid., p. 201.

⁶⁹

Ibid., pp. 17-18.

⁷⁰

Ibid., p. 20.

as the world has seen since rulers became delegates of the community."⁷¹

The causes of such political instability, while many, could be narrowed to two of fundamental importance: the irreconcilability of the desires of the military and the mob, and the unruly behavior of the masses when led by demagogues. In any state, the focus of armed might was the army. Usually it could be depended upon to support the existing regime, but the experiences of the French and the Spanish had shown that in a state based upon popular support, this was not the case. The root of the disagreement was a conflict of purpose between the army and the democracy; the greatest military virtue was obedience, the chief democratic right was to censure public officials. Thus, the maxims of the two major powers within a democratic state were flatly contradictory, and "the man who would loyally obey both finds his moral constitution cut into two halves." The result was "that the more popular institutions, the harder it is to keep the army from meddling in politics."⁷² Once started, military intervention became a habit: "it is a far easier and far more effective way of causing

⁷¹
Ibid., p. 21.

⁷²
Ibid., p. 22.

an opinion to prevail than going to a ballot-box, and far more profitable to the leaders."⁷³

In popular government, the mob is omnipresent. At any time, thought Maine, mass violence posed a threat to government. Modern mobs were not only better armed, but, filled with a sense of their own mission, had become "organs of definite opinions."⁷⁴ Political society in a democratic state was filled with a multitude of large groups holding rigid and irreconcilable opinions. These competing mobs, clinging "to their creed with the same intensity of belief, the same immunity from doubt, the same confident expectation of blessedness to come quickly, which characterizes the disciples of an infant faith," in effect ruled the nation.⁷⁵ Mobs, thus formed, "insist upon the immediate redemption of the pledge, and they utterly refuse to wait until a popular majority gives effect to their opinions."⁷⁶ Nor would a majority vote prevail, if taken, if it meant departure from the simplistic principles the mob professed. Power, in this case, went to the man who could convince, expound or

⁷³
Ibid., p. 23.

⁷⁴
Ibid., p. 24.

⁷⁵
Ibid., pp. 26-26.

⁷⁶
Ibid., p. 30.

preach a doctrine sufficiently enticing to create a popular following; the political future rested with "the wire-puller."⁷⁷ The modern phenomenon of nationalism, for example, illustrated perfectly how a demagogue could control the mob by appealing to popular emotion and by stimulating popular hatred.⁷⁸

Assuming, as in the case of England, that the danger from demagogues was minimal, there still remained the necessity, in popular governments, for all political leaders to appeal, willy-nilly, to the public for political support. The result of this appeal was essentially the negation of democracy and the possible creation of an irresponsible, crowd-pleasing renegade. The basic problem was decidedly simple: in a political democracy, political powers rested with the individual voter, who, by himself, could not employ his power to any appreciable extent. In most places, the voter sold his privileges and where he did not find that convenient, he abstained from voting entirely.⁷⁹ The selling of votes did not need to be gross or open; very often the selling was only indirect. The uneducated and unsophisticated merely voted for the wire-pulling politician

⁷⁷
Ibid., p. 30.

⁷⁸
Ibid., pp. 27-28.

⁷⁹
Ibid., p. 30.

who promised most in return for public support. In the intense struggle among the wire-pullers, party differences, at one time indicative of intellectual, moral or historical differences, became meaningless. Each party's program grew more like the others as each vied, with varying degrees of success, to attract public support, for only those ideas were put forth which attracted public support. To sum up this part of his argument, Maine said:

Lastly, the wire-pulling system, when fully developed, will lead infallibly to the constant enlargement of the area of suffrage.... The extensions of the suffrage, though no longer believed to be good in themselves, have now a permanent place in the armoury of the parties, and are sure to be a favorite weapon of the Wire-Pullers. 80

If not controlled, the propensity of the mob to impose its own intransigent opinions upon the state, even at the risk of the future of that state, would lead to chaos, especially economic chaos. Maine feared that unscrupulous wire-pullers, hungry for votes, would promise a division of the material wealth of the land among all the voting public. Since national wealth had to be replenished by hard labor, it was important that all contributed their share. To destroy the entire economy, "you have only to tempt...the population into temporary idleness by promising them a share of a fictitious hoard lying (as Mill puts it) in an imaginary strong-box."⁸¹ His fear

⁸⁰Ibid., pp. 32-33.

⁸¹Ibid., p. 49.

was that popular government, controlled by wire-pullers and false dreams, would turn to socialism, and in the process "take the heart and spirit out of the labourers to such an extent that they do not care to work."⁸²

Popular governments, then, were weak; their basic tendency "as they widen their electoral basis, is toward a dead level of commonplace opinion, which they are forced to adopt as the standard of legislation and policy."⁸³ Their reliance upon the mob had, in the past, proved to be the major source of instability in popular regimes, and in the present was the source of weaknesses "which do not promise security for them in the near or remote future."⁸⁴ Maine's conclusion about the rational prospects of democracy was that "there is not at the present sufficient evidence to warrant the common belief, that these governments are likely to be of indefinitely long duration."⁸⁵

In his analysis, up to this point, Maine both reflected and played upon three characteristic Victorian political

⁸²
Ibid., p. 48.

⁸³
Ibid., p. 41.

⁸⁴
Ibid., p. 53.

⁸⁵
Ibid., p. 52.

attitudes: fear of the masses, fear of revolution and fear of socialism. Maine had early indicated his distrust of the masses and had attempted to justify his faith in limited government. Writing for Cornhill Magazine in 1862, he argued that it was essential to curb the power of the masses--that to fail to do so was to inflict "upon mankind the greatest of all curses--a permanent degradation of human life."⁸⁶ This degradation would stem from the generally low intellectual level of the masses. Just as there were differences in rank in society, so too were there differences in intellect.

It is a mere dream to suppose that...there will not be an immense and indelible intellectual difference between the upper and lower classes of society. It is just as absurd to suppose that the average labourer or mechanic will ever be intellectually equal to the average gentleman, as to suppose that the average gentleman will ever have the muscles of a man who works with his hands ten hours a day. The brain of a barrister in full practice will be as much more fully developed than the brain of a blacksmith, as the arm of the blacksmith will be better developed than the arm of the barrister. 87

When applied to the political world, this distinction became very apparent. Any person "of really high instruction" upon hearing the political conversation of a group of

⁸⁶ [Sir Henry Maine], "Liberalism," The Cornhill Magazine, V (1862), p. 73.
Magazine, V (1862), p. 73.

87 [Sir Henry Maine], "Gentlemen," The Cornhill Magazine, V (1862), p. 334.

"intelligent mechanics" would inevitably have the impression that:

...he is talking to men who have never learned to use their minds, and who, if they had learned to think, have hardly any materials for thought. The subjects which attract their attention are almost always matters which have been left far behind by the general course of thought, and in politics especially are either trivial, or, if important, are treated in so narrow a way as to make the truth or falsehood of the conclusion ultimately reached almost entirely a matter of chance. 88

To allow such men to participate, in large numbers, in the political life of the nation was to reduce the tenor of that life to their very low denomination.

A country which has reached the point of social and political equality will regulate its affairs according to the prevalent temper of the majority. The average mental level of the great mass will predominate with undisputed and indisputable force, and will fix the position and career of the nation as irresistibly as the social position of a middle-aged man, whose character is formed, is fixed by the general tone of his mind and the nature of his pursuits. 89

Those who ignored this distinction did so at the peril of the nation. It was Maine's fear, twenty-three years before the publication of Popular Government, and five years before the Reform Act of 1867, that the trend of modern liberalism was to ignore the generally low quality of mass opinion.

88

6
 [Sir Henry Maine], "Liberalism, p. 78.

89

Ibid., pp. 73-74.

It is in this danger of deifying almost casual public opinions and slight and ineffectual public sentiments that the danger of political liberalism lies; and it is just the danger to which it ought to be most deeply alive and against which it ought to take the most careful precautions, if it is ever to redeem the pledge which its title implies. Those only are entitled to the description as well as to the name of liberals, who recognize the claims of thought and learning, and of those enlarged views of men and institutions which are derived from them, to a permanent preponderating influence in all the great affairs of life. 90

That the mass could affect the course of government was a basic maxim of Victorian politics; that it would lead government astray and do irreparable harm to the nation was taken for granted. John Henry Newman, assessing the responsibility for the fiasco of the Crimean War, laid the blame squarely on the doorstep of the masses. First the mass created a government so weak and so indecisive that firm actions were impossible. "Acting on the notion that no one is to be trusted, even for a time, and that every act of its officials is to be jealously watched, it never commits power without embarrassing its existence." Government, by Newman's view, was never "a venture for the transcendent," but an institution kept by the masses to a "safe mediocrity." The mass "rather...[trusts] a dozen persons than one to do its work."⁹¹ Having forced its

90

Ibid., p. 80.

91

John Henry Newman, "Who's to Blame?", Discussions and Arguments on Various Subjects (London: Longmans, Green and Co., 1918), p. 323.

creation into an act which proved disastrous, the mob turned upon it. "Who's to blame...in Crimea?" asked

Newman:

They are to blame, the ignorant, intemperate public, who clamour for an unwise war, and then when it turns out otherwise than they expected, instead of acknowledging their fault, proceed to beat their zealous servants in the midst of the fight for not doing impossibilities. 92

Both Maine and Newman castigated the masses for their faults without discussing the origin of these faults.

William Hale White, using the pseudonym "Mark Rutherford" has left a vivid picture of the actual condition of the urban poor. White seemed quite overwhelmed by the problem and at a loss as to what to do or even to say.

I did not know, till I came in actual contact with them, how far away the classes which lie at the bottom of great cities are from those above them; how completely they are inaccessible to motives which act upon ordinary human beings, and how deeply they are sunk beyond ray of sun or stars, immersed in the selfishness naturally begotten of their incessant struggle for existence and the incessant warfare with society. It was an awful thought to me, ever present on those Sundays, and haunting me at other times, that men, women, and children were living in such brutish degradation, and that as they died others would take their place. Our civilization seemed nothing but a thin film or crust lying over a volcanic pit, and I often wondered whether some day the pit would not break up through and destroy us all. Great towns are answerable for the creation and maintenance of the masses of dark, impenetrable, subterranean black-guardism, with which we became acquainted. The filthy gloom of the sky, the dirt of the street, the absence of fresh air, the herding of the poor into huge districts, which cannot be opened up by those who

would do good, are tremendous agencies of corruption which are active at such a rate that it is appalling to reflect what our future will be if the accumulation of population be not checked. To stand face to face with the insoluble is not pleasant. 93

Yet, given this description, it is understandable that the greatest fear of nineteenth century England was that the masses, living in their own squalid world, would rise, bringing that same revolution and chaos to England as had occurred in France. There was a long tradition of fear, extending from 1815 to 1848, during which time "Tory repression or Liberal inaction" produced a state of constant tension. It became common-place to think it possible to have an English revolution as terrible as those on the continent.⁹⁴ The climactic moment came in 1848, when public riots led to the creation of a near state-of-seige in London.⁹⁵ The prosperity of the fifties led to a period of peace and relative tranquility which was not shattered until the Hyde Park riots of 1866. These, however, provoked a renewal of terror. Matthew Arnold,

93

Mark Rutherford [William Hale White], The Deliverance of Mark Rutherford (New York: George H. Doran Company, n.d.), pp. 64-65. ed. by George H. Doran

94

See the comments in Walter E. Houghton, The Victorian Frame of Mind, pp. 54-58 and 239.

95

Ibid., p. 58. See Thomas Hughes' "Prefatory Memoir" in Charles Kingsley, Alton Locke, Tailor and Poet (New York: Macmillan and Co., 1893), pp. xii-xiii.

for example, who labored "always under the fear of revolution,"⁹⁶ "steadily and with undivided heart" supported the government "in suppressing anarchy and disorder; because without order there can be no society, and without society there can be no human society."⁹⁷ This despite the fact that government itself was controlled by "Barbarian and Philistine."⁹⁸ This same outburst prompted John Ruskin's reply in The Crown of Wild Olive:

For this at least we all know too well, that we are on the eve of a great political crisis, if not of political change. That a struggle is approaching between the newly-arisen power of democracy and the apparently departing power of feudalism; and another struggle, no less imminent, and far more dangerous, between wealth and pauperism. 99

Maine was but repeating and summarizing for all to see, that very fear which lay, often unarticulated, in the minds of so many Victorians. Bertrand Russell's grandfather, who, lying on his deathbed in 1869, hear a loud commotion outside and "thought it was the revolution breaking

96

Lionel Trilling, Matthew Arnold (New York: Meridian Books, 1955), p. 212.

97

Matthew Arnold, Culture and Anarchy, ed. by W. S. Knickerbocker (New York: The Macmillan Co., 1929), p. 201.

98

Ibid., p. 200.

99

John Ruskin, "The Crown of Wild Olive: Three Lectures on Work, Traffic, and War," The Works of John Ruskin, ed. by E. T. Cook and A. Wedderburn (London: George Allen, 1905), XVIII, p. 494.

out,"¹⁰⁰ was not much different from Maine, who saw extensive reform in the making, and saw in it that same revolution.

Finally, Maine's analysis raised the omnipresent spectre of socialism. To Maine, whose status-to-contract formulation seemed borne out by the laws of classical economics, the threat of extensive social legislation and of limitations upon the freedom of contract was very real. But this fear was not his alone. The opposition to democratic reform which Robert Lowe so brilliantly expounded, was in large part founded on the harm any democracy would do to the laws of economics. In a debate on the extension of borough franchise in 1865, Lowe argued that:

So far from believing democracy would aid the progress of the State, I am satisfied it would impede it. Its political economy is not that of Adam Smith, and its theories widely differ from those which the intelligent and clear-headed working man would adopt, did his daily avocation give him leisure to instruct himself. 101

This same fear was expressed by John Austin in a letter to his daughter:

It is important to recollect that the present revolutionary tendencies are social rather than political; aiming at equality of possessions, or an equal

100

Related in Walter E. Houghton, The Victorian Frame of Mind, p. 54.

101

Great Britain, 3 Hansard's Parliamentary Debates, CLXXVIII (1865), p. 1439.

distribution of the national revenue, rather than the mere establishment of democratical constitutions. This is the alarming feature in the present condition of France. In England socialist opinions and feelings have not as yet a definite shape.... But, in consequence of the vast inequalities of our social positions, these dispositions, though yet latent, are probably more strong and general than in France; for in this last country a large proportion of the people are small landowners, and have a visible and urgent motive to respect the properties of the rich.... The only remedy is the education of the people; especially the diffusing amongst them of a knowledge of the natural causes which determine the distribution of the products of labor and capital. This knowledge, if diffused amongst them, would cut up revolutionary tendencies by the roots. 102

The prospects for realizing Matthew Arnold's "progress of humanity toward perfection,"¹⁰³ or of attaining Maine's civilized contractual society must often have appeared grim. Mark Pattison's "to live at all is a struggle" was an indication of the bleakness of the prospect, especially for those who did believe in the truth of laissez-faire economics. While depression meant, obviously, social unrest and potential revolution, Pattison saw also that "prosperity means the rapid growth of population, and numbers mean an internecine fight for a share in the earth's produce." His conclusion was dismal: "thus a prolonged prosperity is necessarily suicidal, and progress inevitably destroys

102

Quoted in Janet Ross, "John Austin," p. 367. There was no date attached to the comment, but it was probably 1848 or 1849.

103

Matthew Arnold, Culture and Anarchy, p. 201.

itself by mere progression."¹⁰⁴ It was, then, from this broad strain of pessimism that Maine drew and to which he appealed when he warned that "the British political system, with the national greatness and material prosperity attendant on it, may yet be launched into space and find its lost affinities in silence and cold."¹⁰⁵

Maine's second proposition, that the new democracy was potentially dangerous and desperately needed control, was based upon definition and institutional analysis. The definition proved to his satisfaction the dangerous qualities of the new government, the analysis that there existed in the present form of government, no check to its power. "Democracy," said Maine, "is simply and solely a form of government."¹⁰⁶ By so limiting the term, Maine attempted to remove from the discussion such spurious and emotionally-laden terminology as "right", "freedom" or "justice."¹⁰⁷ As a form of government, democracy was "the State of the Many, as opposed, to the old Greek analysis, to its Government by the Few, and to its Government by One."¹⁰⁸ Inasmuch as the determinant force of

¹⁰⁴

Mark Pattison, "The Age of Reason," p. 121.

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Sir Henry Maine, Popular Government, p. 55.

¹⁰⁶

Ibid., p. 58.

¹⁰⁷

Ibid.

¹⁰⁸

Ibid., p. 59.

government is monarchy, "Democracy is most accurately described as inverted Monarchy."¹⁰⁹ To the claim of the exponents of popular government that democracy differed, agreeably, in essence from monarchy, Maine answered that "it has the same functions to discharge, although it discharges them through different organs. The tests of success in the performance of the necessary and natural duties of a government are precisely the same in both cases."¹¹⁰ Both forms of government had to preserve national existence, national greatness and national dignity, and the "Government which fails to provide a sufficient supply of generals and statesmen, of soldiers and administrators...is a government which has miscarried."¹¹¹

The similarity between democratic and monarchical government, however, went further: there was a basic ruthlessness, particularly in the period following the foundation of the state. Unlike aristocratic government or constitutional kingship, which were "more tempered" political systems, "founded on compromise," both democracy and monarchy, "when they are first established in absolute completeness...are highly destructive."

109

Ibid.

110

Ibid., p. 61.

111

Ibid., p. 62.

There is a general, sometimes chaotic, upheaval, while the nouvelles couches are settling into their place in the transformed commonwealth. The new rulers sternly insist, that everything should be brought into strict conformity with the central principle of the system over which they preside; and they are aided by numbers of persons to whom the old principles were hateful, from their fancy for ideal reforms, from impatience of a monotonous stability, or from a natural destructiveness of temperament. 112

The obvious conclusion, then, was that one of the most dangerous periods in the history of democracy was its inception. Those about to call the devil into existence should prepare for it--prepare the institutions of the country in such a way as to control or curtail the most demonic manifestations of this new power. Of the new political developments, Maine said:

They are opening the way to Democracy on all sides. Let them take heed that it be not admitted into a receptacle of loose earth and sand. And, in laying this caution to heart, it would be well for them to consider what sort of Constitution it is to which they must trust for the limitation of the powers, and the neutralization of the weaknesses, of the two or three millions of voters who have been admitted to the suffrage, in addition to the multitude enfranchised in 1867. The events of 1884 were not reassuring. 113

To Maine's way of thinking, none of "the principal depositories of public authority in the country--the Crown

112

Ibid., p. 66.

113

Ibid., pp. 111-12.

the Cabinet, the House of Lords, and the House of Commons"-- had, by themselves or together, sufficient power to check the surge of democracy.¹¹⁴ Indeed, recent constitutional changes had assured that the House of Commons, controlled by popular vote, would become the weapon by which the masses would beat down all opposition. In this strongest of all political institutions, the concept of representation had disappeared, leaving the instructed delegate in its place. The Member of Parliament as an independent debater was replaced by the puppet of the masses.¹¹⁵ Unfortunately, according to Maine, "the rapid conversion of the unfettered representative into the instructed delegate"¹¹⁶ had occurred at the very time that "the vulgar assumption that the great masses of men can directly decide all necessary questions for themselves,"¹¹⁷ became popular and when the great masses were coming into political power. The result of these developments was the prospect of mob rule.

¹¹⁴Ibid., p. 112.¹¹⁵Ibid., p. 93.¹¹⁶Ibid., p. 94.¹¹⁷Ibid., p. 93.

We are drifting towards a type of government associated with terrible events--a single Assembly, armed with full powers over the Constitution, which it may exercise at pleasure. It will be a theoretically all-powerful secret Committee of Public-Safety, but kept from complete submission to its authority by Obstruction, for which its rulers are always seeking to find a remedy in some kind of moral guillotine. 118

In addition to the obvious play upon English fears of revolution, especially the French revolutions of 1789, 1830 and 1848, Maine's discussion of democratic politics depended upon an established practice of precise definition for its appeal. Though in retrospect, Maine's definition might seem a mere play upon words, it fell into a tradition of political analysis as old as the Greeks and as recent as John Austin. In this part of his political argument, Maine indicated plainly his debt to analytical jurisprudence and its propensity for definition and strict logical argument. Maine was not, however, the only one of Austin's students to use this method. Sir George Cornwall Lewis, also a student of John Austin and also a conservative political theorist, used the method extensively.¹¹⁹ He wrote, not on the facts of political life, but upon the

118

Ibid., p. 126.

119

Sir George Cornwall Lewis, A Dialogue on the Best Form of Government (London: Parker, Son and Bourn, 1863), p. 72.

terminology employed.¹²⁰ When he said "I am not a Believer in the infallibility of aristocracy; I only assert that it is a better form of government than either monarchy or democracy,"¹²¹ Lewis was merely applying this analytic tactic to political argument. "A person wishing to watch his intellectual history," said Bagehot of Lewis' work, should look carefully, for it was "a series of exercizes in Mr. Austin's classroom."¹²² He might have said the same of the second part of Maine's political argument.

Maine had, for many years, firmly believed that the present institutions of British government were insufficient to contain the onrush of democracy: as early as 1856 and 1857, while writing for The Saturday Review, he had expressed many of the same doubts about the structure of the House of Commons, and especially the role of the Member of Parliament. Maine had expressed the belief that petitions to Parliament from the masses were an infringement of the independence of the representative; they implied that he was but a servant of an impatient master.¹²³

¹²⁰ See Walter Bagehot, "Sir George Cornwall Lewis," Biographical Studies, ed. by R. H. Hutton (London: Longmans, Green and Co., 1881), p. 235.

¹²¹ Sir George Cornwall Lewis, A Dialogue on the Best Form of Government, p. 72.

¹²² Walter Bagehot, "Sir George Cornwall Lewis," p. 237.

¹²³ Sir Henry Maine, "Your Petitioners Will Ever Pray &c," The Saturday Review, I (1856), p. 359.

When the independence of Parliamentarians ended, and when they became mere ciphers in a political game, said Maine, "it is rare that you pass the ordeal without either damaging your conscience or emasculating your intelligence."¹²⁴

Maine's third proposition, that the crowd, while dangerous and impatient to bring about change suitable to its own ends was, ultimately, intensely conservative, was based upon his observations concerning the limited number of truly progressive societies in existence. Democracy, which he considered solely as a form of government, had become inextricably and falsely identified with the abstract concepts of inevitability and progress. Political change had not only become the order of the day, but it had become identified with progress. By implication, only a democratic state could be a reforming and progressive state. At any time, Maine insisted, this identification was both false and dangerous.

This zeal for political movement, gradually identifying itself with a taste for Democracy, has not as yet fully had its way in all the societies of Western Europe. But it has greatly affected the constitution of some of them; even when it is checked or arrested, it is shared by considerable minorities of their population; and when (as in Russia), these minorities are very small, the excessive concentration of the passion for change has a manifest tendency to make it dangerously explosive. ¹²⁵

¹²⁴ Sir Henry Maine, "Eothen in the South-West," The Saturday Review, III, (1857), p. 43.

¹²⁵

Sir Henry Maine, Popular Government, p. 129.

Maine found at least three reasons for this inaccurate identification. First was the popular linking of political innovation with scientific progress, illustrated by modern discoveries in transportation, power and communications.¹²⁶ A second source of confusion was the rather accidental coincidence of parliamentary reform and increased legislation. Until philosophic radicalism, or Benthamism, made its mark upon political philosophy, Parliament had done little legislating; since that time, however, legislation had played an ever-increasing role, until it now overshadowed all other parliamentary duties. Such a continuous string of legislation had come from Parliament that the public had come to consider it a never-ending and inexhaustible source of future reform which could only end in the creation of an ideal society. Of this belief, Maine said: "neither experience nor probability affords anyground for thinking that there may be an infinity of legislative innovation, at once safe and beneficent. On the contrary, it would be a safer conjecture that the possibilities of reform are strictly limited."¹²⁷

More, however, than the identification of democracy with science or with continual legislation or legislative

126

Ibid., p. 145.

127

Ibid., p. 149.

progress, "a group of words, phrases, maxims, and general propositions,"¹²⁸ most of them false, had given to the democratic creed its aura of invincibility. The source of most of the mythology of democracy was Jean-Jacques Rousseau, with Jeremy Bentham running a close second. From Rousseau, modern democrats obtained their notion of

...the modern omnipotent democratic State, rooted in natural right; the State which has as its absolute disposal everything which individual men value, their property, their persons, and their independence; the State which is bound to respect neither precedent nor prescription; the State which may make its laws for its subjects ordaining what they shall drink or eat, and in what way they shall spend their earnings; the State which can confiscate all the land of the community, and which, if the effect on human motives is what it may be expected to be, **may** force us to labour on it when the older incentives to toil have disappeared. 129

The monolithic state had its origin in a hazy concept of a mythical state of nature. "The natural condition from which it starts is a simple figment of the imagination." The same arguments which Maine marshalled against the natural law school of jurisprudence were, in Popular Government, again repeated; since the state of nature never existed in history, it had no validity, and since the state of nature had no validity, the political ideas arising therefrom were equally without value.¹³⁰

¹²⁸ Ibid., p. 151.

¹²⁹ Ibid., p. 158.

¹³⁰ Ibid., pp. 154-60. See also Ancient Law, pp. 83-88 and 298-303.

Benthamism, on the other hand, while disavowing Rousseau's theory of the social contract, popularized the notion of legislated change to benefit the greatest number. First, Bentham suggested that the greatest number could best legislate for itself, thus laying the foundations for universal suffrage, then asserted the close relationship between morals and legislation, paving the way for the modern phenomenon of legislated change. The great difficulty of these theories, to Maine, was that they implied that the people were all-wise and omnipotent. They were not. Thus, he said: "when this multitudinous majority is called to the Government for the purpose of promoting its happiness, it now becomes evident that, independently of the enormous difficulty of obtaining any conclusion from a multitude of men, there is no security that this multitude will know what its own happiness is, or how it can be promoted."¹³¹

The difficulty with democratic philosophies was that they had produced a desire for exceedingly rapid political change which could not take into account historical development. To many, constant legislative response to the demands and wishes of mankind was progress. This, said Maine, was nonsense. Democracy was based upon mass-support, and the masses, rather than being centers of

¹³¹Sir Henry Maine, Popular Government, p. 166.

progress and enlightenment, were traditionally the most reactionary force in society. If universal suffrage were to come into being, the result would be almost total social stultification.

The principles of legislation at which they point would probably put an end to all social and political activities, and arrest everything which has ever been associated with Liberalism. A moment's reflection will satisfy any competently instructed person that this is not too broad a position. Let him turn over in his mind the great epochs of scientific invention and social change during the last two centuries, and consider what would have occurred if universal suffrage had been established at any one of them. Universal suffrage, which today excludes Free Trade from the United States, would certainly have prohibited the spinning-jenny and the threshing-machine. It would have prevented the adoption of the Gregorian Calendar; and it would have restored the Stuarts. It would have proscribed the Roman Catholics with the mob which burned Lord Mansfield's house and library in 1730, and it would have proscribed the Dissenters with the mob which burned Dr. Priestley's house and library in 1791. 132

The truth was, said Maine, men did alter their habits, "but always with more or less reluctance and pain."¹³³

That which changed was man's desires, and these could be, in a democracy, under the guidance of the wire-puller.

Democracy was placing power in the hands of a mob which was basically reactionary, while at the same time materially voracious and demanding. The result would inevitably be social, cultural and scientific stagnation, together with

132

Ibid., pp. 35-36.

133

Ibid., pp. 137-138.

economic and political turmoil.¹³⁴ Maine concluded that "if there really rise a conflict between Democracy and Science, Democracy which is already taking precautions against the enemy, will certainly win."¹³⁵

Of all Maine's arguments, this was perhaps the most sympathetic, but the pessimism implicit in his remarks was not new or original. Though Matthew Arnold could speak of his belief in the progress of humanity toward perfection, he cautioned that this progress would be slow. "But neither, on the other hand, must the friends of culture expect to take the believers in action by storm, or to be visibly and speedily important, and to rule and cut a figure in the world."¹³⁶ In politics, Robert Lowe, too, reflected this same despondency. Speaking of the attempt by the Liberal Party to "unite their fortunes with the fortunes of democracy," Lowe darkly predicted that "they will not miss one of two things--if they fail in carrying this measure they will ruin their party, and if they succeed in carrying this measure, they will ruin their country."¹³⁷

¹³⁴
Ibid., p. 138.

¹³⁵
Ibid., p. 190.

¹³⁶
Matthew Arnold, Culture and Anarchy, pp. 203-204.

¹³⁷
Great Britain, 3 Hansard's Parliamentary Debates, CLXXVIII (1865), p. 1440.

Nor was argument that the mass of the population was totally conservative new. Alexis de Tocqueville had noted it when discussing the unlimited power of the majority and its effect upon opinion. The mob stultified original thought; "if America has not yet had any great writers," said de Tocqueville, "the reason is given in these facts: there can be no literary genius without freedom of opinion, and freedom of opinion does not exist in America." Departures from the normal course of opinion were unusual; "unbelievers are to be met with in America, but there is no public organ of infidelity."¹³⁸ Sir George Cornwall Lewis, too, had earlier applied Maine's argument of mass conservatism to the contemporary scene. "The leaders of liberal parties should bear in mind," he said, "that despotism is the normal state of mankind, and free governments are the rare exception...."¹³⁹ Finally, popular conservatism was not a new concept for Maine; a year after the publication of Ancient Law he was already transferring many of the conclusions concerning the rarity of progress and the stagnancy of most popular cultures which he discerned in ancient societies to contemporary

¹³⁸ Alexis de Tocqueville, Democracy in America, I, p. 275.

¹³⁹ Sir George Cornwall Lewis, Essays on the Administrations of Great Britain from 1783 to 1830, ed. by Sir Edmund Head (London: Longman, Green, Longman, Roberts and Green, 1864), p. 180.

political life. One point, he said in 1862, concerning popular government, "was established almost beyond the reach of controversy."

Once place the sovereign power unreservedly in the hands of the bulk of the community, and, whether they exercise it themselves, or delegate it to a single nominee, reform, by a process yet discovered, is at an end. This or that detail may be altered by discussion, but the general type of the national existence, the general objects and principles of its politics, are settled forever. 140

Maine was again drawing material from the twin reservoirs of public opinion and previously delineated argument.

When Maine argued that it was necessary to preserve the government from the masses and to retain a certain limited or aristocratic bias in government, he was not nearly as original as when he suggested that these institutions had already been developed, in large part, in the United States and that some effort to create similar checks should be made in Britain.

When arguing that government by the few was preferable to government by the many, Maine noted that "History is a sound aristocrat."¹⁴¹ The progress of mankind, argued Maine, "has hitherto been affected by the rise and fall of one aristocracy within another, or by the succession of one aristocracy to another." There had been so-called democracies before, "but they were only peculiar forms of

¹⁴⁰ Sir Henry Maine, "Liberalism," p. 73.

¹⁴¹ Sir Henry Maine, Popular Government, p. 42.

aristocracy."¹⁴² The specific problem with which Maine concerned himself in the remaining pages of Popular Government was to discover how, despite the existence of a nearly universal suffrage, the institutions of government and the effective control of the nation could be kept in the hands of a select few. If history was a sound aristocrat, England should remain a sound aristocracy. He hoped "that this opposition between democracy and science, which certainly does not promise much for the longevity of popular government, may be neutralized by the ascendancy of instructed leaders."¹⁴³ Quite obviously, "if you place power in men's hands, they will use it for their interests," and since the multitudes "include too much ignorance to be capable of understanding their interest,"¹⁴⁴ it naturally followed that some type of aristocracy or trained leadership was necessary to prevent the complete collapse of organized government. It was too late to prevent the unleashing of the masses in the form of universal suffrage, but it was not, perhaps, too late to channel their destructive energies and to check their destructive impulses by properly constructed institutional devices, safely in the hands of an aristocracy.

¹⁴² Ibid.

¹⁴³ Ibid., p. 37.

¹⁴⁴ Ibid., pp. 245-46.

The success of the republican form of government in the United States despite the presence of universal suffrage, was due largely to such a stabilizing influence. American history began "in a condition of society produced by war and revolution, which might have condemned the great Northern Republic to a fate not unlike that of her disorderly sisters in South America." This fate she happily avoided, because:

...the provisions of the Constitution have acted on her like those dams and dykes which strike the traveller along the Rhine, controlling the course of a mighty river which begins amid mountain torrents, and turning it into one of the most equitable waterways in the world. 145

Contrasting, then the beneficent effects of American political institutions to the dangers forthcoming in Britain, Maine continued the somewhat labored analogy:

The English Constitution, on the other hand, like the great river of England, may perhaps seem to the observer to be now-a-days always more or less in flood, owing to the crumbling of the banks and the water poured into it from millions of drain-pipes. 146

To shore up the banks and to provide the requisite constitutional diking, Maine argued that Britain adopt some of the institutional checks so successful in America. Though republican institutions devised by the founders of the United States might appear to the uninitiated too strange

145

Ibid., pp. 245-46.

146

Ibid., p. 246.

or too foreign to be effectively transplanted, Maine argued differently. He thought the American constitution to be "coloured throughout by political ideas of British origin" and to be "in reality a version of the British Constitution."¹⁴⁷ While the American constitution excluded an hereditary monarch and "virtually excluded an hereditary nobility,"¹⁴⁸ it did include a large number of "securities against hasty innovation,"¹⁴⁹ which took the form of checks upon popular pressure. The American presidency, itself a strong office, was kept from total popular control by the electoral college, and from over-much power by the Supreme Court and legislature.¹⁵⁰ The Supreme Court, protected from mob pressure, assured that there would be no undue harm in constitutional matters.¹⁵¹ The House of Representatives, although a popularly elected body, was counter-balanced by the existence of a Senate, indirectly elected and serving as a stabilizing factor in the legislative process. "We may not doubt," said Maine:

¹⁴⁷
Ibid., p. 207.

¹⁴⁸
Ibid., p. 253.

¹⁴⁹
Ibid., p. 243.

¹⁵⁰
Ibid., pp. 211-16.

¹⁵¹
Ibid., pp. 217-24.

that the Senate is indebted for its power...and for its hold on the public respect, to the principles upon which it was deliberately founded, to the mature age of the Senators, to their comparatively long tenure of office, which is for six years at least, and above all, to the method of their election by the Legislatures of the several states. 152

To Maine, the role of the Senate was the most important innovation in the American constitution, for it was "a political body, of which the basis is not equality, but inequality."¹⁵³ The Senate did most to provide for the rule of an aristocracy in a nation which did not recognize an hereditary aristocracy. Maine did not demand from an aristocratic second chamber infallibility of action but a greater expectation of ability. Particularly would this be true if Britain were to strengthen the position of an hereditary House of Lords.

Under all systems of government, under Monarchy, Aristocracy, and Democracy alike, it is a mere chance whether the individual called to the direction of public affairs will be qualified to undertake the task; but the chance of his competence so far from being less under Aristocracy than under the other two systems is distinctly greater. If the qualities proper for the conduct of government can be secured in a limited class or body of men, there is a strong probability that they will be transmitted to the corresponding class in the next generation, although no assertion be possible as to individuals. 154

152

Ibid., p. 227.

153

Ibid.

154

Ibid., p. 188.

Maine's argument indicated that he would, indeed, have gone beyond even the American experience. The American constitution suggested the desirability of a second chamber; his own predilections supplied the stipulation that it be hereditary.

Of the two parts to Maine's argument, his reliance upon American precedent was perhaps the more uncommon. The other part, his support of political control by an elite, was less so. He shared with his time a respect for the upper classes, though Maine's support of an hereditary aristocracy as opposed to the middle class set his argument apart somewhat. Victorian England did, indeed, have "a habit of mind, partly inherited, partly acquired," which focused on respect for one's elders and betters. "The hierarchical structure of society, spared any direct revolutionary attack, remained relatively firm, and the concept of equality never won any general acceptance...."¹⁵⁵ For example, early in his study of The English Constitution, Walter Bagehot noted that "the masses of the 'ten-pound' householders did not really form their own opinions," but were "guided in their judgment by the better educated classes."¹⁵⁶ Nor was Maine's assumption that the

155

Walter E. Houghton, The Victorian Frame of Mind, pp. 102-103.

156

Walter Bagehot, The English Constitution, p. 13.

traditional rule of the aristocracy was under attack unusual; in a nation where it was generally believed that feudalism was degenerating, this fear was unavoidable. It is in this context that Thomas Arnold's statement concerning the future role of the aristocracy should be placed.

I believe that the aristocracy still retain a strong hold on the respect and regard of England, and if their excessive influence is curtailed, they will be driven to try to gain a more legitimate influence, to be obtained by the exercise of those great and good qualities which so many of them possess. At present this may be done; but five years hence the democratical spirit may have gained such a height, that the utmost virtue on the part of the aristocracy will be unable to save it. 157

Even the particular defense of aristocracy which Maine put forth, that it tended to promote a hierarchy of intelligence, was often voiced before, Maine's emphasis upon the need for an intellectual elite stemmed, of course, from his definition of progress as an intellectual development;¹⁵⁸ however, his insistence that an intellectual elite was synonymous with an hereditary aristocracy was but a reflection of Robert Lowe's statement before the House of Commons in 1865. Lowe argued that

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Arthur Penrhyn Stanley, The Life of Thomas Arnold, I, p. 260. Quoted from a letter to Chevalier Bunsen, 20 March, 1831.

158

See above, Chapter IV.

...because I am a Liberal, and know that by pure intelligence alone can the cause of true progress be promoted, I regard as one of the greatest dangers with which the country be threatened a proposal to subvert the existing order of things, and to transfer power from the hands of property and intelligence, and to place it in the hands of men whose life is necessarily occupied in daily struggles for existence. 159

If opposition to an equalitarian society and to political democracy was not rare, Maine's emphasis upon an hereditary aristocracy, excluding the middle calss was more so. Equalitarianism was severely attacked, even by the middle class, "eager to preserve the social distinctions it was trying to attain."¹⁶⁰ Maine, however, defended the aristocracy to the exclusion of the middle class; there was nothing in Popular Government to suggest that Maine saw any advantage to participation of the middle classes in government, nor did he attack democracy because it threatened the position, either social or political, of the middle class. Maine's argument was for an intellectual and hereditary elite to act as a check upon popular enthusiasms. His bias was purely aristocratic. This peculiar twist to his argument was apparent as early as 1855 and 1856, at which time he indicated how sordid he believed the values of the

159

Great Britain, 3 Hansard's Parliamentary Debates, CLXXVIII (1865), pp. 1439-1440.

160

See Walter E. Houghton, The Victorian Frame of Mind, p. 103.

middle class to be and how given to mediocrity. He suggested that there was a complete "groundlessness to the opinion that the moral standards of the middle class are higher than those of a self-seeking aristocracy."¹⁶¹ Consequently, the standards of a business community were not necessarily applicable to the state. When the middle class asked "that the method of the merchants' offices should be copied by the State," Maine replied that "nothing is more certain than that the rules and principles of English commercial business urgently require revision before they can be successfully applied to undertakings on the largest scale."¹⁶²

Middle class demands that the hold of the hereditary aristocracy upon governmental institutions be broken by competitive civil service examinations was positively harmful, for it led to mediocrity and to the destruction of that intellectual superiority which was the one obvious quality of an aristocracy. The experience of competitive examinations, thought Maine:

...proves that success in them is not only not a complete test of that of which they were intended to

161

Sir Henry Maine, "Circumlocution versus Circumvention," The Saturday Review, II (1856), p. 649.

162

Sir Henry Maine, "A Burst Bladder," The Saturday Review, I (1855), p. 76.

to prove the existence,--namely, general superiority--but is, to some extent, a test of the reverse. The best man on the whole will not be the first in an examination on specific subjects. Given equal abilities, docility will carry the day; and independence and originality, and above all, interest in other matters besides the subject of examination, will be dead weights, positively injurious to their possessors. 163

Anything, whether democracy or the claims to power of the new industrial middle class, which challenged the ascendancy of aristocracy was dangerous. "The great families have," he said, "truly enough, something like a monopoly of office, but it is one which even political economists call a natural monopoly, and respect under that name."¹⁶⁴ This opinion was never to change. It was not, in the end, an unbiased conclusion derived from the historical method.

That such a convinced aristocrat should have turned to the United States for examples of how to control democracy was rather ironic. Alexis de Tocqueville had, of course, already studied American society, as had Harriet Martineau¹⁶⁵ and Michael Chevalier.¹⁶⁶ Most of their

¹⁶³ [Sir Henry Maine], "Competative Examinations," The Cornhill Magazine, IV (1861), p. 698.

¹⁶⁴ Sir Henry Maine, "Eothen in the South-West," p. 45.

¹⁶⁵ See Harriet Martineau, Society in America, ed. by Seymour Martin Lipset (Garden City, New York: Doubleday and Co., Inc., 1962).

¹⁶⁶ See Michael Chevalier, Society, Manners, and Politics in the United States, ed. by J. W. Ward (Garden City, New York: Doubleday and Co., Inc., 1961).

commentary on those aspects of American life stemming from its equalitarianism were adverse in the extreme. De Tocqueville had assumed the dominance of this equalitarianism and had considered it almost ruefully, while Mrs. Frances Trollope's comments were, perhaps, notable more for their forthright quality than their rarity.

Any man's son may become the equal of any other man's son, and the consciousness of this is certainly a spur to exertion; on the other hand, it is also a spur to that coarse familiarity, untempered by any shadow of respect, which is assumed by the grossest and the lowest in their intercourse with the highest and the most refined. This is a positive evil, and, I think, more than balances its advantages. 167

Standard European, and especially British, reaction to the United States was, at best, ambivalent.

Maine reflected this same ambivalence: he detested the generally low tone of American political life (as opposed to American political institutions) and of American literature (although he spoke highly of American success at avoiding complete mob rule). Of vulgarity in American life, Maine said:

In America, both politics and periodical literature have fallen, to a great extent, into the hands of an ill-educated class. The excessive vulgarity of a great part of what they say and write gives far too low a notion of the strong points of the American character, and has a fatal tendency to make their policy as unworthy a representative of the real

167

Frances Trollope, Domestic Manners of the Americans, ed. by Donald Smalley (New York: Vintage Books, 1960), p. 121.

powers of their minds as their literature unquestionably is. 168

But at the same time, he argued that the United States had peculiar virtues in that its government had not succumbed to the most obvious manifestations of mob rule on the national level. In speaking of the United States, Maine could go beyond his distaste for equalitarianism and say:

Two only among the great Powers of the world have preserved the inestimable blessing of freedom. Their laws, and language, and manners are the same--their interests are, in almost all instances, identical--and any serious collision between them would throw back the prospects of liberty for a generation. 169

The consistency with which Maine's conclusion in Popular Government reflected long-held biases and popularly-held opinion, the consistency with which his arguments were those of his youth and of the Victorian period, casts grave doubt upon the success of his attempt to adopt the historical method to the study of politics. Popular Government was not an example of scientific politics so much as an excellently-written polemic against the political revolution he saw going on about him. Far from being political science, it was political opinion, unless, of course, one were to grant the possibility that both his opinions and those of his contemporaries were scientifically verifiable fact rather than opinion. From its publication,

¹⁶⁸ [Sir Henry Maine], "The Dissolution of the Union," The Cornhill Magazine, IV (1861), p. 166.

¹⁶⁹ Sir Henry Maine, "Panama and Kansas," The Saturday Review, II (1856), p. 518.

Popular Government became the focus of an extensive political debate in which charges and counter-charges flew with great ferocity. By conservatives, Popular Government was quoted as an ultimate authority in opposition to a wide variety of reforms; by liberals it was taken as a symbol of blind opposition to a form of government which most thought inevitable.

For a decade, from 1886 to 1896, the friendly pages of the Quarterly Review--the same journal in which Maine's essays originally appeared--contained articles favorably quoting Maine as an authority on all of the less savory aspects of democracy. All the articles were anonymous, and all bemoaned the advent of popular government. One, describing the conditions of bribery prevalent in the new political arena, quoted Maine on "the kind of corruption which under these new conditions is likely to flourish in England," and which, the author insisted, already flourished in Ireland.

The corruption appeals to classes. The farmer is bribed with the anticipation of a prairie rent; the labourer, with the hope of a share in the spoil of the landlords; the Catholic priesthood are caught by the bait of increased influence in public appointments, and of the transfer to them of Protestant or secularist educational endowments. Lastly, the Artisans are bribed by the prospect of protective legislation. 170

Another quoted with favor Maine's fear that pressure groups

170

"Bribery, Ancient and Modern," The Quarterly Review, CLXIII (1886), pp. 32-33. The article quoted Popular Government, pp. 105-106.

within the country would attack many of England's hallowed institutions, and saw in this warning a prediction of the undermining of the established church.¹⁷¹ Yet another saw in Maine's work the correct forecast of the disintegration of Parliament and "a direct transfer of legislative power" to a dictatorial ministry.¹⁷² Over-legislation and a corresponding tendency to overlook the fact that "the possibilities of reform are strictly limited," was also seen as a continuing threat to the nation correctly foretold by the sagacious pages of Popular Government.¹⁷³ Finally, "the misgivings so forcibly expressed by Sir Henry Maine... are, by the pressure of taxation, being brought home to the mind of the ordinary voter," promoting a general "disillusionment of the nation with regard to popular government." The revolt has been long expected," said the author, drawing upon Maine's remarks about the short tenure of democratic regimes, "but we believe it has come

171

"Church and State," The Quarterly Review, CLXII (1886), pp. 11-12. The article quoted Popular Government, p. 38.

172

"The Work of the House of Commons," The Quarterly Review, CLXXI (1890), pp. 562-63. The article quoted Popular Government, pp. 94-95.

173

"Executive Government and the Unionists," The Quarterly Review, XLXXIII (1891), pp. 539-40. The article quoted Popular Government, pp. 149-50.

at last."¹⁷⁴ What Maine had intended as an investigation became, in the hands of conservative doom-criers, an apparently inexhaustible mine of material to bolster their arguments and to justify their resistance to change.

If, in the polemical exchange following the publication of Popular Government, conservatives turned blindly to it for support, political liberals just as blindly attacked and rejected it. John Gibb, perhaps, set the tenor of the attack in an emotional diatribe against "enemies of progress."

It is disappointing to find writers like Sir Henry Maine...ranging themselves among the enemies of progress, and giving the authority of their great names to the party whose object it is to keep man in ignorance and subjection. 175

Forgetting that Maine's appeal for an aristocratic government stemmed from his despair of finding progress among the multitudes, Gibb saw in Maine's book an attempt to impose upon morality, upon hope and future promise, the dead hand of the past. Overlooking the fact that Maine did allow of progress, that he was not denying the future and that he questioned only that popular government opened this road, Gibb said that Maine's argument:

174

"Democratic Finance," The Quarterly Review, CLXXVI (1896), p. 76.

175

John Gibb, "Sir Henry Maine on Popular Government," The British Quarterly Review, LXXVIII (1886), p. 318.

...cannot but have a lowering effect upon the ideals of men, on their hopefulness for the future of the race, if dead laws and the play of blind impulses are the only forces recognized by historical writers when they discourse upon the history of mankind or when they prospect its future. 176

The most slashing attack, however, came from John Morley in the Fortnightly Review. Morley took Maine's critique seriously, not only because of the quality of argument, but also because of the stature of the author.¹⁷⁷ This respect gave to Morley's review a sense of urgency which led him to commit the very sin for which he castigated Maine: what began as an analysis of Maine's book soon degenerated into a polemic. Morley did make sound criticisms: Maine, indeed, was "not altogether above lending himself to the hearsay of the partisan;"¹⁷⁸ he obviously exaggerated "the whole position of Rousseau" and "misinterpreted the nature of his influence" by attributing to the Frenchman "an isolated eminence which does not really belong to him;"¹⁷⁹ and it was true that Maine gave "an altogether

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Ibid., p. 319.

177

Francis Wentworth Knickerbocker [R. Cutler], Free Minds: John Morley and His Friends (Cambridge: Harvard University Press, 1943), p. 248.

178

John Morley, "Maine on Popular Government," Studies in Literature, p. 127.

179

Ibid., p. 115.

excessive and unscientific importance to form" of govern-
 men when "other conditions which happen to go along with
 it in a given society at a given time" were ignored.¹⁸⁰
 All of these were justified responses to Maine's book,
 but just as Maine had been guilty of partisanship, so too
 was Morley. Maine's book was "fuller of apprehension
 than of guidance, more plausible in alarm than wise or
 useful in direction." It was, thought Morley, "excessively
 critical and negative."¹⁸¹ Too often Morley's analysis
 centered on the author, however, rather than the argu-
 ment. "The truth is that scientific lawyers have seldom
 been favourable to popular government, and when the
 scientific lawyer is doubled with the Indian bureaucrat we
 are pretty sure beforehand that in such a tribunal it will
 go hard with democracy."¹⁸² Altogether, Morley's reaction
 was close to a diatribe; just as Maine's assessment of
 democracy was too harsh, Morley's assessment of Maine was
 "a little unfair."¹⁸³

¹⁸⁰
Ibid., p. 149.

¹⁸¹
Ibid., p. 110.

¹⁸²
Ibid., p. 108.

¹⁸³
 Mark De Wolfe Howe (ed.), Holmes-Laski Letters:
 The Correspondence of Mr. Justice Holmes and Harold J.
 Laski, 1916-1935 (Cambridge: Harvard University Press,
 1953), I, p. 47. A letter from Laski to Holmes, 15
 January, 1916.

The acrimonious debate continued with the publication of a very critical review by an American, E. L. Godkin. Again, the fires of partisan polemic burned brightly, fed not only by Godkin's acidic remarks but also by Maine's curt and barely polite answer. Godkin repeated a comment made also by Morley that Maine has assumed that "the religion, the culture, the manners, the history and the material surroundings of the people have nothing to do with the security of their institutions," and that he had not inquired how pre-democratic society had "got on" under other forms of government.¹⁸⁴ This justifiable criticism was lost, however, in a welter of overstatement or misstatement, prompted by the heat of debate. To Maine's accusation that the mass was conservative, Godkin answered, probably with less justification, with the blanket statement that "there is not the smallest sign of the bigoted conservatism which Sir Henry Maine looks for."¹⁸⁵

Maine's reply was couched in the same heated terms: on the question of the conservatism of the general populace, he repeated his earlier argument, adding only that the mass would normally combat all change, particularly

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E. L. Godkin, "An American View of 'Popular Government', The Nineteenth Century, XIX (1886), p. 181.

185

Ibid., p. 188

new machines, "as unfairly competing with human labour."¹⁸⁶ His own argument, Maine asserted, was "perfectly simple and perfectly legitimate, and it has no affinity for a priori reasoning."¹⁸⁷ As was so often the case with polemical dispute, the argument had come a full circle: Maine asserted that the mass was conservative, Godkin that it was not, Maine, again, that it was. Lost in the scuffle was the dispassionate appraisal Maine had set out to write.

Even after Maine's death the debate continued, this time one-sided but just as partisan. For over a quarter century following its publication, Popular Government continued to draw criticisms from political theorists, lawyers, and economists. David Ritchie criticized Maine's attempt to "exempt certain rights from the control of the legislature,"¹⁸⁸ suggesting instead that "time, place and circumstances must determine the manner and degree" in which the state acts.¹⁸⁹ Though not specifically mentioned,

186

Sir Henry Maine, "Mr. Godkin on 'Popular Government'," The Nineteenth Century, XIX (1886), p. 372.

187

Ibid.

188

David G. Ritchie, Natural Rights: A Criticism of Some Political and Ethical Conceptions (London: George Allen and Unwin, 1916), p. 16.

189

Ibid., pp. 228-29.

it was without doubt Maine's argument that Ritchie had in mind when he said:

The democrat is often told that he is very unscientific; but the evolutionist who points to the aristocratic preferences of history, errs greatly if he thinks the undoubted pre-eminence of a few great individuals and even of a few famous families any sound argument in favour of a hereditary aristocratic caste.... Darwin, as we have also seen, inveighs against the folly of primogeniture: so that after all, even the English nobility do not get much countenance from the theory of natural selection. 190

Similarly, A. V. Dicey treated the topic of the rising importance of the popular referendum within the context of Maine's treatment in Popular Government. Dicey's article was a defense of the referendum, concluding that "Maine's assumption that progress is impossible where the veto of the electors can stop the legislative action of a representative assembly" was essentially false.¹⁹¹

Viscount Bryce not only criticized Maine's political argument in his Studies in History and Jurisprudence,¹⁹² but also devoted considerable space in his study of South America to the grave charges Maine brought against the political structure of the Latin American republics.

190

Ibid., pp. 21-22.

191

A. V. Dicey, "The Referendum," The Quarterly Review, CCXII (1910), p. 545. See Popular Government, pp. 41, 67 and 90.

192

James Bryce, "Flexible and Rigid Constitutions," Studies in History and Jurisprudence, I, p. 142.

Bryce had wanted to see for himself what truth there had been to Maine's charges. He concluded that there was none. The essence of Bryce's criticism was that most Latin American republics were that in name only; some had real constitutional machinery, some were petty despotisms, most "lie between these two extremes" with constitutional machinery which worked "more or less irregularly and imperfectly." Maine's tendency to lump all states together under a single heading, regardless of the real constitutional structure of the state was

...really no more legitimate than that of the enthusiastic North Americans who were prepared to defend the government of any South American country that called itself a republic. Both the assailant and the apologist looked only at the name, and did not stop to enquire into the thing. Sir Henry Maine's reasonings were valid against those who held, as did the North Americans, that the name of republic is enough to ensure good government, but valid against them only. There are always people ready to assume that things are what they are called, because it is much easier to deal with names than to examine facts. 193

Popular Government suffered the fate it deserved; it became the focus of a wide-ranging and bitter controversy on the merits, or otherwise, of political democracy. That the book was not the dispassionate analysis which Maine envisioned should be absolutely clear. Upon examination, each of his propositions reflected, not scientific analysis,

193

James Bryce, South America: Observations and Impressions, new ed., (New York: The Macmillan Co., 1914), p. 526.

but a passionate, emotional commitment to a set of a priori political ideals common to his time. So obvious was this distortion when compared even to his earlier works that one must agree with the observation that "Popular Government might be described as a caricature of Ancient Law." While Ancient Law had a certain "tough and technical" nature, "the substance of political history is less exacting. In dealing with it, all but the greatest will write an opinion and not an analysis."¹⁹⁴ Maine's writing was, in this case, not of the greatest. "In Popular Government it is obvious that the selected facts are a mere decoration of the selected theme that civilization is a technical skill held in trust for the many by the few. The book is a mirror of a temperament."¹⁹⁵

Maine's whole argument, said one critic, was "viti-ated by silence."¹⁹⁶ Alert to political phenomena favorable to his case, he remained silent on other examples. His was, most often, a sin of omission. Bryce caught Maine out in another way; where political phenomena admitted of more than one interpretation, as in the case of the Latin

194

K. B. Smellie, "Sir Henry Maine," p. 91.

195

Ibid.

196

See John Gibb, "Sir Henry Maine on 'Popular Government'," p. 309.

American republics, Maine selected only that one which conformed to his expectations. Thus, despite Maine's disclaimer that his argument did not have "an affinity for a priori reasoning," one can only conclude that it did have a strong, unavoidable affinity. In this, however, Popular Government was different only in degree, not in kind, from his earlier works. Maine did not spend his life as a scientific seeker of truth only to become the committed, opinionated opponent of democracy in his last years. In this respect, his work is of one piece, though the less controversial subject matter of Ancient Law or of Village-Communities may more effectively have camouflaged his biases.

This is not to say that Maine should not have manifested this commitment; on the contrary, he could not have avoided it, not because of his personal nature but because commitment and a priori ideals--or at least ideals established before thorough investigation--are the stuff from which academic research is made. Maine's misconception was not in being committed to pre-conceived goals; it was in not recognizing that fact. He hood-winked himself into believing that he had found the way to accomplish what had never been done: a scientific analysis of politics. Having convinced himself that he had found the way to truth--though he never made so bold as to claim he had the truth--his method, his out-look and his conclusions became rigid

and dogmatic. His reply to Godkin was but a shortened version of the book, and, as such, was altogether disappointing, for it was an almost perfect illustration of the evils of intellectual inflexibility and dogmatism. Unfortunately, few things can be more conducive to dogmatism than too rigid an adherence to a single method or to a single conclusion. Popular Government helped Maine's contemporaries to understand the nature of the political world, and it contributed to a continuing dialectic which helps us understand our own. But it was not truth. It was not the only interpretation possible. It was not scientific. It was but one of a number of partial and ever-changing truths concerning the nature of politics.

The world in which Maine lived is dead. That this should be, need not be so disastrous as he would have us believe, however. One of the wisest thoughts in political literature was penned, in 1852, by Alexis de Tocqueville, when he said: "What we call necessary institutions are often no more than institutions to which we have grown accustomed, and...in matters of social constitution the field of possibilities is much more extensive than men living in their various societies are ready to imagine."¹⁹⁷ Constant change in every field, in social life, religion,

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Alexis de Tocqueville, Recollections, trans. by A. T. de Mattos, ed. by J. P. Mayer (New York: Meridian Books, 1959), p. 81.

economics and in politics, has become standard procedure. Whether it is progress or not is a moot point; that concept, so central to Maine's entire system, has become blurred and very imprecise in meaning. That which remains important is that too rapid change can yet be dangerous; the role of works such as Popular Government is to remind us of our historical antecedents and to remind us that too rapid change can lead to social disintegration.

By approaching the topic of political democracy from an historical perspective, Maine was able to explode some of the more obvious myths surrounding that term. Whatever weaknesses one might find in his examples, he did succeed in pointing out that democracy was not inevitable, that it need not be progressive, that it was a rare form of government and a difficult one. But these were not the only valid "truths" worth knowing about democracy; there was, to many, a moral side of the argument which was as "truthful," as important, as the historical. However hard he might try, his findings remain history--a record of what was and how it came to be. And since political theory, like legal theory, must ultimately deal with the moral problems of "oughts," Maine's methodological approach enabled him to beg the most important question which a theoretician must face. Maine was able to avoid the very question which the concepts of natural law and of the greatest number were designed to meet -- what should

government be? By asking instead, what is government?
Maine missed the point at issue altogether.¹⁹⁸

198

See the comments in Ernest Barker, Political Thought in England from Herbert Spencer to the Present Day (New York: Henry Holt, n.d.), p. 161.

CHAPTER VIII

FACT VERSUS SENTIMENT:
THEORY AND ADMINISTRATION IN INDIA

The history of the British in India may be conceived, in broad terms, within the context of social and cultural conflict.¹ British entry into India signified not only a political or military conquest, but also a cultural conquest--the imposition of an essentially alien outlook and system of government, law and economy upon a group of non-European cultures which resisted, not by force (except, perhaps, in 1857), but rather by passive, conservative adherence to established traditions. From the beginning of the seventeenth century to the middle of the eighteenth, while the East India Company was only a trading corporation, "existing on the sufferance of the native powers and in rivalry with the merchant companies of Holland and France,"² the conflict was minimal. The small number of British settlements, combined with the dominance of interest in trade, limited the possibility of conflict. However, the expansion of the Company over the sub-

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See the comments in George D. Bearce, British Attitudes Towards India, 1784-1858 (Oxford: Oxford University Press, 1961), pp. 6-7.

2

The Imperial Gazetteer of India: The Indian Empire, IV, p. 5.

continent, the consolidation of its position, the consequent increase in non-commercial, governmental activities and the increased intervention in India by the British home government, broadened the area of contact and intensified the degree of conflict. After 1857, when the remaining powers of the Company were transferred to the Crown and Britain fully assumed the "whiteman's burden," the twin questions of the nature of cultural imposition, and the speed of it, took on an even greater importance.

India "attained early to civilization,"³ but by the eighteenth century, the golden moments of glory were past. Politically disunited and culturally unchanging, India "lacked the leadership, technology and organization which characterized Britain's rapid rise to world importance."⁴ India's ancient, impressive and infinitely complex social and cultural traditions, her political institutions, legal and religious practices, and her dominantly agrarian and traditional hand-culture industry were on the defensive against British influence.⁵ The history of Britain in India is the history of the contrast between a vigorous,

³ Vera Anstey, The Economic Development of India, p. 97.

⁴ George D. Bearce, British Attitudes Towards India, p. 5.

⁵ Vera Anstey, The Economic Development of India, p. 96.

changing social order which tended to confuse this change with progress, and a traditional, relatively unchanging society whose hold upon the past was weakened by internal disintegration and external pressure.

Lack of effective Indian opposition, technological superiority and the emergence of Britain as a dominant European sea power allowed her to impose her military rule upon India through war and political manipulation. Military conquest and political control of India coincided with the rapid expansion of British industrial capacity, and it was the Industrial Revolution which did most to bring about a definition of the purpose of the dominion thus accomplished. The role of government in India after 1800, was increasingly interpreted as being "an instrument for ensuring the necessary conditions of law and order by which the potentially vast Indian market could be conquered for British industry."⁶ In this way the conflict was broadened and intensified; the collision between cultures added to the collision between states.

The voices of English liberalism--new liberalism "in its clear, untroubled dawn"--and of Evangelicalism were raised in support of assimilating India into a distinctively English pattern and in support of creating an England in

6

Eric Stokes, The English Utilitarians and India, p. xiii.

the Orient. "The physical and mental distances separating East and West was [sic] to be annihilated by the discoveries of science, by commercial intercourse, and by transplanting the genius of English laws and English education."⁷ India was to be given the benefits of English civilization and, too, of the Christian religion. Bishop Wilberforce, Charles Grant, Jeremy Bentham, James and John Stuart Mill and Macaulay, whatever their individual differences, brought forth programs of social reform expounded with the utmost missionary zeal. The battle was not only for markets, or even for converts; it was a battle for progress. It was a battle against the darkness of the past and for the hope of the future. In most instances, the liberal drive for assimilation in India was compounded -- one might almost say confused--with the battle against the vestiges of medieval society in England. True, the Indian problem was infinitely more vast, infinitely more complex, but it was the same problem, nevertheless. India was seen as a major bastion of medievalism. Religiously dominated, hierarchical, agrarian, it suffered from all these faults. All had to be combatted. In this way were the "conflict and tensions in Britain's intellectual environment manifested in British attitudes on India."⁸

⁷ Ibid.

⁸ George D. Bearce, British Attitudes Towards India, p. 7.

The resistance which liberalism encountered in India was compounded of inertia and confusion. Maine's insistence upon the utter conservatism of the great mass of people had a certain validity in India as it has in any agrarian, peasant-dominated society. The very breadth of reform which liberals attempted to undertake assured a high degree of resistance. Where, as in the question of land-ownership, liberalism won a partial victory, the result was confusion. Concepts of private ownership, the absolute right to dispose of property in perpetuity, of contract law and of a monetarized economy were alien to most of India; imposed upon that society, they did not gain sufficient support to create an "Asiatic England." They did, however, succeed enough to undermine the old system. The Indian native was, despite the best efforts of the reformers, "still bound by caste, by traditions, and by ties to his joint family." Forced to give up these links by British attempts to treat the question of land-ownership within their own context, the Indian peasant "had no new way of life which he understood, nor did the transformation of the economy proceed far enough to provide him with an alternative life."⁹ The degree to which the Indian Mutiny of 1857 was caused by this social reform

⁹ Walter C. Neale, Economic Change in Rural India: Land Tenure and Reform in Uttar Pradesh, 1800-1955 (New Haven: Yale University Press, 1962), p. 9.

was a question upon which there was little agreement. In the years following, the topic was the center of an acrimonious debate in which the original liberal aims, once so clear, became confused and imprecise.¹⁰ In the babel of conflicting voices, the clear and hopeful aim of complete assimilation was lost. The impact of the Mutiny, combined with the waning enthusiasm and the increasingly conservative character of English liberalism at home combined to frustrate reform enthusiasm.¹¹

To conceive of the British presence in India simply in terms of avid and zealous reformism at work within a stagnant society would, by itself, be misleading. The liberal program had, from the beginning, another opponent, found, not in India, but in England itself. Liberalism had also to confront the tradition of Edmund Burke. In the persons of Mounstuart Elphinstone, Sir John Malcolm and Sir Thomas Munro, the romantic horror of speculative reform and of the uprooting of ancient society was combined with a respect for and an emotional kinship with the past. Whereas in England romantic conservatism failed to

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Thomas R. Metcalf, The Aftermath of Revolt: India, 1857-1870 (Princeton: Princeton University Press, 1964), p. 92.

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Ibid., p. viii.

flourish in the face of a growing industrial society, in India it prospered, momentarily, in the hands of this generation of administrators.¹² Yet, while neither philosophy failed in India, neither triumphed. English liberalism found in English romanticism a worthy opponent and an implacable foe.

Between these two poles thought on India flowed. The parties were irreconcilable, compromise impossible. Either one accepted the worth of Indian society and culture, defended it and attempted to utilize it as an instrument of government in India, or one disregarded it, destroyed it and made way for a more rational, humane and understandable society. Both approaches, so rigidly conceived, were discredited by the Mutiny: the former because it was generally felt that no society producing the savagery and the barbarism latent in the Mutiny deserved respect or preservation, the latter because too rapid a transformation seemed one of the obvious causes of the revolt. After 1857, a new intellectual synthesis, a new concept of the role of the British in India was necessary.

It is in this context that Maine's presence in India has to be understood, for it was Maine who was responsible for helping to create this new synthesis and whose work did much to popularize it. Maine did not work alone;

¹² Eric Stokes, The English Utilitarians and India, p. xvi.

the new English stance in India was not only his but also that of James Fitzjames Stephen, A. C. Lyall and a host of others. Nor was he alone responsible for the acceptance of the new synthesis. The fact, however, that his works were used in England in the university and in the Indian civil service contributed to its success. Just as James Mill's History of British India helped form English attitudes toward India in the first half of the century, Maine's Ancient Law and his Village-Communities helped shape them in the latter half.

The intellectual synthesis which Maine helped to create was almost dialectical. From each of the old antipathies he salvaged key attitudes and crucial concepts, but to them he added a new element of assurance and of scientific certainty. To the new outlook on India he brought the historical method and the truth of scientific discovery. Instead of a priori assumptions, the like of which had characterized both liberalism and romanticism, he founded his analysis upon positivism and the naturalistic pattern of thought. The fallacy of liberalism and of romanticism was proven by the Mutiny; the new outlook had the appearance of truth.

From the romantic school of Monro, Malcolm and Elphinstone, Maine retained few specific concepts but many attitudes: he too distrusted the notion of rapid change in a conservative society, he too rejected the optimistic

assertions concerning human nature based upon a priori liberal theory and he too questioned the blind faith in progress that liberalism implied. All of these reservations seemed justified by the Mutiny, the spectre of which constantly haunted Maine's thoughts. Maine could not, however, accept the basic contention of the romantics that Indian culture was of sufficient merit to justify preservation. Whereas the earlier administrators accepted and attempted to preserve Indian institutions in order to create a possible haven for the best aspects of the Indian past, Maine was not so ready to accept that culture on a separate-but-equal basis. In this respect he remained firmly within the liberal camp.

From the liberals, Maine salvaged the notion that change in Indian society was desirable, even though it had to be slow and could probably never be complete. Britain's burden was doubly difficult--not only had she to provide the men and institutions for modernizing India and bringing it into the modern world, but she had to do it without undue strain on the existing social structure. The British in India had to understand the wide gulf which separated not only India from England, but one part of India from another, and to comprehend at what different rates of speed progress could be brought to the various parts of a complex world. Nowhere was this contribution of Maine's to English thought on India more clearly

indicated than in M. E. Grant-Duff's statement:

"...The institutions of any community should correspond to its existing stage of growth, though they must be varied in novel environments." "Maine was so far as I know," Grant-Duff continued, "the first to turn the bright light of this principle of evolution upon the already melting mists which shroud and distort Indian facts under Western observation."¹³ From the liberals, too, Maine borrowed a respect for law as opposed to edict, bureaucracy as opposed to autocracy, government as opposed to reign. In this he rejected not only the personalized rule espoused by Munro and Elphinstone, but also the authoritarian, almost dictatorial powers claimed after the Mutiny by Lord Lawrence. The type of governmental control which England needed in India to fulfill properly its newly conceived role was, Maine argued, more complex than one man could oversee. England's civilizing mission required a patience, a flexibility, a breadth of vision not available to one individual. That English government after 1857 was government under law, can be traced, in part, to Maine's pervasive influence and to his guiding hand.

The relationship between Maine and India was not a simple one. His experiences in India helped greatly to

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Sir M. E. Grant-Duff, in: Sir Charles Tupper, "India and Sir Henry Maine," p. 399.

formulate his system of thought, but this process was also reversed. His assumptions helped too, to reconstruct India after the chaos of rebellion. The new India and the new British understanding of India was partly of his making. Maine "stood between the East and the West, between the present and the past, the interpreter alike of archaic and of modern ideas," said Grant-Duff.¹⁴

Whether his contributions were to the benefit of India and its inhabitants is a moot point. The confidence, however, and the assurance which he gave to the British concept of their role in India does indicate one of the more disturbing features of Maine's thought. The conviction that his analysis was true or nearly so, in its essential if not in its specific points, lent to his thought a rigidity and a righteousness which brooked of no argument or debate and confirmed, scientifically, that notion of British superiority which underlay so much of nineteenth century imperialism and which continued for many decades to pervade, however subtly, British scholarship and British thought on India. Even in the twentieth century, British scholarship tended "to focus attention on what the British were doing in India, in government, law and administration, and to forget what was happening in Indian

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Ibid.

society...."¹⁵ Part of this was normal chauvinism, part simply the ready availability of records concerning British rule, but part was, undoubtedly, a conviction that British rule was civilizing rule and that it brought progress to a backward corner of the world.

I. The Background

Whether "the dominion exercised by the British Empire" in India should or should not be permanent, and what, precisely, this dominion should be were questions which haunted Englishmen throughout the latter part of the eighteenth century and well into the nineteenth. In 1777, Warren Hastings thought that control of India by Britain could only be temporary and that her position on the sub-continent would soon be ended.¹⁶ Fifty years later, Sir John Malcolm, though himself engaged in bringing a large part of Central India under British control, repeated these same sentiments, for he too believed that India was so completely alien that British rule could never be permanent.¹⁷ The fifty year interval between Hastings'

¹⁵C. H. Philips, "British Historical Writing on India," The Listener, LIV (1955), p. 989.

¹⁶Ainslie Thomas Embree, Charles Grant and British Rule in India (New York: Columbia University Press, 1962), p. 142

¹⁷Sir John William Kaye, The Life and Correspondence of Major-General Sir John Malcolm, G.C.B., Late Envoy to Persia, and Governor of Bombay... (London: Smith, Elder and Co., 1856), II, pp. 371-72.

statements and those of Malcolm, however, witnessed the growth of political and economic ties between India and England so important as to assure the continuation of British rule and to challenge the accuracy of Malcolm's prediction.

In Bengal, for example, British trade interests dominated the economic scene. Britain accounted for half of Bengal's trade in 1832, receiving almost 53% of her exports and sending in almost 57% of her imports. Private capital and the private trader with about thirty-one million pounds invested in Bengal alone had an increasing stake in continued British control.¹⁸ Further opportunity for British trade would, it was felt, increase greatly once European civilization was diffused throughout India. Altruism and the desire for economic gain were inextricably combined in the defense of British dominion in India which grew even as trade grew. There was, as Charles Grant noted, no foreseeable time when "we may not govern our Asiatic subjects more happily for them than they can be governed by themselves."¹⁹ India had first to be civilized,

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Amal Tripathi, Trade and Finance in the Bengal Presidency, 1793-1833 (Bombay: Orient Longmans, 1956), p. 252.

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Great Britain, Parliamentary Papers, Vol X (Reports, Vol. IV), 15 June, 1813, Sir Charles Grant, "Observations on the State of Society among the Asiatic Subjects of Great Britain, particularly with respect to Morals; and on the means of improving it,--Written chiefly in the year 1792," p. 94.

be made the beneficiary of, in Macaulay's words, "our arts and our morals, our literature and our laws," and, of course, "our trade."²⁰ More directly to the point was the testimony of one Mr. Mackenzie, in 1832, that "whatever, in short, has made England prosper, should, unless there be clear ground for objection, be given to India...."²¹

Hastings' prognosis, and Malcolm's, were shown increasingly wrong.

The heart of this new enthusiasm for India might well be economic, but it ranged far beyond the mundane realms of trade and commerce. In England, an exuberant liberalism combined with an equally exuberant Evangelicalism to produce a view of India designed to fit the changing realities of British involvement. The views of these two groups were not identical, for evangelicalism represented a movement of religious revival, while liberalism suggested extreme secularism. Both, however, believed in intense individualism, in freeing the individual from the bonds of feudal society, and in "the power of ideas and institutions

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Great Britain, 3 Hansard's Parliamentary Debates, XIX (1833), p. 535.

21

Great Britain, Parliamentary Papers, Vol. X, Part II (Reports, Vol. VI), 10 August, 1832, "Affairs of the East India Company; Continuation of Appendix to II. Finance and Accounts--Trade. Part 2--Commercial," p. 590.

to mould men's character."²² The literature which emerged from these groups attempted to find a sanction for British rule, not only in economics but in a direct comparison of the two civilizations.²³ That Indian civilization emerged from this comparison the definitive loser served to justify a zealous reforming program which neither group shirked. William Wilberforce, in a statement to Lord Wellesley in 1799 indicated the basic convictions behind the reformers when he characterized British government in India as

...that phenomenon, never known to the world till the period of the British constitution, of an immense kingdom at the distance of half the globe, governed with a dis-interested regard for the happiness of the subjects, and though in a quarter of the world where slavery seemed to be fixed in unassailable security, yet ruled over with a firmness and a moderation and an enlarged and benignant policy, which imparted to the bulk of the people more than they ever before tasted of the blessings of rational and practical liberty. ²⁴

In this single statement appeared the ideas of Britain's military, institutional and individual superiority, of the Indian's basic spiritual weakness, of Indian civilization's

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Thomas R. Metcalf, The Aftermath of Revolt, p. 8.

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Ainslie Thomas Embree, Charles Grant and British Rule in India, p. 142.

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The Wellesley Papers: The Life and Correspondence of Richard Colley Wellesley, Marquis of Wellesley, 1760-1842 (London: Herbert Jenkins, Ltd., 1914), I, p. 97.

corruption, superstition, anarchy, injustices and vice, and the conviction that Indians were much better off under Britain's benign and sensible rule.²⁵

James Mill's History of British India seemed to prove conclusively that Indian society was so corrupt that British control could only serve to improve the condition of the population. Using his own standards of civilization,²⁶ which included only modern Europe and ancient Greece, Mill placed India far down the scale. He insisted that Hindu culture was lower even than medieval Europe's in terms of agricultural technique, art and in the intellectual and moral qualities of the people.²⁷ In the face of such corruption, the role of Britain in India was clear; she must be the agent of reform and the destroyer of despotic and decadent institutions and ideas. Britain in India was responsible for what Wilberforce saw as "that prudent and gradual communication of light and truth which will cause the natives themselves spontaneously to abandon them [Ancient Indian customs]."²⁸ Wilberforce thought

²⁵ See George D. Bearce, British Attitudes Towards India, pp. 40-41.

²⁶ James Mill, The History of British India, II, p. 132.

²⁷ Ibid., pp. 148-50.

²⁸ Great Britain, 1 Hansard's Parliamentary Debates, XXVI (1813), p. 1072.

the British in India to be

...engaged in the blessed work of substituting light for darkness, and the reign of truth and justice and social order and domestic comfort, of substituting all that can elevate the character or add to the comfort of man, in the place of the most foul, degrading and bloody system of superstition that ever depraved at once, and enslaved, the nature and destroyed the happiness of our species. 29

The instrument which was to end the misery of India was education. Both Macaulay and Wilberforce saw in education the panacea for the birth of a new, modern nation. Education would end idolatry and promote liberty; it would bring the end to darkness. Even Wilberforce expected, ultimately, that more would be gained from education than from missionary work.

I do not hesitate to declare, that, from enlightening and informing them, in other words from education and instruction, from the diffusion of knowledge, from the progress of science, more especially from all these combined with the circulation of the Holy Scriptures in the native languages, I ultimately expect more than from the direct labours of missionaries properly so-called. 30

Education, however, meant English education, not oriental; it meant science and modern languages, medicine and western literature. The old, the traditional in India was to be abandoned; specifically, governmental aid to oriental literature and scholarship would have to be foregone.

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Ibid.

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Great Britain, 1 Hansard's Parliamentary Debates,
XXVI (1813), p. 832.

Macaulay argued that:

The question now before us is simply whether, when it is in our power to teach this language, we shall teach languages in which, by universal confession, there are no books on any subject which deserve to be compared to our own; whether, when we can teach European science, we shall teach systems which, by universal confession, whenever they differ from those of Europe differ for the worse; and whether, when we can patronize sound philosophy and true history, we shall countenance, at the public expense, medical doctrines, which would disgrace an English farrier-- astronomy, which would move laughter in the girls at an English boarding-school-- and reigns thirty thousand years long--and geography made up of seas of treacle and seas of butter. 31

When these attitudes came to be implemented in India, however, the new program suffered. Reforms had to be inaugurated on a practical level, by civil servants constantly faced with the need to compromise; reforms had to face the bitter opposition of administrators like Thomas Monro whose attempts to preserve Indian cultures directly contradicted the liberal platform; and, the reforms had to overcome both apathy in India and special interest in Britain. All of this meant a general "dilution of the fair promise of liberalism."³² In theory, however, the liberal and evangelical reformers agreed that their goal in India was the creation of "a middle class, scientific

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George Otto Trevelyan, Life and Letters of Lord Macaulay (New York: Harper and Brothers, 1878), I, p. 291.

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George D. Bearce, British Attitudes Towards India, p. 164.

modernized society, such as was being developed in Britain in their own age."³³ That the reforms were not as complete as they hoped, or as efficacious as they dreamed, was not due to any lack of effort on their part.

The intellectual tradition of reform had already an administrative tradition in India to work within, established at the end of the eighteenth century by Lord Cornwallis, and known as the "system of 1793."³⁴ Cornwallis' aim had been to repair the fortunes of the East India Company by establishing an efficient administration which would allow the company to realize a regular profit.³⁵ His system was one of anglicanization or, as one unsympathetic observer said, of making "everything as English as possible in a country which resembles England in nothing."³⁶ Cornwallis was, in his own day, relatively unsuccessful, but his approach to Indian government was

³³ Ibid., p. 136.

³⁴ Arthur Aspinall, Cornwallis in Bengal: The Administrative and Judicial Reforms of Lord Cornwallis in Bengal, together with Accounts of the Commercial Expansion of the East India Company, 1786-1793, and of the Foundation of Penang, 1786-1793 (Manchester: University of Manchester Press, 1931), p. 173.

³⁵ Eric Stokes, The English Utilitarians and India, pp. 25-26.

³⁶ George Robert Gleig, The Life of Major-General Sir Thomas Munro, bart. and K.C.B. late Governor of Madras (London: H. Colburn and R. Bentley, 1830), III, p. 381.

taken up again in 1813 when the renewal of the Company's charter offered another opportunity, though the intervening years had decreed that more than Company profit should justify foreign intervention. Lord Grenville, for example, argued that anglicanization should be used to reform and improve the people, protect property and individual freedom, preserve peace and impartially administer law.³⁷

If the British were to remain in India they would have to provide these customary amenities expected of all good government. "These are duties," said Grenville, "which attach on government in all its forms; the price and condition of obedience; sacred obligations from which no sovereign power can ever be released; due from all who exact to all who pay obedience."³⁸

The major agent of reform after Cornwallis was Lord William Bentinck, appointed Governor-General in 1827. His arrival in Calcutta in 1828 signified the beginning of another era of extensive reform in India.³⁹ Though much emphasis was placed upon liberal concern for education,

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Great Britain, 1 Hansard's Parliamentary Debates, XXV (1813), pp. 712-13.

³⁸
Ibid., p. 713.

³⁹
B. B. Misra, The Central Administration of the East India Company, 1773-1834 (Manchester: University of Manchester Press, 1959), p. 55.

Bentinck's administration was also concerned with the reform of law.⁴⁰ The Indian legal system in the early nineteenth century was of such wonderful complexity as nearly to defy description. In 1830, Sir Charles Grey gave some indication of the wide variety of law which Indian judges were expected to use in the determination of individual cases.

There are English Acts of Parliament, especially provided for India and others of which it is doubtful whether they apply to India wholly, or in part or not at all. There is English common law and constitution, of which the application, in many respects, is still more obscure and perplexed. Mohomedon law and usage; Hindoo law, usage and Scripture; Charters and Letters Patent of the Crown; Regulations of the Governments; which are founded, as some say, on the general powers of Government entrusted as to the Company by Parliament, and as others assert, on their rights as successors to the old Native Governments; some Regulations require registry in a Supreme Court, others do not; some have effect generally throughout India; others are peculiar to one presidency or one town.... There are commissions of governments...; treaties of the Crown; treaties of the Indian Governments; besides inferences drawn at pleasure from the application of the droit public and law of nations of Europe, to a state of circumstances which well justify almost any construction of it, or qualification of its force.⁴¹

This tangled web of law and legal institution had somehow to be dispensed with, or at least minimized, if

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Demitrius G. Boulger, Lord William Bentinck (Oxford: The Clarendon Press, 1892), p. 149.

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Great Britain, Parliamentary Papers, Vol. VI (Reports, Vol. III) 11 October, 1831, "Appendix to the Report on the Affairs of the East India Co., Part V, On the Establishment of a Legislative Councils,--A new System of Courts of Justice,--and a Code of Laws in British India," p. 112.

India were to enjoy the fruits of English civilization to the fullest. The question, to the liberal mind, was not so much whether law should be simplified as it was how this simplification should take place. So long as the law remained confused, personal rule and autocratic government had to prevail in order to assure justice; yet, this was precisely the concept of government which James Mill had viewed as one of the bases for Indian decadence. Some means of simplifying the law had to be found, a law code devised, to bring government under law to India. Charles Wood, particularly, advocated the creation of uniform methods of pleading and practice applicable throughout the country.⁴² In 1834, the first Indian Law Commission was established under the direction of Macaulay. Its work was supplemented by a second commission established in 1853,⁴³ though neither commission was able to put new codes before the government. The two commissions did, however, much of the preliminary work which resulted in the creation of the Penal Code in 1860 and which "led to the enactment of the Codes of Procedure, civil and criminal, in 1859 and 1861 respectively."⁴⁴ On the whole, however, the Law Commissions

⁴² Sir Francis Du Pre Oldfield, "Law Reform," The Cambridge History of India, ed. by H. H. Dodwell, VI, p. 381.

⁴³ Ibid., p. 384.

⁴⁴ Sir Benjamin Lindsay, "Law," Modern India and the West: A Study of the Interactions of their Civilizations, ed. by L.S.S. O'Malley, p. 111

seemed to lose their vitality and, in the period before 1857, they "did not succeed in effecting any codification of the laws or customs of the country."⁴⁵ The legacy of the Law Commissions was, however, greater than their production; they left in India a rich tradition of antipathy to personal government and of concern for government under law which later reformers, including Sir Henry Maine, could draw upon.

The enthusiasm with which liberal reformers tackled the question of legal improvement was carried over, as well, into the realm of economics. Nowhere did the clash of British liberalism and Indian culture have a more significant impact than on the pattern of land-holding. The economic history of India, at least until the Mutiny, was a history of misunderstanding; specifically, it was a history of British efforts to impose the idea of ownership as the power of absolute disposal of property in perpetuity upon an essentially agrarian community in which this concept had never prevailed.⁴⁶ The Indian tradition was fundamentally different; insofar as it is possible to make any generalizations concerning dominant Indian concepts

⁴⁵Sir Courtenay Ilbert, The Government of India, p. 92.⁴⁶Baden H. Baden-Powell, The Land-Systems of British India, I, p. 220.

of land-holding in the face of a bewildering assortment of different and sometimes conflicting customs,⁴⁷ the following would appear to have been true:

The two principal ideas of landed right were that the person who first cleared the land and made it productive had a first claim on the land, expressed as a share in the product, and that he who conquered the area had a claim to the product. A claim to hold land, to enjoy its produce, to alienate it, or to inherit it could be based only upon these grounds, and throughout the East the strongest connection with the soil was an ancestral holding.⁴⁸

When the British came to India, the views of the classical economists and the actual socio-economic structure of rural England prevented them from believing that cultivated land could belong to no one, or that land could be held by a large number of people, each possessing it in a different way.⁴⁹ Where, for example, in Bengal or North Madras, the British did not find a landlord, they searched for one in an attempt to "approximate the Indian to the English land system."⁵⁰

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For the problems involved in discussing the economic impact of Britain upon India, see Sir Percival J. Griffiths, The British Impact on India, pp. 359-60.

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Walter C. Neale, Economic Change in Rural India, p. 19.

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For an interesting effort to present a conception of landed interests in India in terms of a scale or table, ranging from one to four interests, see B. H. Baden-Powell, A Short Account of the Land Revenue and Its Administration in British India, p. 129.

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Vera Anstey, The Economic Development of India, p. 98.

In Bengal, an arrangement was made with a class of persons called zamindars, whose original claim to the land, though not that of ownership, was sufficiently like it to satisfy the British.⁵¹ The government imposed upon the zamindars a permanent assessment, in return for which they granted them a full control over the land and its tenants, including the rights of ejection and of increasing rent.⁵² B. H. Baden-Powell argued that "even if the zamindars had been less like landlords," the British habit of seeing possession in their own terms made it "almost inevitable that such a system should have shaped itself in the minds of our legislators."⁵³ In later years, when the British came across systems of land-holding quite obviously communal and unsuitable for the type of settlement made in Bengal, they could not adapt their thinking completely. Even when local administrators discovered areas where village tenure prevailed, "they kept on writing as if some one person in the village must be the proprietor."⁵⁴

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Pramathanath Banerjea, Indian Finance in the Days of the Company (London: Macmillan and Co., 1928), pp. 158-59.

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Ibid., pp. 162-63.

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Baden H. Baden-Powell, The Land-Systems of British India, I, p. 187.

54

Ibid.

A series of land settlements was consequently made throughout India as British power extended over the sub-continent. A "settlement" consisted of an official assessment of land revenue due the government from all but revenue-free land.⁵⁵ In most cases, the land was surveyed to ascertain its value and to inquire into the rights of all persons on the land, but the basic misunderstanding of the nature of Indian land-holding and the desire of the East India Company to make an economic settlement favorable to itself often nullified or minimized the effects of the survey. The settlements were often hurried and the results catastrophic.⁵⁶ The old India was slowly destroyed and one of its most fundamental characteristics undermined.⁵⁷ The resulting social dislocation should probably be assigned a prominent place in the gallery of causes for the Mutiny of 1857.

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Vera Anstey, The Economic Development of India, p. 98.

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Pramathanath Banerjea, Indian Finance in the Days of the Company, p. 162.

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On the disruptive influence of British economic policy, see Walter C. Neale, Economic Change in Rural India, p. 279; and Pramathanath Banerjea, Indian Finance in the Days of the Company, pp. 158-170. The whole burden of Maine's Ancient Law was, of course, that contract law was a later, superior development of the west. In 1870, George Campbell indicated an awareness that private ownership was not universal in India. See his "The Tenure of Land in India," Cobden Club, Systems of Land Tenures in Various Countries, pp. 145-227.

Legal reform, or economic, zealously advocated, were not the only projected solutions to the question of Britain's role in India. Liberal ideology, while dominant in the decades prior to 1857, did not sweep all before it; a sizeable segment of British opinion and a respectable number of conservative officials opposed the uprooting of Indian society. Those officials who looked with sympathy upon the ancient civilization of India were, in effect, following in the footsteps of Edmund Burke and William Robertson, whose treatments of social institutions as legitimate, almost sacred, products of history, set the tone for opposition to the thoughtless or even deliberate destruction of Indian culture. Edmund Burke treated the Indian constitution as comparable to, if somewhat less desirable than, the British. Though Burke thought Asia had already passed its greatest historical period to be replaced in world prominence by Europe, he still declared: "God forbid we should pass judgment upon a people who formed their laws and institutions prior to our insect origins of yesterday."⁵⁸ William Robertson, instead of insisting upon a rigid, western-oriented concept of law and civilization, recognized that "the human mind bends itself to the restraints which the conditions of its

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The Works of the Right Honorable Edmund Burke
(Boston: Little, Brown and Co., 1866), IX, p. 382.

nature or the institutions of its country impose...."⁵⁹

This historical relativism allowed Robertson, unlike James Mill, to appreciate that Indian law, especially, "will bear a comparison with the celebrated Digest of Justinian, or with the systems of jurisprudence in nations most highly civilized."⁶⁰

These romantic and conservative biases were carried over into the administration of India, where Warren Hastings was responsible for helping to preserve Indian institutions. In law, especially, he insisted that the courts recognize the existing customs and traditions of the country. In order to establish knowledge concerning Mohammadan and Hindu law, he contributed to the foundation of the Bengal Asiatic Society in 1784 and to the founding of the Moham- medan College in Calcutta; both institutions concerned themselves not only with law but with the history, art, literature, science and antiquities of India.⁶¹ Sir

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William Robertson, An Historical Disquisition Concerning the Knowledge which the Ancients had of India and the Progress of Trade with that Country prior to the Discovery of the passage to it by the Cape of Good Hope (New York: Harper and Brothers, 1850), p. 76. For a commentary on Robertson's history, see Thomas Preston Peardon, The Transition in English Historical Writing, 1760-1830 (New York: Columbia University Press, 1933), p. 25.

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See William Robertson, An Historical Disquisition, p. 80 and p. 85.

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Arthur Aspinall, Cornwallis in Bengal, p. 125.

William Jones, for example, the first president of the Asiatic Society, was intimately involved in this work. In a letter to Lord Cornwallis, in 1788, Jones reflected the concern which he felt about the possible evils attendant upon imposing foreign law on the Indian populace.

Nothing, indeed, could be more obviously just, than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could anything be wiser than, by a legislative act, to assure the Hindu and Mussulman subjects of Great Britain that the private laws which they severally hold sacred, and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system of which they could have no knowledge and which they must have considered as imposed on them by a spirit of rigour and intolerance. 62

By the regulating Act of 1773, matters pertaining to inheritance, succession and contract were to be dealt with according to Mohammedan and Hindu usages.⁶³ To avoid the danger of having British magistrates duped by Indian law officers who were to explain the law existing in Persian or Sanskrit, Jones undertook to provide English translations of the major native codes.⁶⁴

⁶²Quoted Ibid., pp. 125-26.

⁶³Ibid., p. 126.

⁶⁴See, for example, Sir William Jones, "The Mohammedan Law of Succession to the Property of Intestates," Works, VIII, pp. 159-265; and "Institutes of Hindu Law: or, the Ordinances of Menu...", translated from the original," Works, VII, pp. 75-399.

It was asking too much, perhaps, of British desire or ability to expect Hastings' or Jones' hope of governing without destruction to be fulfilled. India was not to be governed by her own laws; the result was to compound the confusion of the magistrates and to contribute to the plurality of law in India described by Sir Charles Grey.

Conservative sentiment was most evident in Madras and Bombay. Sir Thomas Munro, Governor of Madras, actively opposed liberal reformism. In a letter written in 1823, Munro condemned the major part of government publications as worthless because each was authored by a person who "writes as much as he can, and quotes Montesquieu, and Hume, and Adam Smith, and speaks as if he were living in a country where people were free and governed themselves." Government servants wrote as if they had never left England, "and their projects are nearly as applicable to that country as to India."⁶⁵ Munro objected to the contempt which the average Englishman had for Indian civilization⁶⁶ and to his insistence that the Hindus could be made into Englishmen in Asia.

I always dread changes at the head of the India Board, for I fear some downright Englishman may at last get there, who will insist on making Anglo-Saxons of the

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George Robert Gleig, The Life of Major-General Sir Thomas Munro, II, p. 66.

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Thomas R. Metcalf, The Aftermath of Revolt, pp. 6-7.

Hindus. I believe there are men in England who think that this desirable change has been already effected in some degree; and that it would long since have been completed, had it not been opposed by the Company's servants. I have no faith in the modern doctrine of the rapid improvement of the Hindus, or of any other people. ⁶⁷

Mountstuart Elphinstone, Governor of Bombay, also distrusted efforts to bring about rapid social change, focusing his attack upon the system of government established by Lord Cornwallis in Bengal.⁶⁸ Elphinstone saw Cornwallis' government as a system of abstract principles, as government conducted apart from the people and as government conducted only in the interests of revenue collection and the speedy dispatch of misguided justice.⁶⁹ His desire to counteract the effects of the system of 1793, to humanize the Regulations and to protect the privileges of the native aristocracy and the customs of the native population led him into almost continual conflict with the reformers and with the government.⁷⁰ Elphinstone's

⁶⁷ Quoted in John Bradshaw, Sir Thomas Munro and the British Settlement of the Madras Presidency (Oxford: The Clarendon Press, 1894), p. 180.

⁶⁸ Kenneth Ballhatchet, Social Policy and Social Change in Western India, 1817-1830 (London: Oxford University Press, 1957), p. vi.

⁶⁹ Eric Stokes, The English Utilitarians and India, p. 20. See also Sir Edward Colebrooke, Life of the Honourable Mountstuart Elphinstone (London: John Murray, 1884), II, pp. 115-124 et. seq.

⁷⁰ Kenneth Ballhatchet, loc.cit.

successor as Governor of Bombay, Sir John Malcolm, continued the struggle. Malcolm, himself an admirer of Indian civilization, said he dreaded no man "half so much as an able Calcutta civilian whose travels are limited to two or three hundred miles, with a hookah in his mouth, some good but abstract maxims in his head, the Regulations in his right hand, the Company's Charter in his left, and a quire of wire-woven fooscap before him."⁷¹

All of these administrators possessed a knowledge of India and of Indian tradition denied their liberal opponents; reform came easier when the magnitude of the problem was not so obvious. In no other area did they depart so drastically from liberal precepts as in their attempt to preserve what they considered the Indian tradition of personal government and to deny the desirability of the rule of law in Indian government.⁷² Their denial of the rule of law was not so much the result of their authoritarian personalities as of their distrust of the liberal belief in external institutions to bring about moral reform. Munro said:

The strength of our government will, no doubt, in that period, by preventing the wars so frequent in former times, increase the wealth and population of the

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Quoted in Sir John William Kaye, The Life and Correspondence of Major-General Sir John Malcolm, II, pp. 335-36.

⁷²Eric Stokes, The English Utilitarians and India, p. 21.

country. We shall also, by the establishment of schools, extend among the Hindus the knowledge of their own literature, and of the language and literature of England. But all this will not improve their character; we shall make them more pliant and servile, more industrious, and perhaps more skilful in the arts, and we shall have fewer banditti; but we shall not raise their moral character. 73

Changes in human society, according to this theory, stemmed from sources much deeper than the activity of legislators. At best, government could provide paternalistic protection, devoid of excessive legalism and capable of a degree of flexibility sufficient to take into account the peculiarities of Indian society.⁷⁴

Conservative sentiment, while a strong factor in Indian administration in the early part of the nineteenth century, tended to disappear in India after Sir John Malcolm's departure from Bengal in 1830. There was a momentary resurgence under Lord Ellenborough in the decade of the '40's, but the last years of British rule before the Mutiny were characterized by the triumphant dominance of liberal reformism.⁷⁵ The East India Company's College at Haileybury, at which all Company civil servants received their training, was a center of liberal ideology, and the

⁷³ Quoted in John Bradshaw, Sir Thomas Munro, pp. 180-181.

⁷⁴ Eric Stokes, The English Utilitarians and India, pp. 20-24.

⁷⁵ Thomas R. Metcalf, The Aftermath of Revolt, p. 18.

young candidates were well trained in Benthamite concepts of law and political economy.⁷⁶ Against this constant infusion of reformers, the conservatives could do little.

As the conflict between the competing ideologies slowly died out, and as the British subjection of India went on apace with the incorporation of the Punjab in 1849, Englishmen began to hope that "the rough war-time had ended, and that the whole country could settle down tranquilly under our dominion."⁷⁷ This was not to be, however, for the crisis of 1857-58 "shook for a moment the empire's foundations,"⁷⁸ and led to a drastic re-evaluation of the entire role which Britain had played in the past in India, and to a new conception of what her role was to be in the future. Ancient conflicts were forgotten--both liberal and conservative had been proven wrong. The need was for a new start and for a new definition of empire. Sir Alfred Lyall noted that after the suppression of the Mutiny,"the

76

Ibid. See, for example, Monier Monier-Williams (ed.), Memoirials of Old Haileybury College (Westminster: Archibold Constable and Co., 1894), pp. 170-199, for a discussion of instructors and instruction at the college. Malthus, for instance, was Professor of Political Economy from 1806 to 1836.

77

Sir Alfred Lyall, The Rise and Expansion of the British Dominion in India, 5th ed. (London: John Murray, 1910), p. 377.

78

Ibid., p. 376.

permanent reconstruction of government became practicable and necessary, the task of the British authorities was to deduce order out of this confusion, and to lay the foundations of a new and uniform policy."⁷⁹ Here, indeed, was the time for a, hopefully, more successful beginning.

One of the first victims of this desire was the East India Company. Despite the skill with which the Company defended itself⁸⁰ and the vociferous defense put up on its behalf by interested individuals like Sir Henry Maine, it was doomed. The delay and confusion implicit in "double-government," especially after the Company's commercial interests disappeared in 1833, spoke against it, as did the identification of the Company with monopoly and backwardness --with "non-civilization, non-irrigation, non-road-making, non-railway constructing."⁸¹ The new era could not accommodate the Company. Yet, if it disappeared in body, it remained, momentarily, in spirit. The Queen's proclamation of 1 November, 1858, stipulated that the

79

Ibid., p. 379

80

It required a succession of three Government Bills and two Ministries to clear the way for direct governmental control in India. Even then, the form of government created both at home and in India remained strikingly like that before 1857; only the Company was gone. See George D. Bearce, British Attitudes Towards India, p. 240.

81

William Howard Russell, My Indian Mutiny Diary (London: Cassell and Co., 1957), p. 11.

Company's policy should continue,⁸² and that the form of government should only gradually change. In India, the Governor-General remained, as did the military and civil service. In England, a Secretary of State with an advisory Council was substituted for the Company directorate.⁸³

It was apparent that the change about to take place was not revolutionary and that the British were not about to risk another upheaval by instituting a completely different policy overnight.

Another victim of the Mutiny was the belief that India could be modernized and her inhabitants' moral nature improved by legislated reform and education. One of the major questions after the Mutiny was the degree to which the policy of social reform had contributed to upheaval. There seemed to be universal agreement among Indian administrators that too-rapid reform had jeopardized Britain's position in India, and that "in a time of popular upheaval, local prejudices had to be conciliated and Hindu customs left to reform themselves."⁸⁴ Sir Alfred Lyall, for

82

See George D. Bearce, British Attitudes Towards India, pp. 24-41.

83

See Sir John Strachey, India: Its Administration and Progress, pp. 49-61 for a description of the new government.

84

Thomas R. Metcalf, The Aftermath of Revolt, p. 92.

example, questioned the validity of too-rapid an attack upon the essentially religious basis of Hindu civilization. "One is inclined," he said, "out of pure conservatism, to question whether the...annexation of old theologic dominions may not go on too fast."⁸⁵ Lyall saw no danger in reform per se, nor did most supporters of Britain in India. His was, instead, an increased awareness that the removal of old, established custom had to be accompanied by an alternate set of conventions considered equally valid by the population. To destroy without creating was the danger. "Conquest and civilization together must sweep away the old convictions and prejudices," he argued, "and unless some great enthusiasm rushes in to fill the vacancy thus created, we may find ourselves called to preside over some sort of spiritual interregnum."⁸⁶

The question which Lyall was raising was considerably different from that which had absorbed the energies of administrators before the Mutiny; no longer was it a question of whether or not to reform, but how to reform and, by implication, how to determine the speed with which a backward nation could assimilate change. Lyall argued that "a free people" should not be responsible for destroying

85

Sir Alfred Lyall, Asiatic Studies, Religious and Social (London: John Murray, 1899), I, p. 94.

86

Ibid., p. 322.

ancient institutions "before it is clearly understood how the void which they will leave can be filled up."⁸⁷ But before one could determine "how the void...can be filled up," there had to be a general conception of how wide the gap between Indian and western civilization was, how it came about, and how it could be most effectively bridged. To these newly conceived questions, Maine was to provide an answer.

Though Lyall had given indication that the traditional liberal concern for reform was to be retained, even after the Mutiny, the purposes for which that reform was to be pursued underwent transformation. While India was to be introduced to the benefits of western civilization, no longer was it in the hope of achieving a rapid and complete mental and moral transformation of Indian society. As the "crusading Zeal" of British radicalism declined and radical reform "ceased to be fashionable" in England, conservatism spread among Indian administrators. Sir Mortimer Durand's comment that "there are probably few Viceroys or Governors who do not return to England more conservative in their views about Indian affairs than they were on arrival,"⁸⁸ fairly well summed up this view.

87

Ibid., p. 322.

88

Sir Mortimer Durand, Life of the Right Honourable Sir Alfred Comyn Lyall, pp. 306-307.

James Fitzjames Stephen, who insisted throughout his life that he was a true liberal, also reflected this increasing disillusionment with the possibility of fundamental reform.

Our age is full of new ideas; it is full of all sorts of discontent with the present and of wild hopes for the future; and this makes the establishment of new forms of government especially easy and tempting, and thus affords a special motive to all friends of law and established order to deep the ferment, if possible, within the limits of discussion and exhortation, and to prevent the different revolutionary leaders from getting possession of effective sanctions by which they can convert into coercive laws their various crude systems. 89

This doubt concerning the efficacy of institutional reform which soon became fear of reform, was intensified when the question of the political organization of India was broached. Lyall had no doubt that Indian government would have to remain restricted and authoritarian. He supported any effort to "boldly proclaim the principle of authority and of government by the fittest," and opposed "anything like democracy, above all the sham democracy of the crude Bengalee who has no strength behind his words," because it "may yet drive us prematurely into some unlucky collision."⁹⁰ It became increasingly obvious that the new approach to government in India was to take place within

89

James Fitzjames Stephen, "On the Suppression of Boycotting," The Nineteenth Century, XX (1886), pp. 773-74.

90

Sir Mortimer Durand, Life of the Right Honourable Sir Alfred Comyn Lyall, p. 165.

the established bounds of authority and within the confines of an efficient government conducted by an educated and propertied elite. The new authoritarian mentality "made morally respectable that which the events of the Mutiny had made politically expedient: the maintenance of a strong... government which brooked no challenge to its authority."⁹¹

The change in attitude toward the government of India after the Mutiny ultimately involved a change in attitude toward the natives. Early liberals had assumed that India could be regenerated and reformed on an English model. When Wilberforce argued that "by enlightening the minds of the natives, we should root out their errors," he was suggesting that natives would, in time, be saved and that they "could, in short, become Christians...without knowing it."⁹² After the Mutiny this was no longer possible. No longer could Englishmen assume that India would, in the foreseeable future, attain the position of a civilized nation. India was uncivilized; it was faithless; it was barbaric. The job of bringing civilization to the sub-continent was greatly extended. The Mutiny seemed to mark, not the end, but the beginning of the battle. Said one anonymous author, in 1857:

⁹¹

Thomas R. Metcalf, The Aftermath of Revolt, p. 317.

⁹²

Great Britain, 1 Hansard's Parliamentary Debates, XXVI (1813), pp. 832-33.

If, therefore, we are called upon to restore the British empire in India to its former stability and grandeur by force of arms,--if this contest between barbarism and fanaticism of Asiatic hordes and the civilized authority of Christian rulers must be fought out on the plains of Hindostan,--we engage in it not only with a clear conscience and a bold heart, but with all the means which a well-disciplined and highly cultivated nation can apply to the chastisement of its enemies. The collision was not sought by us, nor was it caused by any act of tyranny or injustice. It has been forced upon us by unparalleled acts of brutality, treason and wickedness. 93

Even the apparent docility, apparent civility, apparent ability to grasp the bases of civilization reflected by the Indian native need not be conclusive proofs of success in reform. Were not the millions of peasants in Oudh,-- the "most easily governed masses in this world"-- the same masses who had participated in revolt? Durand noted that "it gives one an uneasy sensation when one reflects how easily such a population was stirred to such a convulsive outbreak."⁹⁴

In the long run, these attitudes toward the Indian native involved a flirtation with racism. The apparently docile Indian was shown a rapacious murderer. There was safety only among one's own kind, comfort only in a white community.

93

"India," The Edinburgh Review, CVI (1857), p. 593.

94

Sir Mortimer Durand, Life of the Right Honourable Sir Alfred Comyn Lyall, p. 277.

Once betrayed by those whom they had trusted, the British could no longer bring themselves to trust anyone with a brown face: all alike were tainted. Hence the bonds of race were quickly tightened, for survival itself was seen to depend upon it and the British from their entrenchment looked about upon the Indian people with increasing bitterness and hatred. 95

One cannot suggest that the Mutiny was the source of racial hatred in India, though it did much to stimulate this hatred. When the new social sciences seemed to confirm the inferiority of the Asiatic, there could be no doubt as to the necessity of continuing British rule for an indefinite period.

When Maine arrived, in 1862, as Law Member of the Council of the Governor-General, British thinking about India was in the midst of these great changes. Maine stood between those who would create a new India and those who would preserve the old, between those who would reconstruct India outside the law with the barest requisite institutional aid and those who believed in formal government operating under law.⁹⁶ The synthesis he created was selective; he rejected as much as he preserved from every school of thought. The basis of this synthesis was, however, of his own making. Maine's understanding of India, as reflected in his actions as a member of the government,

95

Thomas R. Metcalf, The Aftermath of Revolt, p. 290.

96

Sir Charles Tupper, "India and Sir Henry Maine," p. 402

was founded upon that same concept of law and society found in his work in jurisprudence and politics.

II. Maine in India

When Maine urged that history be studied "because it is true: because it is a portion of the truth to which it is the object of all study to obtain,"⁹⁷ he meant also, of course, the history of India. Upon his conviction that "there can be no essential difference between the truths of the Astronomer, of the Physiologist, and of the Historian,"⁹⁸ Maine constructed his theory of social evolution which, although it posited the notion of "an identity of origin between all the great races of the world,"⁹⁹ assigned to India--and to all non-European societies--a scientifically ascertained, inferior position in the scale of human social evolution. In India, particularly, the cruder, simpler and younger institutions of Aryan society flourished, often unmolested, in the midst of the modern world. While, to the scholar, these social atavisms, "infinitely less complex" than modern institutions and fitted "to serve as materials for a first generalization,"¹⁰⁰ served an admirable purpose, to the administrator

⁹⁷ Sir Henry Maine, Village-Communities, p. 264.

⁹⁸ Ibid., pp. 265-66.

⁹⁹ Ibid., p. 267.

¹⁰⁰ Ibid., p. 269.

they presented enormous problems concerning the way in which these backward peoples could best be brought along the long, tortuous road from barbarism to civilization. As a scholar, Maine admired greatly the vastness of the living documentary material India put at his disposal. As an administrator, however, Maine was committed not only to the maintenance of peace and order among the natives, but also to their introduction into the modern world.

"Nobody," Maine once said, "brought to India a stronger conviction than I did of the policy of abandoning all English or European generalizations in India, and of respecting native usage even though it should be unreasonable."¹⁰¹ This was the scholar speaking, the newly famous author of Ancient Law. The administrator, however, felt himself bound by the obligation to recommend all legislation concerning Indian natives "which is likely to contribute to their happiness and prosperity,"¹⁰² regardless of the fact that such regulations upset and disrupted Indian civilization. As an administrator, too, he found that, by 1862, much had already changed, that "there was a great deal less actual custom" in Bengal, for example,

101

Sir Henry Maine, "Prinsep's Punjab Theories," Minutes, p. 105.

102

Sir Henry Maine, "Oudh Tenant-right," Minutes, p. 61.

than he had originally supposed, so that to preserve Indian customs would be to re-create them. To this Maine was also opposed: "I think revolution just as bad when effected on the pretext of retrogression as when effected under the colour of advance...."¹⁰³ The result was that Maine felt himself obliged to acquiesce in the destruction of that remarkable ancient society he had discovered. The scholar had to work fast; "what has to be done must be done quickly." India, in the form which he came to know it, "pregnant with interest at every point, and for the moment easily open to our observation, is undoubtedly passing away."¹⁰⁴ Such was the price of progress.

Maine felt deeply that reform in India had, before the Mutiny, been blind and destructive; he opposed Indian reform based upon a priori idealism with the same vehemence as did Monro. Just as he had attacked a priori philosophies in jurisprudence and political theory, so too did he attack them in relation to Indian reform; his distrust of the basis of Mill's or Macaulay's reformism was but an extension of his attack upon political liberalism and Benthamism. Always, Maine reflected a distaste for those who "simply opposed one assumption to another," even in the

103

Sir Henry Maine, "Prinsep's Punjab Theories," Minutes, p. 118.

104

Sir Henry Maine, Village-Communities, p. 24.

day-to-day operation of government. Thus, he severely castigated the provincial officers of the Oudh who retained much of their early liberal enthusiasm for reform:

I remarked on the persistency of the Oudh officials in making assumptions instead of stating facts. It seemed impossible to get them to answer aye or no to plain questions, and every inquiry about the hereditary tenants produced either observations on the fallacious basis of the North-Western system, or assertions that the recognition of beneficial occupancy was an invasion of the rights of property. 105

Assertions of this nature, very often unsubstantiated by observation, were inferior to statements validated by empirical proofs. When adopted by Governments, principled assertions, however humane their objectives, committed that government to an inflexible policy which was often found to be inconsistent with good governing practices.

...I must urge that there are grave objections to admitting that any course of policy adopted or announced by the Government of India carries with it a pledge or promise to any class affected by it. It is too much the habit in India to complain of the abandonment by the Government of any particular principle or line of action, as if it involved a breach of faith to those who had profited by it.... Such a view of our position is irreconcilable with the functions of a Government which now pretends to exist for the benefit of its subjects, which is bound to carry out every measure which is likely to contribute to their happiness and prosperity, and which is not ashamed to admit that it learns by experience. 106

105

Sir Henry Maine, "Statute 33 Vict., c. 3 ss. 1 and 2; Bengal Legislative Council," Minutes, p. 165.

106

Sir Henry Maine, "Oudh Tenant-rights," Minutes, p. 61.

Maine was not, however, about to carry over his objection to a priori theory to the point of resisting social change of any kind. The Mutiny may have jolted Englishmen out of their complacency, but it had not destroyed the ultimate vision of reform. The vision, however, was postponed indefinitely, with emphasis placed now on the means of achieving change rather than upon the ultimate benefits of change or upon the state of society which might emerge. The problem became one of balance, one of maintaining a pragmatic, realistic approach to government in India, based upon good governmental practices rather than idealism. Government had, at all costs, to avoid the pitfalls of erratic behavior, inconsistency and lack of policy. The very complexity of Indian society, on the other hand, militated against too rigid an application of ideologically-based programs.

...in Bengal the problems are complex, many-sided and of extreme difficulty. There is scarcely a single question which has not a European side and a native side, a proprietor's side and a tenant's side, which has not to be regarded from the point of view of the educated and progressive section of Bengali society, and again from the point of view of rigid Hinduism. He will be a bold man who pronounces an unqualified opinion on any Bengal questions, and not a wise one who thinks that many of them can be solved without adjustment and compromise. 107

The argument for adjustment and compromise did not mean a

lack of continuity in governmental policy from year to year or even from decade to decade, however. Should a government of one ideological persuasion succeed that of another, there should always be some effort to retain consistency.

As a matter of policy I most fully admit the inexpediency of abrupt recoils from one line of action to another. Knowing, as we do, how much the influence of this Government over the races which it rules depends on their impression of the stability and consistency of the principles which guide it, we must allow that it would be most unwise in the Government of India, as constituted during one five years, rashly and on the score of any trivial differences of opinion, to break the tread of connection which ties it to the Government of the five years which preceded it. 108.

The obvious solution to the question of balance was to reject the principled argument of the kind prevalent before the Mutiny in favor of a sound evaluation of the factual circumstance of India.

In the long run, social and legal progress in India was possible, not because of the rightness or wrongness of any particular a priori theory, but because social and legal institutions and conceptions were subject to a law of evolution. No set of institutions and concepts, not even those of India, were so singular or immutable as to escape the fact of evolutionary change. After his return from India, Maine reflected upon the importance of recognizing

this fact.

The tendency of German juridical opinion which I have mentioned shows that we are in danger of over-estimating the stability of legal conceptions. Legal conceptions are indeed extremely stable; many of them have their roots in the most solid portions of our nature, and those of them with which we are most familiar have been for ages under the protection of irresistible sovereign power. The great stability is apt to suggest that they are absolutely permanent and indestructable, and this assumption seems to me to be sometimes made, not only by superficial minds, but by strong and clear intellects....The fact that they are nevertheless perishable suggests very forcibly that even jurisprudence itself cannot escape from the great law of evolution. 109

To discover and to understand the evolutionary process was the greatest problem facing mankind; in India it was essential.

One had only to compare England and Wales with the North-West Provinces of India, thought Maine, to establish the fact that there had been progress in India. If one considered the condition of these two regions thirty years ago, "it may be doubted whether, in respect of opinions, ideas, habits and wants, there has not been more change during thirty years in the North-West than in England and Wales."¹¹⁰ In this search for the future, there could be no looking back; the past, though having a relevance and an integrity relative to its own time, had

109

Sir Henry Maine, "Indian Codification," Minutes, pp. 238-39.

110

Sir Henry Maine, "Over-legislation," Minutes, p. 214

no place in the present or in the future. To contemplate the past while striving for the future was a danger to be avoided and a luxury which India could ill afford.

On the educated Native of India, the Past presses with too awful and terrible a power for it to be safe for him to play or palter with it. The clouds which over-shadow his household, the doubts which beset his mind, the impotence of progressive advance which he struggles against, are all part of an inheritance of nearly unmixed evil which he has received from the Past. The Past cannot be coloured by him in this way, without his misreading the Present and endangering the Future. 111

Consequently, though the ancient languages and customs of India represented a rich cultural tradition, their continued study could only impede the development of civilization in India and had, therefore, to be dropped.

Maine fervently believed that the progress of civilization in India depended, in large measure, upon the acquisition of scientific knowledge. The greatest contribution of the English was "the amount of this knowledge we dispense," and the greatest chore of the native to learn "that the knowledge of physical laws is the least destructible and the most enduring" form of knowledge one could have.¹¹² The false fabric of ancient society could be rent asunder by science, "and through that breach the armies of

111

Sir Henry Maine, Village-Communities, p. 291.

112

Ibid., p. 271

truth march in." ¹¹³ While a start had been made in this direction, it was by no means clear that India was won for the cause of civilization. Imagination rather than science had dominated India for too long "and much of the intellectual weaknesses and moral evil which afflict it to this moment, may be traced to imagination having so long usurped the place of reason."¹¹⁴ What was wanted, "what the Native mind requires, is a stricter criteria of truth; and I look for the happiest moral and intellectual results from an increased devotion to those sciences by which no tests of truth are accepted except the most rigid."¹¹⁵ In the acquisition of strict truth, the study of native or ancient languages, for example, was but a hinderance.

The simple truth is, that the compulsory study of Persian--a difficult classical, and in India, practically dead language, of limited though considerable usefulness--stands in the way of any effectual reform of the educational curriculum of young Civil-ians. In particular, it obstructs their acquisition of the form of knowledge most urgently needed in the India of the present day--knowledge of law. ¹¹⁶

Not only Persian, but all oriental languages were a

113

Ibid.

114

Ibid., p. 276.

115

Ibid.

116

Sir Henry Maine, "The Study of Persian," Minutes, p. 25.

hinderance because they were not adopted to conveying the degree of precision that western languages had developed.

I venture to think that those who believe they can easily be made the instruments of conveying knowledge (by which I mean positive and not literary knowledge), have scarcely paid sufficient attention to the long and labourious process by which even the eastern languages have been so fashioned as to admit of their becoming vehicles of accurate thought. 117

To bring India slowly into the modern world was, ultimately, the new justification for British rule and the basis for adjusting the mechanics of British government to Indian society. It was a long chore, an onerous chore, seemingly without end.

No Englishman will admit that there is any probable limit to the continuance of the supremacy of his race in India. But there is one thing which will certainly outlast English power in the East, and that is Nature and her phenomena. If that catastrophe should ever happen, which now seems remote or impossible--if that pent-up flood of barbarism, which the empire of the English race restrains, and only just restrains, were to sweep down as it has so often done in Bengal, and were to destroy that mere fringe of civilization and education which decorates this province, I think it probable that any tincture of physical science we may impart would die out last. 118

"No Englishman will admit that there is any probable limit to the continuance of the supremacy of his race in India." Certainly Maine could not. There was, in Maine's thought on India, a conviction of western superiority so

117

Sir Henry Maine, "Universities; Punjab University," Minutes, p. 183.

118

Sir Henry Maine, Village-Communities, p. 271.

utterly profound and a sense of native inferiority so completely ingrained that his most innocent statement to or about the native population constituted an insult. Maine's was not an assertion of racial supremacy but an acceptance of it; not a strident "nigger-ism" but a statement of what he considered the patently obvious. While one found in Maine's reflections on the relationship between Englishmen and Indian a denial that anyone "would care to echo those assertions of the inherent rights of Englishmen which are sometimes current here,"¹¹⁹ he recognized native inferiority, nevertheless. Educated natives, for example, aspired to be "placed on a footing of real and genuine equality with their European fellow-citizens." "Some persons," said Maine, "have already told them that they are equal already, equal in fact as they undoubtedly are before the law."¹²⁰ There was, he thought, some justification for this, insofar as there was a common attachment of Indian and Englishman to the Aryan race. True, however, as this common attachment was, "nothing can be more certain than that it was a barren truth."

Depend on it, very little is gained by the Native when it is proved, beyond contradiction, that he is of the same race as the Englishman. Depend on it,

119

Sir Henry Maine, "India," The Reign of Queen Victoria, p. 481.

120

Sir Henry Maine, Village-Communities, p. 252.

the true equality of mankind lies, not in the past, but in the future. It may come--probably will come--but it has not come already. 121

These observations were made in a speech delivered before the Senate of the University of Calcutta in March, 1864. There were present in the audience a large number of native students who also were told that no Indian could yet "subscribe to the same moral creed, and entertain the same ideas as to honour, as to veracity, as to the obligation of promises, as to mercy and justice, as to that duty of tenderness to the weak which is incumbent on the strong" as Englishmen.¹²² Since there could be, in Maine's estimation, "no such thing...as mixed Native and European society,"¹²³ the relationship between Englishmen and Indian had always to be one of conquerer and conquered. Until that unforeseeable time when India did become civilized, Britain had an obligation to maintain a strong, stable government and a duty to institute programs of western education.

Maine was not alone in his opinions. No one, perhaps, recognized the full implication of these attitudes or expressed them as clearly as Sir Alfred Lyall. In his

121

Ibid., p. 253.

122

Ibid., p. 254

123

Ibid., p. 292.

estimation, the civilization of India depended upon the firm establishment and steady maintenance of the Pax Britannica; in Maine's words, all progress proceeded "on the assumption that the British Government of India must continue."¹²⁴ "For the present, therefore," said Lyall, "the less we indulge in pledges or speculations as to the final outcome of our administration of India, the better it will be for all concerned."¹²⁵ Britain had established and was retaining "a moral standard far beyond that of any other government in Asia," and to withdraw that morality "would have the effect of a political earthquake."¹²⁶ To "delude the inexperienced Indians" into believing that "they have learned our lessons" or that India was in a position to be "turned out into the world to shift for itself" was not "political morality."¹²⁷ Upon the assumption that "the English have incontestably substituted a higher and better condition of existence" for India, it was dangerous to treat of any discussion of Britain's

124

Sir Henry Maine, "India," The Reign of Queen Victoria, p. 481.

125

Sir Alfred Lyall, "The Government of the Indian Empire," The Edinburgh Review, CLIX (1884), p. 40.

126

Ibid., p. 38.

127

Ibid., p. 40.

presence in India as "an open question of ethics," for ethics were not scientific. Such discussions would only "lead the topic away into a region of fallacies, illusions and disappointments."¹²⁸

If Englishmen propound for academic debate the thesis as to the moral justification of their government, and if they persist in asserting that they only desire to remain so long as India may require their good offices, they may soon get worsted in argument, and later they may find themselves elbowed, more or less politely altogether out of the country. 129

The result of British expulsion would be not only a blow to the British collective ego, or a diminution of empire, but the end of civilization in India. To prevent this, the British were in India to stay.

With such a conception of Britain's role in India as a guide, Maine turned his attention to problems of government and to the question of what form of governmental institutions the country should acquire during the infinite tenure of British rule. Basically, the question was the degree to which the Government of India should be a centralized regime, or a bureaucratic administration, and the degree to which India should endure a paternalistic regime or a government under law. The issues, however, went far beyond these broad considerations to include the questions

128

Ibid., p. 38.

129

Ibid., pp. 40-41.

of the role of the Governor-General, his Council, the law code, the basis of British sovereignty in India, relations with the native states and the proper allocation of financial responsibility. In each of these questions, Maine was deeply involved; the time he devoted to them constituted the major part of his work in India and the solution which he evolved were his major contribution to Indian government. Maine, in the course of his work "facilitated the development of the Indian political system,"¹³⁰ by establishing a set of principles within which the Government functioned for several decades.

A whole assemblage of notions, ill-conceived, and jumbled together, began, at his initiative, to take upon themselves, a lucid and orderly arrangement and to draw to themselves others to be ranged with equal effect, the whole process resembling the formation of a disciplined army out of a mob by the reiteration of words of command. 131

The basic issue, that of paternalism as opposed to government by tradition and law, was almost as old as British rule in India. Both conservatives and reformers had argued for paternalistic government. Monro and the conservative school, for example, had argued that it was traditional in India and that it was a form of government with which Indians were familiar.¹³² They saw in

¹³⁰ Sir Charles Tupper, "India and Sir Henry Maine," p. 398.

¹³¹ Ibid., p. 399.

¹³² Eric Stokes, The English Utilitarians and India, pp. 20-21.

paternalistic government a way of stemming the tide of reform and of preserving what they felt best in Indian society, thus preventing the imposition upon India of ideals formulated in England and imposed by a liberal government and ignorant civilians.¹³³ The concept of paternalism, however, was two-edged. If it could be used to halt reform, it could also be used to promote reform. A tightly controlled, centralized administration could better conduct efficient reform than could a diversified and decentralized regime. The early reformers, with the frustrations suffered by Lord William Bentinck's reformist government in mind, had attempted to streamline Indian administration and put more power into the hands of the central government. After the demise of conservative sentiments in India, when it became increasingly apparent that the focus of power would be in liberal rather than conservative hands, centralization became the battle-cry of the reformers.¹³⁴

When, in 1853, the Company's charter was revised, the position of the Governor-General was increased at the expense of the semi-independent Presidencies of Madras and Bombay, while the new post of Lieutenant-Governor of

133

Ibid., pp. 20-24.

134

Thomas R. Metcalf, The Aftermath of Revolt, pp. 255-56.

Bengal was entirely under the control of the central government. The essential feature of Indian government after the Charter Act of 1853 and the reforms of the Marquis of Dalhousie was that both the older provinces and the newly acquired territories were "under the direct control of the Governor-General in Council."¹³⁵ In the new territories, such as the Punjab, not only did control "directly and in every important question" reside with the Governor-General, but on the local level, the District Officer had, in his own hands, "the concentration of all power, judicial, executive, revenue and police."¹³⁶ Thus, in the years immediately preceding the Mutiny, the tendency on all levels of Indian government was toward a centralized, paternalistic regime, the better to institute a reform program.

After the Mutiny, Lord John Lawrence continued to expound the merits of this tradition. Lawrence, in 1853, had been given the post of Chief Commissioner for the Punjab, with those extensive powers favored by Dalhousie.¹³⁷

135 -

William Wilson Hunter, The Marquis of Dalhousie and the Final Development of the Company's Rule (Oxford: The Clarendon Press, 1895), p. 187.

136

Ibid.

137

Sir Richard Temple, Lord Lawrence (London: Macmillan and Co., 1893), pp. 92-93.

As the first such holder of this position, Lawrence wielded considerable influence over British conceptions of government, particularly when it became apparent that the "Punjab system" had contributed largely to the "stemming and hurling back" of the "tide of revolt" in 1857.¹³⁸ In many respects, strong government was defended as best suited to prolonging the "atmosphere of military conquest and force," and as the best means of imposing "the elements of an advanced civilized government on the stupified and bewildered people."¹³⁹

Added to the apparent success of the system was Lawrence's own desire for power. One of Lawrence's biographers noted simply: "He loved power...to be wielded not capriciously but under the constraint of a well-informed conscience."¹⁴⁰ Though he listened to all sides of an argument patiently, Lawrence's mind "would be made up decisively without further delay, and would be followed by action with all his might."

Thus he became essentially a man of strong opinions and was then self-reliant absolutely. The test of a first-rate man, as distinguished from ordinary men,

¹³⁸
Eric Stokes, The English Utilitarians and India, p. 268.

¹³⁹
Ibid.

¹⁴⁰
Sir Richard Temple, Lord Lawrence, p. 160.

is the fitness to walk alone; that was his favourite expression, meaning doubtless the exercise of undivided responsibility. Thus he was masterful in temperament. He would yield obedience readily to those whom he was bound to obey, but would quickly change if the orders he received were couched in considerate terms. He would co-operate cordially with those from whom he had no right to expect more than co-operation; but he always desired to be placed in positions where he would be entitled to command. Though not thirsting for power in the ordinary sense of the term, he never at any stage of his career felt that he had enough power for his work and his responsibilities. 141

When Lawrence became Governor-General, the question of paternal rule acquired tremendous importance in the councils of government, both in England and India.

While theories of paternalistic government, after the middle of the century, assumed the use of political tools as agencies of reform, the more moderate position ignored reform almost entirely and emphasized order, authority and regularity, as well as the provision of a stable political environment within which the broader and more general process of civilization could take place. Stability rather than reform was the basis of Sir John Strachey's insistence that the Government of India be "content to carry on the administration without largely increasing the cost of existing establishments, and without incurring new and heavy charges."¹⁴² When Maine arrived in India, the

141

Ibid., pp. 34-35.

142

Sir John Strachey, India, Its Administration and Progress, pp. 78-79.

simmering conflict burst into the open. In 1867, Sir Stafford Northcote, Secretary of State for India, created a special committee to make recommendations on the permanent structure of the Government of India.¹⁴³ In the ensuing controversy Maine was particularly active, taking sides with neither group, but attempting "to find a modus vivendi that reconciled both."¹⁴⁴

Northcote's Special Commission submitted two reports on the questions of the government of Bengal and on the proposed relationship between subordinate administrators and the Governor-General. The majority report, signed by H. G. Montgomery, a close friend of Lawrence's and a former Chief Commissioner for Oudh, repeated Lawrence's arguments for paternal government.¹⁴⁵ The report urged the adoption in Bengal of a system of government headed by a Lieutenant-Governor without an Advisory Council. The Lieutenant-Governor of the province would be subject directly to the Governor-General of India and would, in

143

Great Britain, Parliamentary Papers, Vol. XLIX (Accounts and Papers, Vol. X), 8 May, 1868, "East India: Finance and Revenue; Army; Bengal; Berar; Bombay Banks; Chief Justices; Contract Law," "Papers Relative to the Administration of Bengal," pp. 2-3.

144

Sir Charles Tupper, "Sir Henry Maine and India," p. 402.

145

Great Britain, Parliamentary Papers, Vol. XLIX, "Papers Relative to the Administration of Bengal," p. 35.

turn, be given "such legislative powers for executive purposes" as were necessary. Thus, the subordinate Lieutenant-Governor of Bengal was to be given extensive personal power; he "will be enabled to exercise that active personal supervision and control...which are always associated with, and seem to be characteristic of, a Lieutenant-Governor."¹⁴⁶

At the same time, however, the Governor-General of India was to have his personal control over Bengal extended to include trade, shipping "and ought else of an Imperial character."¹⁴⁷ In sum, the majority report suggested that each subordinate official be given a clear field of responsibility under a higher authority, and that the official be allowed, within his respective operational area, great latitude of personal discretion, unobstructed by bureaucracy or by Councils.

The minority report, signed by Sir Bartle Frere and W. U. Arbuthnot, tended to emphasize the growing complexity of government in India, the effect of increasing civilization, and the consequent multiplication of duties which were more than one man could handle alone. After describing conditions in Bengal in all their complexity, the report

¹⁴⁶

Ibid., p. 36.

¹⁴⁷

Ibid., pp. 34-35.

commented upon the proposal to put government into the hands of one man:

Let anyone imagine the condition of any head of department in this or any other country, deprived of all the light which is thrown on a subject by counsel and discussion by equals or opponents in or out of Parliament, and required to dispose of a case simply on official correspondence with his own subordinates. Imagine such a man devising a scheme of education or irrigation, or police or judicial reform, or even drawing up a law on any subject affecting money interests with no aid but his own intellect and the departmental experience of the secretaries and clerks under him. No one who has ever attempted such a task can doubt the certainty of his failure. 148

Only in primitive, newly conquered provinces could the paternal system work, and then only till such time as the complexities of civilization threatened to overwhelm the officer.

Such a government has succeeded as a temporary expedient in a newly conquered province, where it is possible to give really uncontrolled executive power to any one man. In such a position, it is the natural step after military occupation, and may endure for a longer or shorter period according to the size and importance of the province, but the possibility of entrusting really absolute power to any one, however gifted, speedily ceases in any province. 149

The argument advanced by Frere and Arbuthnot coincided closely with the position outlined throughout the course of his stay in India by Sir Henry Maine. As Legal Member of Council, Maine opposed his superior, Lawrence, in nearly

148

Great Britain, Parliamentary Papers, Vol. XLIX, "Papers Relative to the Administration of Bengal," p. 46.

149

Ibid., p. 46.

every particular of his argument. He was most responsible for marshalling the forces of law against the 'paternalists' arguments. As Frere, so too Maine did not deny the necessity of occasional lapses into personal rule, especially in primitive areas. The need for flexibility of decision and personal discretion was simply too great to justify tying an officer to inelastic rules issued by a government far from the scene of action.

The absolute denial of legislative power to the Executive Governor, as it affects the wilder and less civilized portions of India, is most inconvenient, and, I venture to think, most dangerous; for it comes to this, that the Executive Governor can do no act unless there is a known rule to back it. This might be all very well if India was--what China was once supposed to be--a country in which there was a rule for every possible contingency. But the government of the country is an experiment conducted under perpetually changing conditions. Those who know most of the people in the outlying provinces probably know but little of them; mistakes are constantly discovered which ought to be at once corrected, peculiarities of character and feeling unknown before have suddenly to be allowed for, and new circumstances arise to which measures must be moulded. As matters now stand at present, the Governor can do nothing without coming to Calcutta for a formal law, the reasons for which it is often not easy, and occasionally not safe, to assign. 150

After the country had been settled, however, and regular institutions established, the situation had to change considerably. The process of promoting civilization required much more permanence and stability than the

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Sir Henry Maine, "Statute 33 Vict. c. 3 ss. 1 and 2; Bengal Legislative Council," Minutes, p. 162.

imposition of political and military control. In making this point, Maine took dead aim at Lawrence's so-called Punjab system.

The peculiar system of the Punjab, the accumulation of diverse functions--political, fiscal, administrative and judicial--in the same hands is, no doubt, excellently adopted for countries which are just settling down from the anarchy of native government; but it is most unjust to retain such a system after it has ceased to be necessary, and to sacrifice all other considerations to the transient need of concentrated authority. It is obvious that very different qualities are required for the discharge of judicial and other purely civil functions from those which contribute to produce effectiveness in political and semi-military administration. 151

To argue that the system of paternalistic government should be extended to the whole of India was, Maine thought, little short of irresponsible. Nowhere did Maine indicate his distaste for government as an instrument of change more clearly than in the following statement:

While I admit that the abridgment of discretion by written laws is to some extent an evil,--though, under the actual circumstances of India an inevitable evil,-- I do not admit the proposition which is sometimes advanced that the natives of India dislike the abridgment of official discretion. This assertion seems to me not only unsupported by any evidence, but to be contrary to all probabilities. It may be allowed that in some cases discretionary government is absolutely necessary; but why should a people, which measures religious zeal and personal rank and respectability by rigid adherence to usage and custom, have a fancy for rapid changes in the actions of its governors, and prefer a regimen of discretion sometimes coming close upon caprice to a regimen of law? 152

151

Sir Henry Maine, "Punjab Frontier," Minutes, p. 41.

152

Sir Henry Maine, "Over-legislation," Minutes, p. 211.

This was the voice of the true conservative--fear of excessive change which was as real a danger in an autocratic regime as in a democratic. One can see, in his opposition to intensely centralized government in India, both the resistance to uncontrolled political power and the fear that revolution would follow the creation of such power. In England the danger was potential; in India it was real and immediate.

...the greatest danger which a centralized Indian government entails is one which will be only admitted by those who feel as I do, that no special structure, no benevolence of intention, and no individual sagacity, will altogether save a government in charge of such an unexampled undertaking as the rule of India from occasional serious errors. Under a centralized government, there is a danger of generalizing a local mistake. Localized, a mistake can be corrected with comparative ease; it becomes dangerous in proportion to the area of its diffusion. I care to give no illustration of this danger except by reference to the Sepoy Mutiny, which I again call the most important fact in Anglo-Indian history 153

These general considerations were, in the long run, the most important elements in his conflict with Lord Lawrence. As an administrator, however, Maine had also to argue on the specific, administrative level, pointing out the practical problems that would ensue if, for example, Bengal were deprived of its provincial council and the Council of Governor-General were saddled with a multitude of minute Regulations relating to that province alone.

153

Sir Henry Maine, "India," The Reign of Queen Victoria, p. 515.

He questioned the wisdom of taking away an institution to which the educated natives and Europeans in Bengal were accustomed. It was, he said, "a very serious matter to withdraw from them a formal Legislature when they have once had it, and to subject them to that concrete form of despotism which consists in the complete binding of executive and legislative powers."¹⁵⁴ The existing Bengal Council which Lawrence would abolish had done "all its work reasonably well, and a good deal exceedingly well." Its removal was hardly necessary, the more so since the addition of its work to that of the Council of the Governor-General would only add to "what I hope I may call without disrespect 'parish-vestry' business...."¹⁵⁵ Finally, Bengal, as a special area of India, would suffer from being treated in the same manner as the more primitive regions of the country.

...I think Bengal will suffer from not having liberty to discuss and enact a certain class of measures in an assembly composed of Native and European gentlemen exclusively familiar with the province and the people. The province stands by itself, in respect of the character of the revenue settlement, and the absence of institutions which are the basis of society in other parts of India. Many things are practicable in Bengal proper and many things are desirable which are not practicable or desirable elsewhere. I do not see why the moral and material progress of Bengal should be

¹⁵⁴

Sir Henry Maine, "Statute 33 Vict. c. 3 ss 1 and 2; Bengal Legislative Council," Minutes, p. 166.

¹⁵⁵

Ibid., p. 163.

impeded by the doubts of gentlemen intimately acquainted only with the less intellectual and less supple populations of Upper India 156

Maine's argument that government under law was most conducive to the political control of a nation being brought up to European standards was reflected, too, in his conception of his own role in the Government of India. He reflected his concern with legalism and his desire to make of the Council an institution as much like the British Cabinet as conditions in India would admit.

My theory of the duty and situation of the Legislative Member of Council--that is, of the Legal Member of the Council when charged, as he ordinarily is, with the legislative business of Government--has been many times explained.... I consider a Government Bill to be simply an instrumentality for carrying out an order of the Executive Government that the law be altered in some particular. I consider that, when an order to prepare a Bill has been given in the form of a reference to the Legislative Department, the Legislative Member of Council has no more discretion in the matter than has the Advocate General when directed to conduct a particular case in court. The Legislative Member may have had great influence in determining the question whether the order for legislation should be given, but that has been in his executive capacity as Legal Member of Council; the order once given, he has nothing to do but to prepare the Bill and justify it as best he can to the Council for making Laws and Regulations. 157

The reasons for treating government in this fashion were two:

The general cause may be described as being the steady emergence of the country from a state of discretionary (or, as some call it in its more decided forms, patriarchal) government into a state of government by

¹⁵⁶Ibid.

¹⁵⁷Sir Henry Maine, "Council of the Governor-General of India; Law Member; Act XXI of 1866," Minutes, p. 77.

law.... The special cause...is the urgency of the Local Governments in pressing on us particular legislative measures as necessary for the good government of the territories which they administer and for the discharge of their primary duties to the people.¹⁵⁸

His concern for government by law and for regularizing the structure and function of governmental institutions was reflected again in his treatment of the question of the sovereign power in India. Maine argued that sovereignty was divisible while independence was not. In India, only the British government was both independent and sovereign, whereas even the nominally autonomous native states were not independent and were always forced to share sovereignty with the Government of India.¹⁵⁹ Maine's argument may be seen as a simple statement of political reality and as a recognition of the supremacy of power acquired by Britain in India both before and after the Mutiny. It was, however, somewhat more than a statement of political power; Maine was attempting, once more, to place the entire structure of government upon a firm, legal, foundation by explaining its position in terms of universally recognized

158

Sir Henry Maine, "Legislative Department; Statute 33 Vict. C. 3, ss. 1 and 2," Minutes, p. 209.

159

See Sir Henry Maine, "Kattywar States; Sovereignty," Minutes, pp. 36-40; and, "Kattywar States; Central Provinces Chiefs; Sovereignty," Minutes, pp. 42-45.

principles of international law and concepts of sovereignty.¹⁶⁰

Similarly, the complicated relations with the autonomous native states were put into regular form. These states, comprising one-third the area and about one-fourth the population of India, were governed by over six hundred rulers. Maine attempted to reduce "the vast, intricate and varied mass of relations between these numerous states and the British government"¹⁶¹ by applying to them a series of principles drawn from international law.¹⁶²

This desire to put the functioning of British government upon a clear basis led Maine to develop his argument for legal codification as well. Sir Alfred Lyall spoke for the whole school of legalists against the paternalists when he said:

160

Sir Charles Tupper, "India and Sir Henry Maine," p. 398

161

Ibid.

162

See Sir Henry Maine, "Taxation of Subjects Resident in Foreign Territory," Minutes, pp. 51-52; "Kutch Subjects Abroad," Minutes, pp. 68-69; "Foreign Judgments," Minutes, p. 115; "Sucunderabad; Sovereignty," Minutes, pp. 160-161; "Application of Enactments to Foreign Territory," Minutes, pp. 178-179; "Tributory Mehals of Orissa; Sovereignty," Minutes, pp. 179-80; "Secunderabad; Retrospective effect of orders applicable to Foreign Territory," Minutes, PP. "Application of Enactments to Foreign Territory," Minutes, p. 222.

...government by a clear and scientific body of laws, binding upon the authorities and appropriated to the circumstances of the people, is the only real security for the progress and prosperity of a country; so that it was essential to mould this mass of heterogeneous sections and rulings into some compact and intelligible shape. The problem was to simplify and generalize the principles of equity and morality, with the least possible disturbance of the practices, prejudices and organic institutions of Indian society. 163

Clear laws, clearly stated, would prevent Indian judges from exercising that same degree of unlimited personal power which he so detested in a government administrator. Maine argued that:

...legislation by Indian judges has all the drawbacks of judicial legislation elsewhere and a great many more. As in other countries, it is legislation by a Legislature which, from the nature of the case, is debarred from steadily keeping in view the standard of general expediency. As in other countries, it is haphazard, inordinately dilatory and inordinately expensive, the cost of it falling almost exclusively on the litigants. But in India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thralldom of precedents and analogies belonging to a foreign law developed thousands of miles away, under a different climate, and for a different civilization. I look with dismay, therefore, on the indefinite postponement of a codified law of tort for India. 164.

The advantages of codification were not, however, limited entirely to prohibiting the arbitrary exercise of power; they were also designed to embody "broad principles of jurisprudence, providing, so to speak, the lines upon which

163

Sir Alfred Lyall, The Rise and Expansion of the British Dominion in India, p. 382.

164

Sir Henry Maine, "Indian Codification," Minutes, p. 232.

social evolution might be assisted."¹⁶⁵ When speaking of the Penal Code, the Codes of Civil and Criminal Procedure and the Code of Substantive Civil Law, "now all but completed," Maine insisted that "under all the Indian codes there is, of course, a moral basis, from which a new set of moral ideas are diffused among the population of the Indian countries."¹⁶⁶

Maine was, finally, involved in establishing the basis for financial decentralization, an act which was the direct counterpart to his activities in political decentralization. Though actual legislation for establishing a decentralized financial structure was not passed till 1870, the preliminary work was done by Maine, and he later characterized it as "much the most successful administrative reform" in his day.¹⁶⁷ The financial administration of India, never the strongest point of government, had, during Maine's tenure, reached a point where drastic reform was apparently necessary to ease an increasing deficit. As usual,

165

Sir Alfred Lyall, The Rise and Expansion of the British Dominion in India, p. 383.

166

Sir Henry Maine, "India," The Reign of Queen Victoria, pp. 462-63.

167

Ibid., p. 516.

168

For a brief survey of the deficit, see The Imperial Gazetteer of India: The Indian Empire, IV, pp. 163-65. For example, between 1814 and 1875, "there were twenty-eight years of deficit and only fifteen years in which the revenues exceeded the expenditure." Ibid., p. 163.

Lawrence suggested that the reform be in the direction of increased centralization, a notion that Maine vehemently rejected.

It seems to me too hastily assumed that the nearly exclusive control over the finances of the Government of India results necessarily and inevitably in economy. For the Government of India, as at present constituted, it may, I think be fairly claimed that, while it is free from the bias of local interest, it has no special tendency to extravagance peculiar to itself. But the truth perpetually before us is that the Indian Government in all its parts, is one of the most ephemeral in the world. Five, ten, or fifteen years hence we may have a Governor-General with special crotchets--let us say military crotchets--which, falling in, maybe, with popular fancies, may lead him into expenditures transcending the most wanton extravagance of all the Local Governments together, and for which, moreover, there would be nothing to show when it was over. 169

Instead, Maine suggested a policy of decentralization, of making a fixed grant to each local government for administrative purposes and allowing any additional taxes decided by the local governments to be raised by themselves. He defended his proposition by an appeal to the principle of regularized and clearly defined governmental duties.

I suppose that it will be conceded that both men and Governments discharge a clear duty better and more completely than a remote, obscure, or contingent duty. Now, the clear and primary duty of a Government or a Lieutenant-Governor is to promote the moral and material prosperity of the population under his government. On the other hand, the duty which the Government of India has imposed upon itself...is to regulate the expenditure of the projects sought to be promoted by the Local Governments on principles

determined by the financial necessities and the financial condition of the Empire as a whole. 170

The conclusion to which Maine was driven, then, was that the local governments, following their clearly defined and legally prescribed duty, should have the responsibility of determining the specific application of governmental monies.

The institution of financial reforms was, however, but a part of Maine's larger scheme of laying the foundation for an administration based upon legal principle, order and regulated authority. During the Viceroyalty of Lord Mayo, who followed Lord Lawrence, the threat of paternalism diminished, and "the Current happily turned in the other direction."¹⁷¹ Law and order became the style of the day.

Maine was not alone in attempting to turn India onto the path of legal development and stable government. In his own day, people like Sir Bartle Frere were equally concerned with this development, and after him Sir James Fitzjames Stephen and Sir John Strachey continued the trend.¹⁷² The answer, finally, to the question of British

¹⁷⁰
Ibid.

¹⁷¹ Sir John Strachey, India: Its Administration and Progress, p. 72.

¹⁷² On Stephen and Strachey, see Eric Stokes, The English Utilitarians and India, pp. 282-83.

dominion in India was to get on with administrative and economic development on a sound basis and a large scale, to civilize the natives by the introduction of western ideas and western law, and to settle into the country on a permanent basis. As, however, the administrative machine was perfected, as India was subjected to increasingly uniform control, the ideal of good government was placed above that of self-government.¹⁷³

In retrospect, one's reaction to Maine's work in India must be considerably mixed. No longer does he appear the nearly unblemished hero of law, right and justice as in Sir Charles Tupper's tribute,¹⁷⁴ the fallible but essentially superlative administrator of Grant-Duff's Memoir,¹⁷⁵ or even the quick and comprehending mind portrayed by Sir A. C. Lyall.¹⁷⁶ There remains, nevertheless, a high

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C. H. Philips, "British Historical Writing on India," p. 985.

174

See Sir Charles Tupper, "India and Sir Henry Maine." The article contains eulogies of Maine by Sir M. E. Grant-Duff, Frederic Harrison, W. Lee-Warner, Sir Frederick Pollock, Sir Alfred Lyall, Sir Courteney Ilbert, G. L. Gomme, Brigadier-General Sir Richard Strachey, Lord Shand, G. Noble Taylor and B. H. Baden-Powell.

175

See M. E. Grant-Duff, Memoir, pp. 25-27.

176

See especially A. C. Lyall, E. Glasson, F. von Holtzendorff and Pietro Cogliolo, "Sir Henry Maine," pp. 129-138.

degree of admiration for both the man and his concern for law in the face of Lord Lawrence's paternalism. In part, certainly, sympathy for Maine in the conflict with his superior stems from the relatively unflattering portraits of Lawrence and his objectives which remain to us.¹⁷⁷

Beyond that, however, is the appeal which Maine made to the western liberal tradition of responsible government, functioning within a clearly established legal framework. Paternalism continues, now as in Maine's own day, to smack over-much of irresponsibility, of harsh rule and even of dictatorship. Because the basic principles of government to which Maine appealed have remained the same as those which appeal to our age, and because the principles and implications of paternalistic government remain as abhorrent, the entire tenor of Maine's legalism retains its attractiveness.

A well-defined concept of government under law and a moderate, proportioned sense of what the dominion of the British Empire in India might be, provided a sound foundation upon which the country could build after the devastating experience of the Mutiny. One cannot but believe

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Sir Richard Temple, Lord Lawrence, is an especially critical biography. Both Eric Stokes and Thomas R. Metcalf have carried this harsh portrait over into contemporary research. See Eric Stokes, The English Utilitarians and India, pp. 270-71; and Thomas R. Metcalf, The Aftermath of Revolt, pp. 255-61.

that Maine's firm insistence upon these points helped funnel British frustrations into constructive channels. Old hope and aspirations lay, after that crisis, in shambles; the long, difficult process of re-building required just that assurance, that sense of ultimate right, which Maine was able to bring to his office. The credit, obviously, was not Maine's alone. He worked in the midst of a complex bureaucratic structure, stretching from London to Calcutta. His decisions, too, had to be screened by that collective intelligence and orderly routine which he admired above paternalism. His voice, however, was loud if not raucous, his conviction strong, his course clearly-defined and steady. And in the crucial years of his presence in India, there seems little doubt that both the country and its conquerors benefitted from his vision, his intelligence and his insistence upon long-term rather than gradiose solutions to India's problems.

Such benefits as Maine's work brought to India were not unmixed, however. His error, as before, was in confusing conception with truth. Believing he had truth, Maine was capable of lecturing Indian students on their inescapable softness of intellect. Believing he had truth, Maine conceived of British government in India as government in perpetuity. But truth is an inflexible entity in a flexible world. The very education which Maine sponsored,

the "hardening of Indian intellect" which he supported, helped greatly to stimulate Indian nationalism and to bring about the demise of that government for which he foresaw no end. The final irony of Maine's work in India was that his rigid conception of truth in social evolution became, as well, a rigid conception of a forever-inferior India. Yet the governmental policies designed by Maine created flux and change which challenged his initial interpretation and made it fairly meaningless.

To Maine, the incongruity of this situation was never apparent. When, however, first Sir A. C. Lyall and then Sir Courtenay Ilbert transmitted these same inconsistent concepts to later generations, the stage was set for tragedy. Sincere, honest and capable administrators were simply not able to comprehend the need to alter, perhaps even to end, British government in the face of changing conditions which they themselves helped to sponsor. In 1898, it was still customary to speak of the "deep and broad gulf...lying between the semi-civilization and barbarisms of different parts of India and the actual civilization of the West...."¹⁷⁸ As late as 1941, it was still possible to refer to Maine on the difficulty of bringing civilization to India "neither too fast to

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Sir Charles Tupper, "India and Sir Henry Maine," p. 396.

endanger security nor too slow to impede progress."¹⁷⁹ And in 1944, a description of the impact of British rule in India could state that "among a growing minority of educated, town-bred Indians they [the reforms] fostered a consciousness of Indian unity, of something that, despite all the differences between India and the western world, might almost be called Indian nationhood,"¹⁸⁰ rather suggesting that even Indian nationalism could not quite duplicate its European counterpart. So long as the assumption that western beliefs were true and "savage" or "barbarian" beliefs merely superstitions had a supposedly scientific foundation, changing Indian demands and the need for Britain to respond to them could remain obscured. In the hands of his successors, Maine's scientifically-founded notion of progress became a hindrance to progress.

179

See L. S. S. O'Malley, "General Survey," Modern India and the West, A Study in the Interactions of Civilizations (London: Oxford University Press, 1941), p. 587.

180

See R. Coupland, The Indian Problem: Report on the Constitutional Problem in India (New York: Oxford University Press, 1944), p. 23.

PART IV

THE IMPACT

CHAPTER IX

THE GREAT DIVISION: MAINE'S THOUGHT IN ENGLAND

A most difficult problem for the intellectual historian is assessing the impact of one man's ideas upon the broad course of a nation's intellectual life. In Maine's case, the task is doubly difficult because so much of what he said, and so many of his techniques were drawn from an extensive reservoir of pre-naturalistic thought. For the historian, the relevant question becomes whether the impact being assessed is that of the individual or of the intellectual tradition he represents. The multitudinous strands of idea which comprise a national intellectual heritage are simply too complex, too interwoven and too indeterminate to be able to isolate one person's thought. There are, however, several indicators which allow a general impression of how Maine's work was received, though one must constantly recognize that these impressions are imprecise and subject to continual reevaluation.

Institutional use of Maine's work was extensive. Oxford University, particularly, relied upon Maine's written work in the process of drawing up new academic curricula in the post-reform decades. Indian civil servants continued, until well into the twentieth century, to receive training and preparation based upon a highly edited and abridged version of the entire body of his work. Finally,

the much-maligned Inns of Court provided Maine with a public rostrum which he used to reach a wide variety of individuals who were later to play an important role in British political and intellectual life.

There is, however, another way of assessing Maine's long-term impact upon Britain's intellectual life: to determine the fate of his functional, historical and comparative jurisprudence at the hands of later scholars and to see how each of these three areas fared after Maine's death. In many ways, Maine's functional, sociological orientation has best survived the ordeal of time. From his own day to the present, from Frederic Seebohm to A. S. Diamond, there has been a small but active tradition of scholarship in that dark and shadowy borderland between law and sociology. As for Maine's historical and comparative method, which he had combined into a single method, it has suffered a most peculiar fate. From the beginning there was a tendency to separate history from comparison and to treat each as a distinctive methodology. The historians, insisting that no comparison was valid until that which was being compared had been thoroughly researched, have tended to lose themselves in the dank recesses of ancient archives, never to emerge in time to make an extensive comparison. Overwhelmed by specific, factual variations, the historians (Sir Frederick Pollock, Sir Frederic Maitland and William

Holdsworth) have tended to relegate comparison to a distinctively secondary position, insofar as they have considered it at all. Comparative jurists, on the other hand, especially more recent ones, have reversed the process, emphasizing the need to compare modern law while reducing the role of history to the minor one of check and guide to research.

In no case, with the possible exception of Sir Paul Vinogradoff, did Maine find a sufficient number of followers to found a school of history or jurisprudence. At best he continues to be recognized for the merits of his individual genius and as a suggestive, but very fallible pioneer in legal sociology, the history of law and comparative jurisprudence. It was fated, however, that while Maine insisted that all three disciplines were an integral and organic part of the same legal science, his intellectual heirs have chosen to accept the distinctions and to insist that each, to its own adherents, represents the pathway to truth.

Except in moments of doubt, it is convenient to think that universities are important centers for the dissemination of knowledge, both ancient and modern. The materials upon which students are examined, and the way in which they are presented, provide some indication of what information is considered significant at various times and in various places. At Oxford, in the last thirty years of the nine-

teenth century, it behooves the historian to look closely at the changing curricula, for reform, once started, went on at a rapid pace in an effort to adjust the university to contemporary interests. By 1856, the series of triposes included one for mathematics, Latin and Greek, moral science, natural science and theology.¹ From that time on, the changes in curricula conformed increasingly to that combined interest in history and science which had characterized Maine's thought. Soon, a tripos in jurisprudence was added, to which modern history was attached in 1870. Finally, in 1875, a separate tripos was instituted for universal history.² The history tripos, especially, seemed to reflect an increased concern for integrated study, and for the development of scientifically founded programs. In 1873, a council arranging the program for the history tripos concluded its report in these words:

1

Paul Fredericq, The Study of History in England and Scotland (Baltimore: John Hopkins University Press, 1885), p. 17.

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Ibid. On p. 18, Fredericq noted: "The historical tripos was as follows. The examination bears upon English history, including that of Scotland, Ireland, the British Colonies and their dependencies; upon certain indicated parts of ancient, mediaeval and modern history; upon the principles of political economy and the theory of law; upon English constitutional law and history of the English constitution; upon public international law in connection with detailed study of certain celebrated treaties; finally, a thesis must be written upon a subject chosen from the ten proposed."

The council is of the opinion that history, considered as a specialty with a separate tripos, ought to be constructed on a larger scale than when it was merely an accessory to other examinations. Therefore it is proposed to assign to ancient and mediaeval history a place in the tripos co-ordinate with that held by modern history, so that the subject may be presented as a scientific whole. 3

In this congenial surrounding, the study of Maine's work occupied a significant place. Largely because there was a brief period of time during which Maine's naturalism fitted into that of the university establishment, the study of Ancient Law was required, and questions from it figured prominently in the history tripos.⁴ Before his death, then, not only was the study of history and historical jurisprudence combined, but it was combined through the mandatory study of Maine's published work.

The same reception was found outside the universities, where Maine's written works were made compulsory for those taking the final examination after passing the Indian Civil Competitive Examination.⁵ An entire generation of Indian

³ Quoted, Ibid., p. 18.

⁴ Ibid., pp. 20-23. The paper for 1884, for example, contained the following question: "The epoch of heroic kings is followed by the epoch of aristocracies (Maine). Prove this statement from Roman history and from the history of a nation of the West or North, showing the part played by these aristocracies in the development of laws."

⁵ Morgan O. Evans, Theories and Criticisms of Sir Henry Maine (London: Stevens and Haynes, 1896), p. v.

civil servants came of age familiar with the authoritarian, legalistic progressivism which characterized Maine's attitude toward India. So common was the requirement of a knowledge of Maine's major ideas that he was paid the ultimate academic honor--a "pony" was made to guide the student safely through the intricacies of his written lectures. With more honesty than tact, the author noted that Maine's book contained "a great deal of writing that is absolutely useless to the student for examination purposes, and page after page has to be waded through in the search for a criticism or a theory." Since the searching and collating which this diffusion made necessary required "a great waste of time and mental energy on the part of the student," Morgan Evans undertook a brief, integrated synopsis.⁶ If the student were as much a philistine as the author, he could still obtain a highly distilled version of Maine's thought, minus, however, the style, suggestiveness, enthusiasm, or even the occasional reservation which indicated the tentative nature of some of his statements. What often began as a series of relatively modest proposals in Maine's own writings became, in Evans' condensation, a series of highly dogmatic statements.

The Inns of Court, having once broken the bonds of tradition, became one of the most important institutions

⁶Ibid.

through which Maine's ideas reached the public. Not only did Maine's written works become, after his death, mandatory reading for candidates taking the Honours Examination,⁷ but they provided, during Maine's lifetime a platform from which he could communicate directly with several leading figures of the future. In 1857, when Maine was lecturing in the Middle Temple, his students included such people as George Venables, W. Vernon Harcourt, James Fitzjames Stephen, Vaughan Johnson and Frederic Harrison. Harrison, particularly, was impressed, spending six months "reading Roman Law and Jurisprudence," and writing for Maine "a pile of essays on civil law, etc.," while participating in group discussion "of general literature and politics" in Maine's rooms.⁸ Repelled by the "barbarous verbiage of common forms," Harrison insisted on pursuing his theoretical study, much to his father's chagrin, for the father felt it a "conclusive bar" to Harrison's "ever becoming a leading practitioner."⁹ This contact helped set the pattern of Harrison's life: it was his study of Roman law "which I gained in Maine's chambers" which led to Harrison's developing what he acknowledged to be a "keen interest in Jurisprudence on its scientific side

⁷
Ibid., p. v.

⁸
Frederic Harrison, Autobiographic Memoirs, I, p. 152.

⁹
Ibid., pp. 157-58.

and ultimately enabled me to succeed to the seat of Maine as Professor to the Inns of Court--in conjunction with Mr. James Bryce."¹⁰ In addition, Harrison saw the proof-sheets of Ancient Law, wrote a highly laudatory review of it in the Westminster Review, "which I know satisfied the author himself," and remained a close friend of Maine till the latter's death, at which time he became, along with Sir Frederick Pollock, one of Maine's executors and trustees.¹¹

Not everyone, however, was as impressed by Maine as Harrison. If one looks, not for specific examples of how isolated individuals used Maine's ideas, nor for specific ways in which these ideas entered into public consciousness, but, instead, at what the long-range outcome of his work was in the hands of later scholars, a more balanced evaluation should emerge of the impression he made upon the British intellectual scene. Maine's approach to law, politics and society was historical and comparative; it was also functional and sociological. There has been, in Britain, a consistent interest in that nebulous area of study between law and anthropology, though the number of people involved has been limited and their work constantly

¹⁰

Ibid.

¹¹

Frederic Harrison, Memories and Thoughts, pp. 110-11. Though Harrison did not identify the article specifically, it could have been "Modern Phases of English Jurisprudence," Westminster Review, LXXXII (1864), pp. 261-76.

suspect.

One of the earliest efforts to pursue information on the village-community beyond Maine's initial investigations was Frederic Seebohm's The English Village-Community, which Maine himself helped to prepare for publication and which followed his theory of evolution from status-to-contact in land forms.¹² Seebohm, who was particularly impressed by Maine's recognition of "the fundamental analogies between the village-communities of the East and West," and by his work in "the tribal system of the Brehon laws," attempted to "set English Economic History upon right lines at its historical commencement" by bringing it within the historical framework established by Maine.¹³ In this respect, Seebohm was filling in a very noticeable gap in Maine's own research, for until it was proven that England followed the general pattern of legal evolution, Maine's thesis could hardly be considered valid. Apart from Seebohm, however, such attempts were limited. Most legal historians were more impressed, as was Frederic Maitland, by the paucity of documentation to work with and by the lack of precision of any legal evidence that "at any given moment...contains things new and old,"¹⁴ and all were

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See Frederic Seebohm, The English Village-Community, p. xv.

¹³

Ibid., pp. ix and xi.

¹⁴

Sir Frederic Maitland, "Seebohm: The Tribal System in Wales," Economic Journal, V (1895), p. 591.

afflicted by a fear that the temptation to eke out "the few established facts" by other evidence would distort English legal history.¹⁵ Thus, despite the personal interest which Maine showed in this area, efforts to extend this research failed.

When Maine published his Early History of Institutions, containing his evaluation of early Irish law within a broadly Aryan framework, he established a precedent easier to assess. When the Royal Commission appointed in 1852 to publish the laws and institutes of ancient Ireland began to issue its volumes in 1865, they were prefaced by statements strongly suggestive of Maine's argument.¹⁶ By the time the third volume appeared in 1873, the framework within which these laws were presented to the public was clearly that devised by Maine. Irish law was but a part of Aryan law:

In all European nations the social changes have been uniformly in the same direction. Some nations may have proceeded further, others may have moved more slowly than their sister communities; some have been cut off in their very origin, some perished from unhealthy rapid growth; but all have started from the same point, and more or less clearly tended to the same result. The laws of all such nations, though infinite in accidental variations, follow the regular development of certain general principles of government and property. 17

15

Ibid., p. 594.

16

See W. N. Hancock, To O'Donovan and To O'Mahany (eds.), Ancient Laws and Institutes of Ireland, I, pp. xlvii-lix.

17

W.N. Hancock, T. O'Mahony and A. G. Richey (eds.), Ancient Laws of Ireland, III, p. xiv.

Given this assumption, it was clear that

...systems of law therefore may be spoken of as either ancient or modern insofar as its [sic] general principles exhibit a more or less archaic, or a more or less modern form of society. Societies in very dissimilar stages of development may dwell side by side; therefore systems of law of most varying development may exist contemporaneously.... 18

The criteria for establishing the modernity of Irish law had to include a decision on "the relative proportion between properties held in joint, and in several ownership," as well as some consideration on "how far the rights and duties of individuals [were] treated as flowing from contract rather than status," and "how far the doctrine of contract [was] assumed as the test to decide questions respecting such rights and duties."¹⁹ These were the same crucial tests which Maine had already advanced for determining the stage of social and legal evolution achieved by any society; given the popularity of Maine's Irish studies and the contact he already had with the documents, one may assume a connection between them.

As late as 1894, it was assumed that the ancient laws of Ireland were indeed within the Aryan tradition, and that the points of resemblance between the laws of India and the Irish laws were "more than coincidences due to similarities

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Ibid., pp. xiv-xv.

19

Ibid., p. xix.

of occasion, or to some common cause acting on the minds of men, or to chance."²⁰ With the decline of a broad naturalistic outlook and the failure of Maine to establish a school of thought, little seems to have become of the interpretation beyond this point, however.

Since then there have been other studies such as A. S. Diamond's two books, Primitive Law and The Evolution of Law and Order which have brought the functional study of ancient law up to the present.²¹ Brought up to date, as well however, was the resistance on the part of both lawyers and jurists to regard this area of research as quite legitimate. Having once begun on a sociological bent, so the argument goes, then:

...you must in all honesty go further, and at least point out that much has been discovered and written since Main's day that tends to blur and confuse the beauty and simplicity of his conclusions, and consequently, before you know where you are you are deep in Diamond's books and chasing fascinating anthropological will-o'-wisps that take you far off your course and make it difficult to get back again. ²²

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Lawrence Ginnell, The Brehon Laws: A Legal Handbook (London: T. Fisher Unwin, 1894), p. 63.

21

See Arthur S. Diamond, Primitive Law (London: Longmans, Green and Co., 1935); and The Evolution of Law and Order (London: Watts and Co., 1951).

22

Denis Browne, "Reflections on the Teaching of Jurisprudence," 2 n.s. The Journal of the Society of Public Teachers of Law 81 (1953).

Just as Maine's functional treatment of ancient law has not emerged unscathed by critical comment, so too has his historical orientation suffered. When research into the historical development in England received the attention of Sir Frederick Pollock, Sir Frederic Maitland and William Holdsworth, theirs was not the comparative analysis outlined by Maine. Despite the existence of their exhaustive histories plus a host of specialized treatises and monographs, there was no effort to construct "a history of English law which closely correlates legal developments with the general political, social and cultural history of England."²³ In the years following the publication of Ancient Law, "Maine...enjoyed the veneration of every legal theorist" who almost invariably acknowledged the "broad and vivid generalizations as to the course of the development of law amongst all peoples," while at the same time declining to follow the method which produced these results.²⁴

Sir Frederick Pollock established the general tone of most legal historians' evaluation of Maine: extreme respect for the man and the audacity of his ideas, followed by several sometimes caustic criticisms of his methods. The ultimate compliment which Pollock paid to Maine was one

²³ Edgar Bodenheimer, Jurisprudence: The Philosophy and Method of the Law, p. 76.

²⁴ See Arthur S. Diamond, Primitive Law, p. 4.

which would have seared Maine's scientific conscience. Convinced as Maine was of the general scientific accuracy of his work, Pollock's statement that "in all true genius, perhaps, there is a touch of art," and that Maine's genius was not only touched with art, but was "eminently artistic,"²⁵ would have been almost an insult, for art, as opposed to science, was Maine's primary antagonist. Maine came, in Pollock's estimation, to be one of the "great masters" whose work "must be acquired while the mind is plastic, and, if omitted then, can hardly be supplied in later life."²⁶ Like the study of Latin, then, the study of Maine was to be part of a general process of intellectual "toughening-up." This was, indeed, a unique fate for one convinced of the existence of truth and of his own discovery of this truth, at least in broad terms.

Pollock's reservations about Maine developed slowly, and were the result not only of his work in editing Maine's Ancient Law²⁷ but of a long study of all Maine's work which culminated in a review article in the Edinburgh Review for

²⁵ Sir Frederick Pollock, "Sir Henry Maine and His Work," p. 269.

²⁶ Ibid., p. 268.

²⁷ The critical notes for this edition were published separately. See Sir Frederick Pollock, "Notes on Maine's 'Ancient Law'," 21 Law Quarterly Review 165-178 (1905); and 22 Law Quarterly Review 73-92 (1906).

July, 1893.²⁸ The benefits Pollock derived from his study were not due to "any specific discoveries of importance," but to "what was more important than any particular discovery."²⁹ He attributed to Maine the revelation that an "intimate alliance between comparative and historical research is not only natural and desirable, but necessary for either branch of work being efficiently done."³⁰ While, however, Pollock was led to wonder why this discovery was "recognized so late,"³¹ his own understanding of the connection between comparison and history was so free of Maine's naturalistic bias and so pragmatic that, in effect, it emasculated the whole purpose of what Maine had attempted.

As Pollock's reference to the artist in Maine suggested, the former's understanding of the comparative method had less to do with scientific truth than with general enlightenment. For this reason, Pollock attributed to Maine motives more generous, perhaps, than were warranted.

He would not risk the literary distinction of his work to save a moderate amount of trouble to the

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Sir Frederick Pollock, "Sir Henry Maine as a Jurist," The Edinburgh Review, CLXXVIII (1893), pp. 100-128.

29

Mark DeWolfe Howe, Holmes-Pollock Letters, I, p. 45.

30

Sir Frederick Pollock, "The History of Comparative Jurisprudence." p. 75.

31

Ibid., p. 79.

small minority of critical readers. In the same way, probably, his objection to serious revision of new editions may be explained. He must have well known that the choice was, in many things, between leaving his former work alone and rewriting it. He may well have felt that the rewriting of chapters and paragraphs was more likely to spoil an original artistic whole than to leave it, as remodelled, an adequate expression of his later thoughts. To make alterations, moreover, would have been to provoke a kind of minute criticism for which he had a constitutional dislike. 32

Though Pollock's great respect for Maine led him to suggest that "Maine can no more become obsolete through the industry and ingenuity of modern scholars than Montesquieu could be made obsolete by the legislation of Napoleon,"³³ he was, nevertheless disconcerted by the somewhat cavalier way in which Maine had utilized his information. The solution, according to Pollock, was to do "less brilliant, though not...less useful or interesting research," to separate fact from theoretical framework.

We have to explore point by point the features which our leaders and masters were the first to discern in their general bearings. We have to disentangle the manifold causes of change in human institutions, and to beware of being satisfied with our explanation of any one effect until we have traced it not merely to a possible cause, but to a cause of which we can prove the existence and watch the operation. Similarity of laws, customs, procedure, even in minute particulars is only a guide to inquiry; it is not conclusive evidence of dependence or of a common origin. 34

³² Sir Frederick Pollock, "Sir Henry Maine and His Work," p. 270.

³³ Ibid., p. 269.

³⁴ Ibid., p. 274.

To suggest that the historical and comparative method which Maine developed could be useful only if disentangled from its theoretical framework was rather to miss Maine's whole point; apart from its naturalistic setting, Maine's work lost its meaning. Out of context, the use of comparison and history could still be helpful, but it would not be the same use which Maine had advocated.

Revered as an innovator in the use of history, Maine was never to transmit his naturalistic framework intact, especially to such historians as F. W. Maitland. An admirer of both Maine and Maitland, Sir Paul Vinogradoff, acknowledged that "he Maitland was a decided sceptic as regards many generalizations proposed by Maine," largely because "his developed sense of historical criticism rebelled against Maine's assumptions and lack of careful investigation of sources."³⁵ A collaborator with Pollock in The History of English Law Before the Time of Edward I, Maitland was most bitter about the subordination of fact to theory to be found in Maine's work. "We have not forgotten Sir Henry Maine," said Maitland, prefacing, as usual, a pointed criticism with the customary praise:

Who could forget the world-wide horizon, the penetrating glance, the easy grace, the pointed phrase? But, to blurt out an unfashionable truth, there were qualities in his work, or in his presentment of his work,

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Sir Paul Vinogradoff, Introduction to Historical Jurisprudence, p. 147.

which would have served to better purpose in a land of laborious pedantry than where men are readily persuaded that hard labours are disgusting. 36

Maine's contributions to comparative law may have been characterized by "wonderful modesty," by a "dislike of all that looked like a parade of pedantry." and by a "beautiful style,"³⁷ said Maitland, but they suffered from too great a dependence upon theory. When faced with the intricacies of legal development, Maine seemed driven to construct an extensive and formidable concept instead of concentrating upon "the life of the people as it was being lived, really and truly lived at any one moment of time."³⁸ Maitland's answer to Maine's theory was, then, to concentrate upon the one moment of time.

It is only through learning wide and deep, though technical, that we can safely approach those world-wide questions that he raised or criticize the answers that he found for them. What is got more cheaply will be guess-work or a merely curious collection of odds and ends, of precarious odds and questionable ends. 39

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Sir Frederic Maitland, "The Laws of the Anglo-Saxons," The Collected Papers, ed. by H.A.L. Fisher (Cambridge University Press, 1911), II, p. 460.

37

Sir Frederic Maitland, "English Law is Not Written," The Collected Papers, I, p. 487.

38

Sir Frederic Maitland, "Seebohm: The Tribal System in Wales," p. 591.

39

Sir Frederic Maitland, "English Law is Not Written," The Collected Papers, I, p. 487.

Lacking proper documentation, any theory was condemned to be of nothing more than momentary interest.

If, scorning all relations of space and time, we ask why law protects possession, the only true answer that we are likely to get is that the law of different peoples, at different times has protected possession for many different reasons. Nor can we utterly leave out of account motives and aims of which abstract jurisprudence knows nothing. That simple justice may be done between man and man has seldom been the sole object of legislators; politics have interfered with juristic interests. ⁴⁰

Maitland did not deny the validity of making generalizations or of attempting comparisons per se, but he insisted so strenuously upon the need for research that both activities appeared to be postponed indefinitely. The proper task of the legal historian was, ultimately, evolving a conceptual scheme "which will mark some theory of development"; but how," said Maitland, "to obtain such a theory, that is the difficulty."⁴¹

Our English documents contain little that can be brought to bear immediately or decisively on those interesting controversies about primitive tribes and savage families in which our archaeologists and anthropologists are engaged, while the present state of those controversies is showing us more clearly every day that we are yet a long way off the establishment of any dogma which can claim an universal validity, or be safely extended from one age or one country to another. ⁴²

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Sir Frederick Pollock and Sir Frederic Maitland, The History of English Law Before the Time of Edward I (Cambridge: Cambridge University Press, 1895), II, p. 40.

⁴¹

Sir Frederic Maitland, "Seebohm: The Tribal System in Wales," p. 591.

⁴²

Sir Frederick Pollock and Sir Frederic Maitland, The

The same distrust of this kind of theorizing which Pollock had termed "poetic" and Maitland had castigated as "precarious" and "questionable" was to be repeated by Sir William Holdsworth. Concerning Maine's assertion that legal fiction, equity and legislation were the "agencies by which law is brought into harmony with society,"⁴³ Holdsworth said it "obviously does not fit the facts of English legal history."⁴⁴ The assertion was false because it underrated the role of legislation in English legal history, it reflected a misunderstanding of the origin and power of equity, and it utilized too broad a definition of the term "legal fiction."⁴⁵ Holdsworth's criticisms, substantiated by copious reference to documentary evidence, were important, not only for the light they shed upon the development of English law, but also for the questions they raised concerning the pattern of legal evolution outlined by Maine. Once the validity of this generalization was questioned, the whole problem of what promoted evolution and progress in legal development

⁴² (Cont'd)
History of English Law, II, p. 237.

⁴³
See Sir Henry Maine, Ancient Law, p. 24.

⁴⁴
Sir William Holdsworth, Sources and Literature of English Law (Oxford: Clarendon Press, 1928), p. 4.

⁴⁵
Ibid., pp. 2-4.

was once more opened. As important, was the technique which Holdsworth used to undermine Maine's position: intensive examination of documentary sources replaced Maine's theoretical approach and was used to cast doubt upon the entire framework.

Fact rather than generalization, documents rather than theory were the common recourse of legal historians after Maine. Though the temptation to hide behind the impersonal facade of the British Museum created its own peculiar problems, the recoil from Maine's naturalism was almost complete. Yet, no legal historian could feel free to avoid Maine entirely. From Pollock's enthusiastic discussion of Maine's seminal intellect to Holdsworth's study devoted specifically to the disproof of Maine's treatment of legal change, there runs a common acknowledgment: that Maine was a jurist worth grappling with. The praise with which he was lavished was, in fact, centered on the respect due him for turning the attention of English jurists to the study of history and the historical development of law. Whether, however, a simple turning to history, without the naturalistic accoutrements with which he had laden the task, and without the conviction of scientific truth to spur them on, would have satisfied Maine, seems doubtful. What Pollock, Maitland and even Holdsworth forgot was that Maine turned not to history alone, but to scientific history and that if anything dis-

tinguished Maine as a legal historian, it was the very naturalistic theory which they were so hurriedly jettisoning.

When one turns from history to comparison, the story changes somewhat. Until the First World War, there continued to be some interest in comparative jurisprudence in the sense that Maine understood the term, though work in this area was generally that "of solitary students after the approved English tradition."⁴⁶ When, finally, a Society of Comparative Legislation was established, it became immediately apparent that, except for individual jurists, interest in comparative techniques was increasingly interest in comparative legislation and the comparison of positive law rather than comparative institutional development. Comparative law as it evolved in the post-war years was a much different phenomenon than Maine's comparative treatment of ancient societies.

Two individuals stand out as stalwart supporters of Maine's comparative method: Edward Jenks and Sir John Macdonell. Edward Jenks was Professor of Law at the University of Liverpool from 1891 to 1895, Dean of the Faculty of Laws at the University of London and Principal

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H.J. Randall, "Sir John Macdonell and the Study of Comparative Law," 12 3rd s. Journal of Comparative Legislation and International Law 193 (1930).

and director of legal studies of the law society from 1903 to 1924: he was also an exceptionally enthusiastic supporter of comparative and sociological jurisprudence.⁴⁷ The assumptions which provided the basis for Maine's work remained the same for Jenks:

It may be that comparative study will ultimately annihilate the hypothesis of evolution. But at present the probabilities point the other way. The evidence, patiently collected and sifted by a generation of observers and students, tends to bring out in a most striking way what Dr. Tyler calls the "stratification" of human, especially legal institutions; and this particularly in respect of the more rudimentary communities of mankind.⁴⁸

Though later anthropological studies had shown Maine's patriarchal society to be of a more recent vintage than originally thought,⁴⁹ Jenks felt this but a technical revision. The technique of investigation established by Maine and the materials from which he drew his conclusions, retained their validity.

Suffice it to point out that, beyond the recorded histories of many legal systems, there are available many sources of evidence which are none the less valuable that they are indirect. In the one source of language alone, whether it be treated as

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See the Dictionary of National Biography, Suppl. 5, 1931-40, pp. 483-85. Jenks was also one of the founders of the Society of Public Teachers of Law in 1909.

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Edward Jenks, "On the Study of Comparative Legislation," 2 n.s. Journal of the Society of Comparative Legislation 448 (1900).

⁴⁹

Ibid.

etymology or as comparative philology, there exist abundant suggestions which, if carefully followed out, would assuredly lead to valuable result. So also in the ceremonial and symbols of ancient and modern communities; whether preserved for us in literature, or studied on the spot by competent observers. As an illustration of this truth, it is hardly necessary to refer to the notable results obtained by Bachofen from the former source, and by Maine from the latter. Once we grasp the pregnant truth, that a ceremony or a symbol is, in nine cases out of ten, the survival of a form which once corresponded with a practical reality, the key to many a mystery stands revealed. Even national legends and so-called myths, though these are, admittedly, dangerous materials, may be made to yield valuable results to the skilled observer. 50

The use of "admittedly dangerous materials"--how different from Mailland's insistence upon a factual and documentary orientation. Jenks' emphasis, like Maine's before him and Macdonell's at the same time, was upon theory not so much at the expense of fact but as the result of fact.

Sir John Macdonell was Quain Professor of Comparative Law at University College, London, and editor of the Journal of the Society of Comparative Legislation. A strong believer in the merits of comparative and sociological jurisprudence, and a great admirer of Maine and his work, Macdonell "was able to impress upon the study his own methods and ideals in a way that was open to none other."⁵¹ Though both the Society and the interests of the holders of the Quain Professorship were to develop along other

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Ibid., pp. 450-51.

51

H. J. Randall, "Sir John Macdonell and the Study of Comparative Law," p. 193.

lines after Macdonell's death, he used his influence to further the study of jurisprudence in the way suggested by Maine.

Macdonell worked out a series of lectures devoted to an examination of "Comparative Law since Maine,"⁵² but his most significant statements appeared in a short course on "The Value of Comparative Law," in which he reiterated, as late as 1919, the same basic points developed by Maine three-quarters a century earlier. The object of comparative law, said Macdonell, "was to discover dominant types; not their modifications; if there was a law of evolution to state it; to attempt to do for law what has been done in other fields of knowledge by comparative anatomy and comparative philology."⁵³ Macdonell considered the comparative method to be an integral part of the general development of science. Just as anatomy, botany or biology had turned to comparison with fruitful results, so too could jurisprudence. The jurist's task was to "seek to reduce to order the facts falling within his province," but "not by treating them as if they were simpler and fewer than they were or by imposing his own ideas on what ought to be the facts,"

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Ibid., p. 198.

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Sir John Macdonell, "The Value of Comparative Law,"
148 The Law Times 189 (1919).

nor by confining his attention to "highly organized systems of law."⁵⁴

All the chief facts, so far as known and comparable, should be studied, and a place found for all of them. A science of biology which ignored the earliest forms of vegetable or animal life would be scarcely less incomplete than a science of jurisprudence which did not recognize its lowest forms. ⁵⁵

The results of comparative investigation remained, for Macdonell, as for Maine, the development of laws of legal and social progress.

Macdonell did more, however, than parrot Maine's methodology. An essential difference was Macdonell's recognition that Maine's status-to-contract generalization was no longer valid.

In treatises on the science of language, and, indeed, all similar sciences there was brought out the conception of a process of evolution or development; and this was more or less clearly recognized in modern treatises on jurisprudence. In most modern societies law was always undergoing changes which were not accidental, and which to a large degree might be foreseen. Maine had formulated one such trend of evolution--namely the transition from status to contract.... Now the reverse process was everywhere seen. ⁵⁶

His lectures clearly showed the major lesson learned by anthropologists and comparative jurists after Maine: that "it was useless to heap together examples taken from

⁵⁴
Ibid., p. 208.

⁵⁵
Ibid.

⁵⁶
Ibid., p. 226

systems of different kinds," and that "to make any profitable comparison, we must know the particular society and its economic condition."⁵⁷ Thus, Macdonell urged a greater care in making essential comparisons than Maine had used.

Isolated points of likeness must not be confounded with proofs of similarity of origin.... It was well to call attention, as Maine had done in his 'Ancient Law' and 'Institutions' in a manner then very novel, to the similarity between the laws of India and Ireland as to execution etc.... By themselves they proved little or nothing. Attaching limited importance to mere individual points of similarity, the student of comparative law should look for groups or points of likeness, and this for a sufficient reason. 58

Macdonell's voice was not the only one raised in defense of the comparative study of early law. Still other writers followed, who wholly or in part retained an interest in the method. Lord Bryce, for example, attempted an application of the comparative and historical method in his essays on Roman and English legal evolution,⁵⁹ while Sir Paul Vinogradoff attempted to retain the comparative method to find broad correlations between social and legal development. Vinogradoff consistently asserted that "I

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Ibid.

58

Ibid.

59

See James Bryce, "Methods of Law Making in Rome and England," Studies in History and Jurisprudence, pp. 669-744; and, "The History of Legal Development at Rome and in England," pp. 745-781.

can claim Maine as one of my most influential teachers;" his work stimulated "the whole of my generation of students in law and history."⁶⁰ Maine was "a potentate in a realm where parochial patronage and a mere aptitude for vulgarization are not recognized as titles to eminence."⁶¹

Reading Vinogradoff's essays on jurisprudence can be a disconcerting experience, for the ghost of Maine haunts every page and every passage. Vinogradoff, like Maine, dwelt upon the importance of studying primitive society. Though even the most rudimentary societies, said Vinogradoff,

...are very complex and replete with various accomplishments, we are justified in considering them at early stages and in tracing the incipient forms of social organization and law in their arrangements. These cultural origins supply us not only with simpler combinations and more clearly defined natural conditions, but they possess the inestimable advantage of presenting themselves in a very great number of instances and varieties which shade off one into another and offer welcome opportunities for comparative investigation. This is so much the case, that comparative jurisprudence has almost become synonymous with a study of primitive societies, although, of course, such a connotation is by no means rendered necessary by the aim of the study. ⁶²

60

Sir Paul Vinogradoff, "The Teaching of Sir Henry Maine," p. 174.

61

Sir Paul Vinogradoff, "Aims and Methods of Jurisprudence," The Collected Papers, I, pp. 326-27.

62

Sir Paul Vinogradoff, Outlines of Historical Jurisprudence, I, p. 138.

Vinogradoff, too, argued that if the study of history was not "to be an aggregate of casual remarks and outbursts of approval and disapproval,...[it] must be fitted into the framework of historical experience."⁶³ That framework, he suggested, was more than mere analogy, for "social life, as well as individual life is an organic process and not a mechanical contrivance."⁶⁴ These assumptions (startlingly familiar even though they appeared some seventy years after Maine first developed them) make it "both possible and desirable to grasp the facts supplied by history not only in their organic sequences of natural development, but also according to the social types to which they correspond."⁶⁵ Within this context, Vinogradoff could attempt a brief analysis of the legal development of the twentieth century, taking into account "some striking features of this historical stage which constitute a kind of framework for its law." The framework, he said, could even now be said to be one of conflict "between individualistic and collectivistic ideals," the results of which "may be tabulated from the point of view of their polar

63

Sir Paul Vinogradoff, "Aims and Methods of Jurisprudence," The Collected Papers, I, p. 325.

64

Ibid.

65

Sir Paul Vinogradoff, "The Study of Jurisprudence," The Collected Papers, I, p. 213.

conceptions."⁶⁶ In this statement, above all, one hears the whispered residue of Maine's proud proclamation that the "movement of the progressive societies has hitherto been a movement from Status to Contract."

Were Vinogradoff but the ghost of Christmas past, it is doubtful whether his work would survive or his name be remembered. He was aware of the intensely difficult process of comparison, of the temptation to abuse the method and the need for caution.⁶⁷ Despite these reservations, however, Vinogradoff was, among the leading English legal historians, the one who best retained both Maine's interest in history and a feeling for the comparative framework within which it was originally couched. Jenks and Macdonell spoke about it, and lectured, while Vinogradoff wrote voluminously. It was, perhaps, significant that he, the only foreign-born and foreign-trained jurist in the group discussed, was the one most completely Maine's intellectual heir.

The dominant tenor of British jurisprudence after World War I was not, however, comparative. For the most

66

Sir Paul Vinogradoff, "Aims and Methods of Jurisprudence," The Collected Papers, I, pp. 326-27.

67

See Julius Stone, The Province and Function of Law, pp. 463-64; and Morris Ginsberg, "The Comparative Method," Essays in Sociology and Social Philosophy, III, pp. 201-202, for a discussion of some of the differences between Vinogradoff and Maine.

part, analytical jurisprudence continued to dominate the juristic scene, and neither history nor comparison played an important role in its calculations. T. E. Holland, for example, made the comparative method a "handmaid of his own limited conception of legal science."⁶⁸ On the whole, the post-war generation of jurists continued to believe that the scope of jurisprudence was "still... what Austin thought it was."⁶⁹ The pressure to omit Maine from the syllabus of legal training came quite early. In 1928, Harold Laski related that, a few years before, "Sir Roland Wilson proposed at the Faculty of Laws in London to cut Maine from the syllabus," because "comparative jurisprudence had no claim to be called law...." After an animated discussion, "the proposal was lost by Bryce's casting vote."⁷⁰ After Macdonell's departure, the Quain Professorship of Comparative and Historical Law at University College, London, "was directed to other purposes by its holders."⁷¹ At the universities of Oxford and Cambridge,

⁶⁸ See R. W. Lee, "Comparative Law and Comparative Lawyers," 4 The Journal of the Society of Public Teachers of Law 2 (1936).

⁶⁹ Denis Browne, "Reflections on the Teaching of Jurisprudence," p. 81.

⁷⁰ Mark DeWolfe Howe, Holmes-Laski Letters, I, p. 575.

⁷¹ H. C. Gutteridge, Comparative Law; An Introduction to the Comparative Method of Legal Study and Research (Cambridge: Cambridge University Press, 1946), p. 21.

the tale was much the same. The Chair of Historical and Comparative Jurisprudence, founded at Oxford in 1869, was, after Maine's departure, "devoted to the study of the general theory of the law," because the holders of the chair had grave reservations about the worth of comparative law as developed by Maine.⁷² Cambridge had a chair of Comparative Law, but as late as 1946 it was personal to the holder and was not a permanent position. Seldom was it used to perpetuate comparative law.⁷³

By the middle of the twentieth century, the study of Maine's works had lapsed from a position of critical importance to the understanding of jurisprudence to one of customary obeisance. "I do not find it possible to contemplate a jurisprudence course that neglects the opportunity of introducing the student to Maine's Ancient Law,"⁷⁴ became the dominant sentiment, as if there were no more to Maine than one volume and no more to his method than literature. As Maine's fortunes declined, so too did those of comparative law as Maine understood that term, till at last it was characterized, with some vehemence, as being

⁷²

Ibid.

⁷³

Ibid.

⁷⁴

Denis Browne, "Reflections on the Teaching of Jurisprudence," p. 81.

"positively shocking."⁷⁵

This is not to say, however, that comparative law has disappeared entirely; it has, however, assumed much different proportions than in Maine's day. The change could be noted as early as 1895, when Sir John Macdonell and Sir Courtenay Ilbert founded the Society of Comparative Legislation. "The strange name was undoubtedly a diplomatic subterfuge," said one person, because "it would have been a hopeless task to have aroused interest in a society formed to study anything so unpractical and academic as comparative law." The term "comparative legislation," however, "had a useful and practical sound about it. Moreover, it made an imperial appeal."⁷⁶ Though Sir Charles Tupper, while discussing the work of the Society, acknowledged that some work was done on searching "for indications of those laws of growth...which become more and more clearly discernable as the laws originating, transforming and completing through the ages the mass of political phenomena at large,"⁷⁷ he dwelt longer on what

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R. W. Lee, "Comparative Law and Comparative Lawyers," p. 1.

76

H. J. Randall, "Sir John Macdonell and the Study of Comparative Law," pp. 189-190.

77

Sir Charles Tupper, "Sociology and Comparative Politics," 9 Journal of the Society of Comparative Legislation 147 (1908).

had, already, in 1908, become the major work of the Society, "the comparison of the laws of civilized countries at the present time."⁷⁸ This comparison, contemporary rather than historical, designed for practical rather than theoretical use, came early to dominate the proceedings.

The evidence which may be examined is extraordinarily abundant, a great deal of it is readily accessible; doubts can be cleared up by a communication with the living men who know. Modern civilized countries alone have reached what is as yet the last chapter in the natural history of mankind; and we may reasonably turn to them if we desire light on the actual or probable contents of the preceding pages. Those communities which have passed through the greatest number of stages, in the long journey from savagery through barbarism to civilization, will assuredly still bear in their living frames many survivals of their past.⁷⁹

The aims of the new movement in comparative jurisprudence were "the improvement of national law, the discovery of the ideas and principles common to modern legal systems, and, so far as that is possible, the unification of the laws of the several countries."⁸⁰ Having ascertained and described other systems of law, the object of the comparative method was now to analyze the merits of these systems, "with a view to moulding legislation."⁸¹

⁷⁸

Ibid., p. 146.

⁷⁹

Ibid., pp. 146-47.

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H. D. Hazaltine, "The Study of Comparative Legal History," 1 Journal of the Society of Public Teachers of Law 28 (1927).

⁸¹

J. Wigmore, "A New Way of Teaching Comparative Law," 1 Journal of the Society of Public Teachers of Law, 6 (1927).

The use of history in this new context was not essential. It appears to have been assigned a minor role in supplying a check upon conclusions derived from comparison, and in supplying a check upon conclusions derived through comparison, and in ascertaining why certain meanings or legal attachments were derived from the past. Thus, "if learning the meanings of legal propositions is an indispensable step in solving every legal problem, their historical meanings are indispensable."⁸² By the same token, history can be used to explain "the emotional pull of old customs and old law," and act as well as a corrective on "erroneous assumptions about contemporary law, especially case law."⁸³ Occasionally, as well, history was a "test of experience," indicating that a long-standing legal tradition "is therefore presumptively the best until a better is produced."⁸⁴ History, in any of these cases is but a handy testing device, a court of appeal to be referred to only upon those occasions when comparisons of contemporary law need explaining, elaborating or justification. Unlike Maine, who found in history truth, value and meaning, modern exponents of

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Edwin W. Patterson, "Historical and Evolutionary Theories of Law," Essays on Jurisprudence from the Columbia Law Review, p. 281.

⁸³

Ibid., pp. 283-84.

⁸⁴

Ibid., p. 285.

comparative law tend to ignore appeals to historical truth and turn to historical values and meaning only when others have failed.

The search for truth and the development of scientific methodology continued in comparative jurisprudence, but the ground has shifted from the past to the present, and the goal from that of comprehending the present through the past to one of changing the future by knowledge of the present. Gone was the emphasis upon integrated theory which was so important a part of Maine's thought; in its place practical problems of legal change dominate. The process of "comparing the rules of law taken from different systems does not," as H. C. Gutteridge noted, "result in the formulation of any independent rules for the regulation of human relationships or transactions."⁸⁵ The process did, however, result in the creation of a notion of law based upon the comparison of specific laws "with corresponding items in other systems." The purpose of this comparison "is ultimately practical as its spirit is scientific."⁸⁶

Thus science, having the purpose to ascertain and to state the truth, must necessarily be comparative, taking into account any and all phenomena that may

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H. C. Gutteridge, Comparative Law, p. 1.

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Hessel Yntema, "Comparative Research and Unification of Law," 41 Michigan Law Review 263 (1942).

bear upon the myriad problems and issues that deserve investigation.... Comparison, the objective examination of legal phenomena in other times and countries alongside of familiar local institutions, is an essential function of a mature or in other words, a true legal science. The community of science is humanity; its currency is truth, not the trademarks of prestige, domestic or foreign. 87

That the attempt to achieve truth and scientific accuracy continues in the present age of comparative jurisprudence, using techniques and assumptions, methods and goals different from those originally expounded by Maine indicates again the very relative nature of any such attempt and the danger of suggesting that a particular method or a particular definition should prevail at the complete expense of any other. Just as Maine cast aside the a priori assumptions of the natural law school or the rigorous definition of the analyst in favor of an historically founded legal functionalism, so too has his historical foundation been cast aside in favor of the comparison of contemporary law.

The most ironic aspect of the treatment which Maine received in the hands of later jurists was their insistence upon his personal worth and integrity, combined with a rejection of his scientific conceptualizations. This was, of course, the very opposite of what Maine, himself,

would have appreciated. Throughout his work, Maine stipulated that while individual research could be fallible, the naturalistic method could not. His successors, on the other hand, praised the man but denied the method. Particularly ironic was Pollock's treatment of Maine in a poetic vein. At one stroke, Maine and his entire scientific functionalism were reduced to the same level as the a priori schools of thought which he had consistently attacked. There was a certain justice to this, however, which cannot be overlooked. Maine was undoubtedly a stylist--he had a remarkable capacity for calling up the apt phrase, for making the obscure point interesting and the difficult comprehensible. There was often a poetic vein to his writing which the discussion even of the most obscure Indian or Irish legal custom could not hide. Another side of this justice, however, was simply that the certainty of truth and the conviction of ultimate righteousness with which that certainty is connected, disappeared. Pollock's service to our understanding of Maine was simply to underline, once again, that what passes for truth is really temporal understanding, and that both the content and method of understanding vary, not only from period to period but from person to person.

Whether Pollock understood his own lesson is debatable. His collaboration with F. W. Maitland on The History of English Law helped to establish another avenue to truth,

more flexible and less encumbered, perhaps, with a priori assumption and interlocking supposition than naturalism, but an attempt to define truth nevertheless. What has been called hiding behind the friendly facade of the British Museum--the intensive and extensive examination and collation of documentary evidence--cannot overcome the singular fallibility of the human agent. Nor can it avoid the charge of being moderately inflexible: the degree to which an examination of documentary evidence leads one to the conclusion that there is but one truthful explanation of any historical event is the degree to which one is determined to remain unmoving and blind to the blandishments of other arguments equally truthful to their exponents. Worse, however, the degree of truth is also the degree of wrath and certitude with which opponents are charged with improper values and inadequate research. William Holdsworth, whose history followed the tradition of Pollock and Maitland, reflects just this attitude in his attack upon Maine.

That the belief in absolutes continues, along with a faith in science and a belief in the attainability of truth, into the modern definition of comparative law, tends to give the lie to the infallibility of legal history as expounded by Pollock, Matiland and Holdsworth. The proper road to truth, according to this view, now appears to lie in a knowledge, not of what law was, but of what it is. History has been reduced to the position of handmaiden to

comparison. History is no longer a criterion of truth.

What, in effect, one finds in the study of jurisprudence after Maine is that the historians tended to minimize the comparative technique while retaining Maine's interest in history, while modern exponents of comparative law have retained the comparison while minimizing history. Interestingly, to both, Maine is an honored and esteemed forebearer, but to neither is he acceptable in the totality of his method.

CHAPTER X

THE FERTILE GROUND:
MAINE'S THOUGHT IN AMERICA

Evidence that Maine affected the intellectual development of Britain directly is mixed. At best, Maine's was a diffuse penetration. He did not found a school of jurisprudence, nor did he initiate a school of sociological study. Of respectful readers he had many; of disciples, few.

The situation was somewhat different in the United States, where Maine's work, particularly his Ancient Law, received an enthusiastic reception at the hands of jurists, scholars and intellectuals alike. In the realm of jurisprudence, Maine got an early and respectful hearing; at least one jurist, William Ivins, can, in terms of the total enthusiasm with which he expounded Maine's view, be considered a disciple. In addition, there are indications that Oliver Wendell Holmes, Jr., was indebted to Maine for some, at least, of the inspiration for The Common Law.

Why this should be so--why Maine should have received a better hearing in America than England--must always remain conjectural. Two reasons, however, suggest themselves. In the first place, American jurisprudence was acquainted with the comparative method and with historical jurisprudence, so that when Maine showed how the two could

be combined, his efforts seemed quite acceptable. In addition, naturalism, while never completely dominating the American intellectual scene, nevertheless was a very important element in American life from the Civil War on. Therefore, when Maine's works became known in the United States, their major concepts fell on fertile soil. To Americans, steeped in Spencerian principles, the transition from the science of law to Maine's historical and comparative method was slight indeed.

The same acceptance of naturalism which promoted an understanding and acceptance of Maine among jurists led also to his enthusiastic reception in both universities and among individual intellectuals. In this respect, Henry Adams, while at Harvard, made great use of Maine's Ancient Law, and John Fiske not only attributed his conversion to the new faith of science largely to a reading of Ancient Law, but continued, throughout his productive life, to incorporate Maine's work into his own, broader, investigations. Insofar, then, as there was a wide-spread and sympathetic body of opinion and idea in the United States already in existence which was closely allied to, or was an integral part of, that same naturalism which had animated Maine's thought, he received a respectful hearing. And, insofar as his work illustrated how that complex system of ideas could help elucidate and properly explain the development of legal institutions, and how one

could create a scientific jurisprudence, Maine enlarged and enriched the main body of naturalistic thought in America.

"If we may claim to know more than our forefathers about the actual historical development of law," said William H. Ivins, in an article on "The Science of Comparative Jurisprudence," in 1880, "it is only because we have become possessed of a new historical method which has already wrought signal, if not fundamental, alterations in our point of view so far as regards the origin and early history of institutions."¹ The new method to which Ivins referred was the comparative method of which "Sir Henry Sumner Maine made the first note-worthy application...to legal history in his now famous 'Ancient Law'."² Ivins, a New York barrister, devoted a major part of his article to a justification of the comparative method in the face of reluctance by practicing lawyers to transgress the boundaries of case law for the green fields of historical sociology. Pointing out that the new juristic science had to have recourse to both ancient and modern history in order to rediscover and characterize "those laws and

¹
William m. Ivins, "Science of Comparative Jurisprudence," The Popular Science Monthly, XVII (1880), pp. 577-78.

²
Ibid.

political institutions which...might fairly be denominated Aryan law," he argued that breadth of study and departure from mere positive law were necessary to pursue scientific knowledge.

If comparative jurisprudence deals with religions, ceremonials, customs, and politics, it is because it reaches back to a time when these and law were but slightly differentiated, when law had no peculiar accent of its own apart from that of the other institutional manifestations of social life. It can no longer be doubted that the law of evolution holds good, not only of organic processes, but of all super-organic processes as well--of the development of language, art, law, religion, and political institutions, and that in the beginning they were homogeneous and incoherent. So jurisprudence is compelled to regard something more than law simple, if it is to comprehend law. It has for its subject-matter the study of the relation of the fact law to all of the other facts of society, and so it goes back of positive law and seeks its springs and motives in systems like the early Roman and Hindoo, where rites, liturgies, prayers, moral ordinances, and what we know distinctively as civil laws, appear to be mingled in mere senseless confusion. If the sphere of comparative jurisprudence is thus rendered larger than that of any of the other comparative sciences, it is only because law is the one social fact in which all others eventually lose themselves, and those others have to be known before law can be known. 3

The results of a scientific jurisprudence, faithfully pursued, were to prove conclusively that "all phenomena of society, politics, religion, ethics, art, are presented simultaneously by society, and constitute a plexus of interacting causes and effects, independent and yet inter-

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Ibid., pp. 579-80

penetrating one another, each of which can only be understood by the light of all."⁴

Not only would comparative jurisprudence eventually reveal the exact relationship of custom to law and that of custom and law to legislation, it would also reveal the true pattern of legal evolution from status-to-contract. Borrowing, doubtless, from Maine's formulation, Ivins concluded that:

The great movement of society has been a slow and painful progression from clan society, governed by the law of status, to political society, based upon the principles of individualism; from a society in which individual self-government was unknown, to one which first organized a single central governing power, and which has ever since been limiting that power in favor of the largest practicable individualism. The history of these changes is the history of social progress, of civilization; but it is unintelligible apart from comparative jurisprudence, which is not only the forerunner of a complete science of history, but of the true philosophy of law, which shall rise above all forms and customs, and discover to mankind the generative principle of the just and of the unjust, and make of positive law nothing less than organized justice and right. ⁵

The hope, which Ivins held forth, of discovering a "true philosophy of law," was consistent with the enthusiasm and assuredness which underlay the promise and the righteousness of naturalism. Consistent, too, was Irvin's conservative

⁴

Ibid., p. 583

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Ibid.

reading of the meaning of integrated social evolution; it proved "the eternal absurdity" of such concepts as "those of Saint-Simon, Fourier, Proudhon and Louis Blanc." All such schemes, containing as they did, "a subtle poison hostile to the essential principle of all society," must fail because they would modify society too rapidly and too completely. Such reformers were "alchemists of thought," who ignored the proofs of comparative jurisprudence.⁶ Thus, not only did Ivins' essay constitute a complete endorsement of Maine's methods and conclusions, but of his social and political conservatism. Such differences as existed were on the side of exaggeration, making Ivins "plus royaliste que le Roi."

Part of the explanation of the notable success which Maine's ideas achieved in the United States must be found in the work of earlier jurists. Neither history nor the use of comparative law were new innovations. Though Maine's was "the first philosophical study of the history of law to reach an Anglo-American audience,"⁷ a system of comparative jurisprudence had earlier been developed by

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Ibid., p. 584.

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Mark DeWolfe Howe, Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870 (Cambridge: The Belknap Press of Harvard University Press, 1957), p. 193.

two "classic legal writers of the nineteenth century," James Kent and Joseph Story.⁸ The comparative method of Chancellor Kent and of Story arose "partly from the need of giving direction to the judicial development of our law, and partly from the pressure of political opposition to the common law," and resulted in a belief that "a universal commercial law, as set forth in the Continental treatises on that subject, was...declaratory of natural law...."⁹ Chancellor Kent, especially, strove to utilize material from European juridical writing of all ages, including classical authorities on Roman law, Dutch publicists such as Grotius, as well as German, French and Swiss authorities.¹⁰ Joseph Story, too, made copious reference to these same sources, thus helping to create a conception, important to American jurisprudence, of comparative law as the declaration of natural law. In this way, Kent and Story were able to unite the seemingly antithetical elements of English common law and American belief in a natural law or a

8

Morris Raphael Cohen, American Thought: A Critical Sketch, ed. by Felix S. Cohen (New York: Collier Books, 1962), p. 184.

9

Roscoe Pound, "The Revival of Comparative Law," 5 Tulane Law Review 10 (1930-31).

10

H. G. Renschlein, "Outline of Taught Law--Notes on American Legal Philosophy: The Beginnings to Holmes and Pound," 28 Minnesota Law Review 16 (1943).

complete, universal code, discoverably by reason, of which positive law was but declaratory.¹¹

A skillful use of comparative law, seeming to show the identity of an ideal form of the English common-law rule, with an ideal form of the Roman-law or civil-law rule...thus demonstrating the identity of each with a universally acknowledged law of nature, was the most efficient of the instruments by which Kent and Story and many who followed them, were able to insure that the English common law should be the basis of the law in all but one of the United States. 12

The comparative method did not, however, retain its importance in American jurisprudence much beyond the Civil War.¹³ Despite the fact that the method tended to disappear after the creative period of American jurisprudence and despite the fact, too, that it was not combined with a sociological bias, its existence made American jurists broadly familiar with the principles involved. Thus, while Maine's comparative method was one of historical comparison, and involved the examination of social and legal institutions as well as law and opinion, there remained a sufficient similarity of technique to allow Maine a respectable hearing.

Just as American jurists had already been introduced

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Nathan Isaacs, "The Schools of Jurisprudence; Their Place in History and Their Present Alignment," 31 Harvard Law Review 373-400 (1918).

12

Roscoe Pound, "The Revival of Comparative Law," p. 12.

13

Ibid.

to a comparative jurisprudence, so too had they an acquaintance with a form of historical juristic thought. In 1849, Luther S. Cushing presented a series of lectures at the Harvard Law School in which he gave a systematic exposition of the German school of historical jurisprudence.¹⁴ Cushing's lectures dwelt largely on Savigny and were, therefore, in the tradition of romantic rather than positivistic philosophy, but they did, nevertheless, accustom some American jurists to look to the past for a justification and an explanation of law. One student who heard these lectures was James Coolidge Carter, who was later to become a prominent New York attorney and leader of the American Bar. In his book, Law: Its Origin, Growth and Function,¹⁵ Carter clearly reflected the influence of historical jurisprudence.¹⁶ Though he was by no means uncritical of Maine's concepts,--particularly

14

Edgar Bodenheimer, Jurisprudence: The Philosophy and Method of the Law, p. 76.

15

James Coolidge Carter, Law: Its Origin, Growth and Function: Being a Course of Lectures Prepared for Delivery before the Law School of Harvard University (New York: G. P. Putnam's Sons, 1907).

16

See M. J. Aronson, "The Juridical Evolution of James Coolidge Carter," 10 The University of Toronto Law Journal 1-53 (1953).

of Maine's criticism of analytical jurisprudence¹⁷--Carter gave Maine a full and fair hearing, and agreed with Maine that "the actual facts of the origin of law" did not support the analysts' conception of sovereignty.¹⁸ In one sense, Carter served Maine in the same way that Maine had served Austin: the elaborate criticisms offered of Maine's work served greatly to publicize it and make it known to a wide audience, even though merely by hearsay.

If both comparison and history were familiar to American jurists, so too was the naturalistic framework into which Maine cast his own historical comparison. American jurisprudence contained several examples of naturalistic thought in addition to that which Maine provided. Though naturalism did not at any time "hold uncontested sway over American thinking," it "exerted an influence out of proportion to the number of people who shared its tenets, because it was identified chiefly with articulate groups of the intelligentsia, such as journalists, literary men, business spokesmen, and professors."¹⁹ One might add to that list lawyers and

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See James Coolidge Carter, Law: Its Origin, Growth and Function, pp. 187-190 and 198-202.

18

Ibid., pp. 218-19.

19

Stow Persons, American Minds, p. 217.

and jurists. One such person was A. G. Keller, whose article, "Law in Evolution," was based almost exclusively upon the philosophic ramifications of Darwin's biological evolution.²⁰ Though appearing late in the history of American naturalism, Keller's article may be taken as a summary of an argument that had been going on within the company of American jurists for some time. His argument was a spirited rejoinder to those who would found jurisprudence upon Spencerian principles.

The evolution of law from the simple to the complex, as envisioned by Herbert Spencer, might well have been generally accurate, thought Keller, but the principles upon which this development had been based were but fanciful prognostications. He called, instead, for a science of law based upon Darwin and the more prosaic but sounder, principles of biological evolution.

So deeply did Spencer impress his stamp upon the social thought of his age that to most students of social phenomena evolution means Spencerian evolution. It is something of a novelty to discard his formulas and to seek the sturdier supports afforded by Darwin and the Darwinians. But let us set aside those all-inclusive, and therefore tenuous and unscientific propositions that Spencer revels in...and inquire more prosaically, whether human institutions, and, among them law, show adjustment to life-conditions by way of the stock Darwinian factors of variation, selection, and transmission. For the upshot of evolution, in the

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See A. G. Keller, "Law in Evolution," 28 Yale Law Journal 769-783 (1918-19).

Darwinian sense, is adaptation to environment. 21 The study of law in this way would, said Keller, reveal "a series of forms developing out of forms, in a connected series, with survival of the fitter, in adjustment to environment."²² In effect, concluded Keller, so close was the relationship between law and environment that "law, along with all other social forms and institutions, is a matter of growth from unpromising beginnings through illimitable time--time that stretches not only from the present back to the beginnings, but also from the present forward to the last days of the last human society that shall inhabit this planet."²³

The controversy as to whether evolutionary law scientifically founded should be based upon Spencerian or Darwinian doctrine was most important insofar as it indicates a rich texture of American naturalism. In this juridical environment, already sensitive to comparison, history, science and functional treatments of law, Maine found a ready audience. His impact was not jarring, his book not gaudy. Ancient Law blended into the intellectual

²¹
Ibid., pp. 772-73.

²²
Ibid., p. 772.

²³
Ibid.

scene, swelling the rising tide of naturalistic thought. Oliver Wendell Holmes, Jr., for example, had much too original and powerful a mind to rest content with a mere parroting of another's ideas, however original they were or however brilliantly presented. Yet, Holmes did author an excellent treatise on the common law, treating it in an historical and functional manner as suggested by Maine.

In 1864, Professor Theodore Dwight expressed the hope that Maine "or some equally competent person," would "do for the English common law" what Ancient Law had done for the earlier periods of legal history.²⁴ His wish seemed fulfilled with the publication of Holmes' The Common Law. The opening paragraph is an appeal to the lawyer to study the history of law.

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men ought to be governed. 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

24

See Theodore Dwight, "Introduction," in Sir Henry Maine, Ancient Law, Its Connection with the Early History of Society, and its Relation to Modern Ideas, 3rd American ed. from 5th London ed., (New York: Henry Holt and Co., 1864), pp. ix-x.

what it tends to become. 25

Throughout the book are constant implications of an intellectual debt to Maine which led Holmes' biographer to note that "the ferment of Maine's genius if it was not the proximate cause of Holmes' efforts in The Common Law was at least a significant influence in their structure."²⁶

As a law student, Holmes made himself familiar with Ancient Law, despite the fact that the book was not then on the list of recommended readings at the Harvard Law School.²⁷ Holmes returned again to Ancient Law in 1867, when he used it as a background against which to place an evaluation of Judge Redfield's edition of Story's Commentaries on Equity Jurisprudence.²⁸ Holmes' discussion was largely technical, but always implicit was his conviction that Maine's treatment of the instrumentalities of legal change was essentially correct. Though Holmes ignored a discussion of legal fiction, he did accept the concept that the agencies of progress in modern times were

25

Oliver Wendell Holmes, Jr., The Common Law (Boston: Little, Brown and Co., 1881), p. 1.

26

Mark DeWolfe Howe, Justice Oliver Wendell Holmes: The Shaping Years, pp. 193-94.

27

Ibid., p. 193.

28

Ibid., p. 272.

equity and legislation.²⁹ This was the context within which Holmes asked his readers to place a discussion of equity.

Holmes' constant emphasis upon an historical treatment, his insistence that law could be scientific,³⁰ and, indeed, his entire conviction that law "was an evolving institution and an anthropological document for the science of jurisprudence,"³¹ indicate a connection between his thought and Maine's. Yet, Holmes drew also from Bentham and Austin,³² from Theodore Dwight and T. H. Green,³³ so that Maine must be considered but one of many often conflicting sources upon which Holmes' fertile mind worked. Thus, when Harold Laski asked Holmes whether "the idea of comparative historical work" stemmed from reading and meeting Maine,³⁴ Holmes replied:

29

Oliver Wendell Holmes, Jr., "Book Notices," I American Law Review 554-55 (1866-67).

30

Oliver Wendell Holmes, Jr., "Law in Science and Science in Law," 12 Harvard Law Review 443-463 (1899).

31

Philip P. Wiener, Evolution and the Founders of Pragmatism, p. 175.

32

Mark De Wolfe Howe, Justice Oliver Wendell Holmes: The Shaping Years, p. 194.

33

Philip P. Wiener, Evolution and the Founders of Pragmatism, p. 175.

34

Mark De Wolfe Howe, (ed.), Holmes-Laski Letters, I, p. 427.

Of course I can't answer for unconscious elements. I don't think Maine had anything to do with it except to feed the philosophic passion. I think the movement came from within--from the passionate demand that what sounded so arbitrary in Blackstone, for instance, should give some reasonable meaning--that the law should be proved, if it could be, to be worth of the interest of an intelligent man--(that was the form the question took then). I went through much anguish of mind before I realized the answer to that question that I have often given since. I don't think of any special book that put me on the track.... I rooted round and made notes until the theory actually emerged. 35

The phrase "except to feed the philosophic passion" indicated the effect Maine had upon American jurisprudence.

Stimulating individual jurists, at the same time he expanded the stream of naturalism. The more intense the passion, the more receptive were individuals to Maine's ideas.

This same environment prevailed in other disciplines as well. American historians, too, were caught up in the general belief that history was a science. There was, of course, a consensus that to be scientific "was the great desideratum."³⁶ What, however, constituted science was often in dispute. The larger number of American historians were not advocates either of law in history or of naturalism. Professor Ephraim Emerton and Charles Kendall Adams,

35

Ibid., pp. 429-30.

36

W. Stull Holt, "The Idea of Scientific History in America," Journal of the History of Ideas, I (1940), p. 352.

for example, ascribed the scientific nature of history to the ideal of absolute and complete objectivity which Leopold von Ranke had developed.³⁷ By this theory, scientific history consisted of "a search for facts alone, with no laws or generalizations and with a renunciation of all philosophy."³⁸ The historian's purpose, according to James Ford Rhodes, was "to get rid, so far as possible, of all preconceived notions and theories," while only telling a story.³⁹ This notion of science was, in effect, an American counterpart to the "British Museum School" of Pollock, Maitland and Holdsworth.

Though the school of objective historians dominated the discipline until challenged by Charles Beard in 1935,⁴⁰ there was a smaller group which believed that the special characteristic of scientific history was the establishment of natural laws. "Since human history lay entirely within a sphere in which the law of cause and effect has un-

³⁷
Ibid., p. 355.

³⁸
Ibid., p. 357.

³⁹
Mark De Wolfe Howe, James Ford Rhodes, American Historian (New York: D. Appleton and Co., 1929) pp. 149-50.

⁴⁰
Charles A. Beard, "That Noble Dream," American Historical Review, XLI (1935), pp. 240-87.

restricted dominion," ran the familiar argument, "and since it could therefore be reduced to general laws, it was a science."⁴¹ Henry Adams became one of the most famous advocates of this notion, suggesting that "should history ever become a true science, it must expect to establish its laws."⁴² In 1894, Adams addressed the American Historical Association in these words:

You may be sure that four out of five serious students of history who are living today have, in the course of their work, felt that they stood on the brink of a great generalization that would reduce all history under a law as clear as the laws which govern the material world.... The law was certainly there, and as certainly was in places actually visible, to be touched and handled, as though it were a law of chemistry or physics. No teacher with a spark of imagination or with an idea of scientific method can have helped dreaming of the immortality that would be achieved by the man who should successfully apply Darwin's method to the facts of human history.⁴³

In the pursuit of history thus defined, Adams formed a small undergraduate seminar in medieval institutions, in which he focused attention on the study of legal development. His primary text was Maine's Ancient Law, though Village-Communities was also used, as well as works by

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W. Stull Holt, "The Idea of Scientific History in America," p. 356.

⁴²

Henry Adams, History of the United States (New York: Charles Scribner's Sons, 1891), IX, p. 222.

⁴³

Henry Adams, "The Tendency of History," Annual Report of the American Historical Association, 1894, pp. 18-19.

John Ferguson McLennan, Erwin Nasse, "and everything else they could lay their hands on, including much Roman Law and other stuff."⁴⁴ Adams, like Oliver Wendell Holmes, Jr., acted upon the hint thrown out by Professor Dwight and next prescribed for the course in Medieval Institutions "a course of special study on the early English law...with a view to ascertaining and fixing the share that the Germanic law had in forming the Common Law." When, in 1873-74, the course was given, membership was limited to "candidates for honors." Adams "centered most of his interest upon this small group of talented men, attempting at Harvard what Sir Henry Maine was accomplishing at Oxford in instituting the study of comparative early jurisprudence."⁴⁵

Adams used Maine's work as a text and a guide, but not as an infallible source. Though he continued to use

44

Quoted in Ernest Samuels, The Young Henry Adams (Cambridge: Harvard University Press, 1948), p. 211.

45

Quoted, Ibid., p. 245. Samuels noted that the intensified interest in legal history led to an expanded program in history. "The larger possibilities of their joint labors becoming apparent, Adams proposed to President Eliot to establish a class of doctoral candidates to carry on the work 'at his own expense.' With the formal vote of thanks by the President and Fellows for 'his generous act' to encourage him he went ahead to inaugurate graduate study in history at Harvard." p. 245.

Ancient Law, and though he knew him well,⁴⁶ Adams was always critical of Maine's work, though not of the naturalistic pattern in which this work was presented. Maine had, Adams felt, relied too heavily on theory and too much upon assumption. Both Ancient Law and Village-Communities needed "two or three volumes" of preliminary work before their subject-matter could be adequately broached, and the Early History of Institutions assumed the archaic character of Irish Brehon law without proving it.⁴⁷ He was also critical of Maine's patriarchal theory, considering it inapplicable to early German society⁴⁸ and of his theory on the early position of women, which was inadequate to explain women's present status and rights.⁴⁹ These were, however, criticisms of Maine's conclusions and not of his aims or methods. As far as these latter were concerned, Maine's publications aided Adams greatly in his search for law in history.

Not so critical was John Fiske, one of the great

⁴⁶
Ibid., pp. 261-62.

⁴⁷
Ibid., pp. 231-32.

⁴⁸
Ibid., p. 253.

⁴⁹
Ibid., pp. 261-62.

popularizers of naturalistic thought in America, whose enthusiasm for Maine knew hardly any bounds. Fiske's early eagerness and the faithfulness with which he incorporated Maine's leading ideas into his own work did much to bring Maine into the mainstream of American naturalism. Fiske was trained in law, though even as a student he combined this interest with science and history.⁵⁰ His early admiration for Comte and Buckle was soon replaced by a rapturous introduction to Maine. Writing to his fiancée, Fiske described not only the excitement which Maine created within him, but the position in his own intellectual scheme with Maine was to assume.

I have passed through an Era, and entered upon an Epoch in my life. Thursday evening I began Maine's 'Ancient Law,' and read it at exactly twelve in the evening. No novel that I ever read enchained me more. I consider it almost next to Spencer. It has thrown all my ideas of Law into definite shape. It has suggested to me many new and startling views of social progress. It has confirmed many new generalizations. I scarcely ever read a work so exceedingly suggestive. In fact it suggests far more than it says. Almost every proposition in it may be made the foundation of a long train of thought, but what it hints at, what it expresses, is wonderful.

He lays open the whole structure of ancient society....
--O, my dear! It is perfectly GLORIOUS! I am going to read it over and over until I know it by heart.

And I am going to get you so posted up that you can read it. Years of study are richly rewarded, when

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Milton Berman, John Fiske: The Evolution of a Popularizer (Cambridge: Harvard University Press, 1961), pp. 52-53.

they enable one to experience such an intellectual ecstasy as I felt New Year's day! When I came out to dinner and heard the fellows talking the small-talk--the stuff that people talk when they have nothing in them to let out--you can't imagine how dreadfully low and worthless their pursuits and ideas seemed to me. O, my dear! there is nothing in this world like SCIENCE; nothing so divine as the life of a scholar! 51

Fiske turned not so much to the life of a scholar as to that of a successful popularizer of naturalism. In all things, he echoed the sentiments of naturalism and in many instances integrated Maine's work in law into his own, broader, context. His passion for the comparative method and his understanding of its contributions to the study of man differed from that of Maine only in enthusiasm and relative lack of qualification.

The point of the comparative method in whatever field it may be applied, is that it brings before us a great number of objects so nearly alike that we are bound to assume for them an origin and general history in common, while at the same time they present such differences in detail as to suggest that some have advanced further than others in the direction in which all are travelling; some, again, have been abruptly arrested, others perhaps even turned aside from the path. In the attempt to classify such phenomena, whether in the historical or in the physical sciences, the conception of development is presented to the student with irresistible force. 52

51

John Spencer Clark, (ed.), The Life and Letters of John Fiske, I, pp. 286-87.

52

John Fiske, "A Century of Science," A Century of Science and Other Essays (Boston: Houghton Mifflin and Co., 1899), pp. 30-31.

In his four-volume Outlines of Cosmic Philosophy, which constitute the epitome of his belief, Fiske constantly referred his readers to "what is implied by the conclusions at which Sir Henry Maine arrived...."⁵³ He saw in Maine's ideas but another, conclusive evidence of social evolution and a primary indication of the ultimate validity of Spencer's law of progress. After illustrating the way in which Maine's study of law, property and early institutions supported Spencer's notion of social progress, Fiske used Maine to distinguish sharply between the patterns of organic and social evolution.

In organic development, the individual life of the parts is more and more submerged in the corporate life of the whole. In social development, corporate life is more and more subordinated to individual life. The highest organic life is that in which the units have the least possible freedom. The highest social life is that which the units have the greatest possible freedom. ⁵⁴

Finally, using evidence offered by both Spencer and Maine, Fiske offered a definition of social progress, "provisionally stated:"

The evolution of Society is a continuous establishment of psychical relations within the Community, in conforming to physical and psychical relations arising in the Environment; during which, both the Community and the

⁵³ John Fiske, Outlines of Cosmic Philosophy, III, pp. 316-330.

⁵⁴ Ibid., pp. 327-28.

Environment pass from a state of relatively indefinite, incoherent homogeneity to a state of relatively definite, coherent heterogeneity; and during which, the constituent Units of the Community become ever more distinctly individuated. 55

Fiske's eclectic mind had, in the Cosmic Philosophy, created a very broad composite of many strands of naturalistic thought, concentrating generally upon their similarities. His use of Maine was more enthusiastic than faithful. He had commended Ancient Law because "it suggests far more than it says," and this power of suggestion led him to accept as fact what Maine had advanced as hypothesis. What Maine had had the grace to be reserved about, Fiske did not.

Fiske was not, however, content merely to mimic or to repeat Maine's work; he was concerned, as well, with the prospects of elaborating upon Maine's findings. In 1880, Fiske embarked upon a lecture tour of England which resulted in the formation of a new interpretation of the importance of the western European village community which von Maurer and Nasse had described and which Maine had popularized.⁵⁶ Fiske admitted that "I have adopted the views of Sir Henry Maine as to the common holding of the arable land in the

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Ibid., p. 328.

56

Milton Berman, John Fiske: The Evolution of a Popularizer, pp. 136-37.

ancient German mark, and as to the primitive character of the periodical redistribution of land in the Russian village community."⁵⁷ He argued, however, that the tendencies in local self-government in the mark which resulted in an independent and freedom-loving strain in European political development came to full fruition in the New England Town Meeting.⁵⁸ In the United States, far from the turmoil of Europe, the transition from status, as outlined in Maine's description of the western village community, to contract, as Fiske saw it in America, had achieved full maturity.

Fiske's philosophy transcended and encompassed all formal disciplines; his purpose was to present to the public a co-ordinated and integrated statement of the truth of naturalism as a cosmic philosophy. At his hands, Maine assumed a broader significance than that implied by jurisprudence alone. The truth which Fiske saw in Maine's juristic works was presented as an integral part of the truth of naturalism. That Fiske's chauvinism and his tendency to see in America the epitome of freedom and modern contractual society might detract from the truth of his statement and lead to serious questions as to the

57

John Fiske, American Political Ideas, Viewed from the Standpoint of Universal History (New York: Harper and Brothers, 1885), p. 8.

58

Ibid., pp. 8-9.

validity of the whole naturalistic position, appeared unimportant at the time. Just as Maine advanced a concept of social and legal evolution positing industrial England as the sine qua non of civilization, Fiske advanced a theory of political development which assumed the ultimate superiority of American political experience. In both cases, a parochial outlook nullified the scientific detachment of their work.

As disillusionment with naturalism grew, as the failure of comparison, or scientific history to produce their promised knowledge and their promised law led to the triumph of von Ranke's factual and document-oriented concept of scientific history, the entire network of assumptions and assertions upon which naturalism was based were seen in another light: not as science but opinion, not eternal but relative. It was not, however, until the publication of Charles A. Beard's "That Noble Dream" and "Written History As an Act of Faith", along with Carl L. Becker's "What Are Historical Facts?", that the very existence of an eternal truth in history was challenged or the possibility of a "science" of history, however defined, questioned. In this new and different light, naturalism, and Maine's work along with it, can be seen not so much as wrong or invalid but as an interpretation, one among many, which helped European and American scholars to understand the nature of the world about them. In this context,

the judging of Maine is lighter than Maine's judgment of those who disagreed with him. His work is allowed, in the long run, to retain some vestiges of validity or integrity in respect to time and place, whereas his judgment, dependent upon a search for truth, would condemn out of hand and brand as false those philosophic and intellectual positions which did not meet his definition of truth.

CONCLUSION

From time to time one mind endowed with the assemblage of qualities called genius makes a great and sudden addition to the combinations of thought, word and sound which it is the province of those arts to produce; yet, as suddenly, after one or a few such efforts, they settle down into imitativeness for perhaps a century at a time. ¹

This description, given by Maine in 1874, has retained a substantial validity. Those who do make "a great and sudden addition" to the intellectual heritage of an age seem usually to do so by challenging accepted values, thereby altering the established intellectual framework. This might well be described as the first level of thought and the province of the seminal mind. On another, secondary, level, there exist a larger number of individuals, less critical, less given to fundamental questioning of the intellectual foundations of an age, whose originality and whose contributions involve a more limited design. Accepting the assumptions of their age, they restrict their efforts to applying these assumptions to new fields and to examining the ramifications of these ideas in new areas of study. This seems to be the kind of originality most often found and the kind to which most intellects gravitate. It is an honorable calling, and a worthy one, but one falling short of what Maine would call "genius."

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Sir Henry Maine, Early History of Institutions, pp. 227-28.

Among those persons whose genius Maine recognized, he could not have included himself. Though many of Maine's arguments and conclusions were memorable and though he opened new pathways in the study of jurisprudence and the understanding of Britain's role in India, his technique was essentially imitative. A comparison of the naturalistic framework used by Maine and that developed by Auguste Comte, Herbert Spencer, or John Stuart Mill or used by E. A. Freeman, E. B. Tylor and Friedrich Max Müller, reveals few significant differences. Maine's intellectual guidelines were identical in their essential points to those of a large number of contemporaries. This is not to say that Maine plodded only the best-worn paths in the groves of academe. Not only did he bring the power of naturalistic analysis to bear upon previously unexamined areas of study, he also brought to his work considerable ability, charm and persuasiveness, which sets it apart. Maine's literary abilities help account for the fact that his work outlasted the framework in which it was cast. An appreciation of Maine and his work survives, even though the technique he used has not.² Maine was, in this limited sense only,

² That Maine's work continues to have an appeal in the twentieth century is indicated by the recent re-publication of Sir Frederick Pollock's edition of Ancient Law in a paperback edition by Beacon Press. See Sir Henry Maine, Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas (Boston: Beacon Press, 1963), with Introduction and Notes by Sir Frederick Pollock.

superior to the intellectual culture of which he was a product. What was at once his strength was also, however, his weakness, for style and the intricacies of graceful communication obscured Maine's ultimate dream of scientific jurisprudence and posed a formidable obstacle to achieving the objective, impersonal stance which he so valued in the social observer.

Chauncy Wright's comment that "the fertility...and the resource of his imagination are apt to lead to the construction of theories which, though useful as suggestions, cannot be said to rest on a wide basis of ascertained fact," had a great deal of truth to it.³ Compliments on Maine's "grace of expression and the easy flow with which he passes from one interesting topic to another," or reference to his "fertility of conception...and the rapid appreciation of other men's best ideas"⁴ while accurate, pointed to one of the great weaknesses in Maine's conceptual framework. Between Maine and his narration of the phenomena he observed stood a uniquely individualized technique of communication. The words or phrases which Maine chose to relate his observations obscured whatever purity the observation may have had in the first place. When, for

³ Chauncy Wright, "Maine's Early History of Institutions, The Nation, XX (1875), p. 226.

⁴ Ibid., p. 225.

example, Maine talked about ancient society being "incomparably simpler" than modern, or its movements being "infinitely less complex,"⁵ he was giving, for purposes of style, a description so immoderate that even he modified it when talking about the specific content of the ancient societies of India or Ireland. To make the point that "the materials for a first generalization" concerning social evolution were easier to come by in an ancient than a modern society, he was led to exaggeration and distortion.

Language and style, too, covered up slips in reasoning and deduction which made it all too easy for Maine and other naturalists to believe that they were following a rigidly neutral and rigorously unbiased technique when, indeed, they were interjecting their own wishes and personal considerations into the text in the most blatant manner. When logic failed, analogy often took over. While part of this misuse may be attributed to a lack of understanding of the role of analogy in argument, a part, too, must be attributed to the stylistic ease and apparent aptitude with which simile could be used. Thus, when John Stuart Mill argued that deductive logic "must...enable us to predict future events, just as after a few terms of an

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Sir Henry Maine, Village-Communities, p. 264.
Italics added.

infinite series in algebra we are able to detect the principle of regularity in their recurrence,"⁶ Mill did not say why deduction must lead to prediction, but slid smoothly and glibly into analogy, using a logical and stylistic trick to cover up inadequate reasoning. Mill's own phrasing encouraged him to forget that history is not algebra and that analogy is only illustrative of principle, not descriptive of fact. Similar considerations led Maine to conclusions less rigorous than he imagined. "If an institution is once successful," Maine once argued, "it extends itself through the imitative faculty, which is stronger in barbarous than in civilized man." No proofs followed, nor did he discuss these propositions at length elsewhere. The sentence remained simply a two-fold assertion of opinion. It was not the type of statement for which it was logical to say: "it follows from this that no universal theory, attempting to account for all social forms by supposing an evolution from within, can possibly be true."⁷ The happy coincidence of Maine's style led the reader easily to overlook the fact that the fact that the passage, while logically consistent by

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John Stuart Mill, System of Logic, p. 576.

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Sir Henry Maine, Early Law and Custom, p. 285.
Italics added.

virtue of the use of the phrase "all social forms," was merely a conclusion based upon casual observation and value judgment, not study and intensive examination.

Thus, while Maine's artistic touches had the advantage of setting his work apart from that of many of his contemporaries and of contributing to its survival in later generations, these same abilities served to conceal from himself, and from others, the difficulty of achieving the standards of objectivity and accuracy he had set. This can be said, too, of his research technique. The scientific method which Maine espoused depended for its accuracy upon close scrutiny of sources and upon a genuine concern for detail and minute fact. Yet, Maine was all too willing to agree with John Fiske's conclusion that "the discussion of endless minute historical details must be reserved until the law of social change has been deduced from the more constant phenomena, and is ready for inductive verification."⁸ Somehow, in the process of translating methodological theory into methodological practice, concern for broad observation and the desire to find a general law of social and legal evolution obscured the notion that social law was supposed to be found as the result of laborious and painstaking inductive observation.

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John Fiske, Outlines of Cosmic Philosophy, III, pp. 281-82.

Maine could not resist the temptation of taking an intellectual short-cut, using R. B. D. Moirer, Erwin Nasse and other secondary accounts where only his own work or that in which he had the utmost confidence and knowledge could apply.

The conclusion to draw from discussion of Maine's shortcomings is, perhaps, that he was not, himself, capable of measuring up to the rigorous standards which his method demanded, partly because the artistic genius which makes his work still palatable as literature helps make that same work less acceptable as scientific scholarship. Another part, however, of Maine's failing would seem to have been implicit in the intellectual framework he chose to use. Though Maine had complete faith in the naturalistic method, one can argue that every point in the naturalistic argument, while linked logically to the next, was based upon a set of assumptions and preconceptions, each of which can be challenged.

The naturalistic argument that there was a natural law of social evolution was assumed by Maine, who provided the world of jurisprudence with one such example in his status-to-contract formulation. Yet, the existence of natural laws of society depended upon several questionable assumptions. It depended, in the first place, upon the validity of Mill's notion of pure induction and pure deduction; yet, it can be argued that both logical methods

are inextricably combined with value and attached to value systems. It depended upon an approach to history using Comte's vue d'ensemble; yet, it can be argued that, just because generalization is unavoidable on all levels of inquiry, it is unrealistic to expect that generalizations piled upon one another in a constantly broadening fashion should lead to a predictive law. Yet, to be effective, natural laws of social evolution must be predictive.

Though the fact that such laws have not yet been discovered is not proof of their non-existence, one can suggest that to find them requires a more rigorous study of society than either the investigator or an existing technique is presently capable of achieving.

The argument, presented by both Maine and many of his contemporaries, that society was, in its structure and by its propensity to evolve into new forms, an organic entity, was almost pure analogy. To argue by analogy can be enlightening only if one remembers that the operative term is "like" and that it serves only to educate by the process of suggestion. When the entities compared become confused in the mind of the observer, and society, for example, becomes an actual organism, the value of the analogy ends. One can argue that Maine's likening of society to an organism was suggestive, as was his notion that the idea of evolution could be applied to both. But when he insisted on making societal evolution nearly with

identical with biological, including the struggle for existence and survival of the fittest, he passed over the line from simile to identity. In any case, analogy is an intellectual operation, conceptual in nature and subject to such vagaries and values as the choice of what elements to compare. Thus, the organic analogy was detrimental to a dispassionate striving for truth.

The use of stages of development and of comparison of societies in similar stages, are interesting devices, potentially enlightening but subject to similar argument. To divide what the naturalists themselves held to be an organically evolving society into stages had, by definition, to be an intellectual operation, subject to value judgment. Once one concedes the presence of values in the construction of stages, it would seem to follow that the comparison of societies or aspects of society in supposedly the same stage of development would be similarly an exercise in judgment and an application of personal as well as societal values. If nothing else, the decision as to what constitutes the definition of stage and what the proper elements were that went into the comparison are almost entirely based upon a system of values. The differences between Lewis Henry Morgan's nine-level tier of social development and Maine's two-level, is due not only to differences in the societies they examined, but to their differing conceptions of them. Maine, as many of his contemporaries, fell into

the trap of assuming that the material and technological basis of their comparison or the secular, "scientific" philosophy which lay behind this standard was the only valid basis of comparison. England was, by this definition, superior because of its industrial capacity and its possession of a philosophic environment which allowed and encouraged that capacity. By another definition, equally arbitrary, other stages and other comparisons might be valid.

The problems which Maine recognized as having beset the use of the naturalistic method went far beyond his explanation of them. He was willing only to concede that the individual investigator could be blinded by prejudices and that the nature of the evidence before the social scientist was difficult.⁹ His firm belief in the ultimate truth of his method, reflected in his assertion that history "is true...because it is a portion of the truth to which it is the object of all study to attain,"¹⁰ made it impossible for Maine to ask whether these limitations in single circumstances could not be broadened to include the whole nature of observation and evidence. Instead of considering the possibility of error in method, he

⁹ Sir Henry Maine, "Mr. Fitzjames Stephen's Introduction to the Indian Evidence Act," pp. 58-59.

¹⁰ Sir Henry Maine, Village-Communities, p. 264.

continued to believe that "there can be no essential differences between the truths of the Astronomer, of the Physiologist and the Historian."¹¹ So firmly did Maine cling to his method, so faithfully did he attempt, with varying degrees of success, to apply this method to the study of jurisprudence, politics and India, and so unwilling was he to examine his intellectual framework with a critical eye that he neither added to or deleted from that framework anything of substance.

One can point out, in this way, that Maine was in error and that his method was beguiling but misleading. To be in error, however, is itself not so great a deficiency as to be willing to impose one's views upon the world to the exclusion of all others. The confidence which Maine had in his method led him to reject the analytic jurisprudence of Bentham and Austin and the political theory of French and English democrats. He claimed not only that these systems had no value for him, or for his age, but that they had an intrinsic weakness which made them eternally invalid. He was willing to deny those intellectual schemes which did not meet his standards and to discard them as a means of gaining insight or of obtaining understanding to anyone who used them. His view, because he

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Ibid., pp. 265-66.

thought it truthful, was a rigid view. Yet, when rigidity and unchallengeable truth come in, that same intellectual dialectic and exchange of ideas which Maine himself defined as progress and which does, even now, seem to be the very stuff with which intellectuals deal, must disappear. Just as Maine would not examine his method, so too would he not examine the conclusions to which his method led.

Similarly, a faith in one's possession of truth also stiffens social and political attitudes which might otherwise be less rigidly held. Maine's attitude toward English superiority was bolstered, for example, by his "scientifically" derived notion of race. His reluctance to admit the native Indian into the full realm of western study, his insistence upon authoritarian government in India and his unwillingness to foresee the end of British government stemmed from what he thought to be the proven superiority of British civilization. His distrust of the masses in government, similarly stemmed from his belief in the proven capability of the aristocrat as a natural leader of men. When science or truth arbitrarily divides mankind into groups, some supposedly superior to others, the resulting burden of righteousness becomes very difficult to bear.

These are, ultimately, grave reservations which one must have about both the man and his work. Yet, to claim too little for Maine would be as serious an error as to claim too much, and to ignore his contributions to the

intellectual development of the nineteenth century as presumptuous as his own denial of Rousseau. Though his leading ideas are no longer accepted without challenge, Maine must be seen as a man of considerable intellectual stature. "Originality" need not be a term limited only to those who contribute substantially to a new conceptual framework or to the modification of an existing one; it can, as well, be used to describe those who, like Maine, attempt to apply existing ideas to new fields where they have not been applied before. In this context, Maine's contributions to jurisprudence, to political theory and to England's understanding of India were creative. In this context, Maine was an innovator. His ideas influenced both his own age and, to a lesser extent, ours. Maine's analysis, for example, of John Austin's analytical jurisprudence has continued into the present and has helped greatly to shape our view of the history of English jurisprudence. His attack upon political democracy tended to reinforce that attitude toward government which A. P. Thornton has characterized as the habit of authority.¹² Finally, his Indian attitudes, passed on to future generations by tradition and by the use of Evans' synopsis,

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See A. P. Thornton, The Habit of Authority: Paternalism in British History (London: George Allen and Unwin, 1966).

not only helped form British attitudes toward India and the Indian population, but perpetuated them well into the twentieth century.

Thus, an evaluation of Maine should not end on a negative theme but on a note of caution. Because Maine accepted too unhesitatingly an intellectual framework tied to his own age, because he worked on a level below that of a truly seminal mind, his impact upon British and American thought was of shorter duration than it might have been. Though he contributed to the ferment of naturalism, especially in America, his sun has been eclipsed even as naturalism was eclipsed by later intellectual trends. With the passing of time, as his contact with the present world becomes increasingly tenuous and increasingly blended into and moulded with innumerable other influences, obeisance to Maine's name and his work has become more a matter of custom or tradition than of fact. Comparative law, for example, long ago took to paths unexplored by Maine, as did legal history. Though a pleasant custom, the brief, almost obligatory, nod to Maine given by recent scholars is losing its meaning. The threads tying modern jurisprudence to Maine's work are thin and are becoming ever more tenuous. An adventurer in many areas and in many disciplines, Maine's was not the adventurousness of the person who attempted to transcend his own age.

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¹The articles are listed, under the title of each periodical, in chronological order. Those articles preceded by an asterisk (*) were published anonymously and were attributed by the author to Maine on the basis of style and content. The articles in The Saturday Review so attributed were mentioned in Sir M. E. Grant-Duff, Memoir, p. 15. Both Gordon N. Ray in Thackeray: The Age of Wisdom, p. 301 and Merle M. Bevington, The Saturday Review, p. 28, suggest that Maine wrote extensively for The Cornhill Magazine, though only one attribution has been substantiated.

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APPENDIX

APPENDIX

Legislative Enactments During Maine's
Tenure as Law Member of Council, 1862-1869

During Maine's tenure, the Legislative Department was very active. Sir M. E. Grant-Duff noted that two hundred and nine acts were passed, thirty three of which he considered to be of particular importance. Maine was, himself, more adept at identifying needed legislation and passing it through the Legislative Council than in "manipulating details," a task he often left in the apparently capable hands of Mr. Whitley Stokes, at that time Secretary to Government in the Legislative Department and later Law Member of Council. The Acts listed by Grant-Duff include:¹

1862-63

The Consolidated Customs Act.

The Merchant Seaman's Act.

The Act constituting Recorders' Courts in British Burma.

1863-64

The Whipping Act.

The Emigration Act.

The Registration of Assurances Act.

¹

Sir M. E. Grant-Duff, Sir Henry Maine, pp. 24-26.

1864-65

The Common Carriers' Act.

The Forest Act.

The Law of Intestate and Testamentary Succession.

The Criminal Procedure High Courts Act.

The Parsi Marriage Act.

The Pleaders' and Mukhtiar's Act.

The Parsi Intestate Succession Act.

1865-66

The Bills of Exchange Act.

The Companies Act.

The Post Office Act.

The Partnership Act.

The Registration of Assurances Act.

The Remarriage of Native Converts Act.

1866-67

Mortgagees' and Trustees' Acts.

The Punjab Murderous Outrages Act.

The Administrator-General's Act.

The Act for the regulation of Printing Presses and the
Preservation of Books printed in India.

The Stamp Act.

1867-68

The Contagious Diseases Act.

Substitution of Stamps for Fees in High Courts, &c.

The Principal Sadr Amins and Munsifs' Act.

1868-69

The Oudh Rent Law.

The Oudh Taluqdars' Act.

The Punjab Tenancy Act.

The Rural Police Act, N. W. Provinces.

The Divorce Act.

The Indian Articles of War.