

From Alan Diamond (ed.), **The Victorian Achievement of Sir Henry Maine** (Cambridge Univ. Press, 1991)

Some contributions of Maine to history and anthropology

An intelligent undergraduate could undoubtedly make a strong case for dismissing Maine. Having read through subsequent assessments of his work, he would list Maine's supposed achievements and then show how each was deeply flawed. Such a critic would point to the supposed 'revolutionary' method, comparative and historical, and show how it was deeply imbued with a form of patronizing Victorian evolutionism which is now both morally and intellectually repugnant. The vaunted width and depth of scholarship would crumble before allegations of inaccuracy and over-dependence on an erring memory. The father of kinship studies in anthropology would be shown to have set up a false theory of universal patriarchal origins which was soon refuted. The great insight, of the movement, of progressive societies from status to contract, would be shown not to be true even of all 'progressive' societies, and in any case was already anticipated by many other Enlightenment thinkers, as well as by Marx. The theories concerning the religious basis of law turn out to be a myth, and the theory of the ways in which legal change occurs, to be inappropriate to the common law. The central thesis concerning the original communal nature of property in Indian and Germanic villages was soon shown to be much too sweeping a generalization. The view that simpler societies rest their associations on kinship, and only later move to non-kinship, or territorial, bonds was soon disputed.

After such a survey, the student would end up, if in critical mood, by asking his supervisor why he had been asked to assess a man who might have temporarily been of importance, but could no longer be of interest except from an historical point of view. Why waste time on a thinker whose methodology was based on an outworn paradigm, whose scholarship was shaky, whose findings were unoriginal or wrong? This chapter will explore some of these charges and try to show that Maine survives all his detractors and emerges with that quality which makes him, like Montesquieu or de Tocqueville or Hobbes, immortal: the ability to speak to us directly and still to contribute strikingly to the intellectual puzzles which face historians and anthropologists.

The methodological criticisms are both the most complex and, in some ways, the most interesting, so let us leave them for a moment. On the question of scholarship, the unanswerable criticism is, of course made by F.W. Maitland. Writing to Pollock in 1901, Maitland wrote: 'You spoke of Maine. Well, I always talk of him with reluctance, for on the few occasions that he trusted much to a memory that played him tricks and rarely looked back at a book that he had once read...'¹ Maitland then gives an example, which he elaborates.² Without months of work it would be impossible to assess **how**

¹Maitland, 1865: 279

²Pollock and Maitland, 1968: II, 305 n.2.

inaccurate Maine was. But ultimately it is not terribly important. One does not assess him as a scholar in the sense of Maitland or Stubbs or Vinogradoff. The scholarly defect was the price he paid for his enormous breadth and insight. His reputed ability to read and extract the heart of a large book at amazing speed and his power to move over wide areas of literature were what was needed to provide a new synthesis. Maitland's later judgment, quoted above, has to be taken against his earlier one in the year of Maine's death: 'He was much more than learned, but then he was learned, very learned in law of all sorts and kinds. It is only through learning wide and deep, touch and technical, that we can safely approach those world-wide questions that he raised or criticize the answers that he found for them.'³ Thus some of the details may be wrong, but at this distance we are more interested in the tree than the separate leaves.

Sir Henry Maine's contribution will be considered under the following headings: kinship theory; political and legal organization; concept of the community; property rights in general; the growth of individual property rights and their relation to feudalism; the movement from status and contract; general methodology; and the evolutionary framework. Each of these sections covers a large area to which Maine and his critics have devoted many hundreds of pages. Necessarily the treatment will have to be brief and preliminary. It has been suggested that Maine's contribution to kinship theory has somehow been discredited by the supposed refutation of his theory of patriarchal origins. In fact Maine made several fundamental contributions which helped lay the foundations for much of the modern analysis of kinship. As Evans-Pritchard, Fortes and others have amply recorded, Maine's ideas of lineage identity, of the differences between cognatic and agnatic descent, of the corporate nature of descent groups, of the importance of adoption and many other topics have been an enormous inspiration to one of the major contributions of modern social anthropology. A few quotations from **Ancient Law** will bring home to modern anthropologists their debt: 'society in primitive times was not what it is assumed to be at present, a collection of **individuals**. In fact...it was **an aggregation of families**. The contrast may be most forcibly expressed by saying that the **unit** of an ancient society was the Family, of a modern society the Individuals.'⁴ And what were these small families? They were corporate groups. 'Corporations **never die**, and accordingly primitive law considers the entities with which it deals, **i.e.** the patriarchal or family groups, as perpetual and inextinguishable.'⁵ Or again, 'Succession in corporations is necessarily universal, and the family was a corporation. Corporations never die. The decease of individual members makes no difference to the collective existence of the aggregate body.'⁶ Of course, this idea is straight

³Maitland, 1911: 1, 486-7

⁴AL: 126

⁵126

⁶186

from Roman law: 'in the pure Roman jurisprudence, the principle that a man lives on in his Heir - the elimination, if we may so speak, of the fact of death - is too obviously for mistake the centre round which the whole Law of Testamentary and Intestate succession is circling.'⁷ But while the idea was not new, Maine's breadth of interests and reading allowed him to connect it with the kinship systems in the simplest societies. A whole world, the modern study of unilineal descent groups, lineages and so on, was born.

There is little criticism of all this. The dispute is centred on Maine's own application of the theory. This is a deep marsh in which many a scholar has become entrapped, so I will just skirt the edge with a few remarks. The first is to note a well-known irony: in the very year in which Maine propounded his famous theory that in Indo-European societies the original form of the society was based on father right, descent through males, or what he called the 'Patriarchal Theory', was published Bachofen's famous work on **Mother Right** showing that the original form of the family in the simplest societies was the complete opposite. From then onwards, there was fierce debate, with McLennan and Morgan later joining to propound a third theory, or original 'primitive promiscuity', leading through mother right to father right to modern cognatic systems.

Several things are now obvious. Maine was uncertain at first as to whether his theory should be applied outside the Indo-Aryan culture area of Europe and India from which all his evidence was drawn. He notes that 'the legal testimony comes nearly exclusively from the institutions of societies belonging to the Indo-European stock, the Romans, Hindoos, and Slavonians supplying the greater part of it', and therefore 'the difficulty, at the present state of the inquiry, is to know where to stop, to say of what races of men it is **not** allowable to lay down that the society in which they are united was originally organized on the patriarchal model.'⁸ He leaves the question open, and it therefore seems unfair that he should be branded as having a universal theory of patriarchal origins.

At any rate, the evidence as to which races did not have such an original 'patriarchal model' was soon to hand. Bachofen, McLennan and Morgan soon produced counter-evidence of other early forms, and we now know, of course, that many of the simplest societies have matrilineal or cognatic kinship (for example, Evans-Pritchard, 1981:89). Maine reacted in a reasonable and flexible way when this new evidence appeared. This can be seen in his comments on Morgan's work. In **Ancient Society** (1877), Morgan had paid a handsome tribute to Maine, 'whose brilliant researches in the sources of ancient law, and in the early history of institutions, have advanced so largely our knowledge of them.' He agreed with Maine's theories about the patriarchal origins of Indo-European civilizations: 'the patriarchal family, it is

⁷190

⁸AL: 123

true, is the oldest made known to us by ascending along the lines of classical and Semitic authorities'. But he then argued that 'an investigation along these lines is unable to penetrate beyond the Upper Status of barbarism, leaving at least four ethnical periods untouched, and their connection unrecognized.'⁹ With his deeper knowledge of tribal societies, he added strong evidence of early matrilineal systems. This and other evidence Maine accepted. In the Preface to the tenth edition of **Ancient Law** (1885), he admitted that 'the Author has not done sufficient justice to investigations which appear to show the existence of states of society still more rudimentary than that vividly described in the Homeric lines quoted at page 124, and ordinarily known as the Patriarchal State...and, in fact, since his work was first published, in 1861, the observation of savage or extremely barbarous races has brought to light forms of social organization extremely unlike that to which he has referred the beginning of law, and possible in some cases of greater antiquity.'¹⁰

He then referred the reader to his article 'Theories of primitive society', published in **Dissertations on Early Law and Custom** (1883). In that volume Maine very calmly and rationally assesses his own work in the light of McLennan and Morgan's work. In essence, he accepts that they have shown that there are many societies which are not patriarchal in origin. But he effectively criticizes their position, suggesting that by substituting his own supposed universal evolutionary framework by another, they have produced an equally bad distortion. Thus he writes, 'It appears to me that, while the Patriarchal theory and the counter-theory of which I have been speaking each explain reasonably well a certain number of ancient social phenomena, both are open to considerable objection as universal theories of the genesis of society.'¹¹ Thus while he admits that there are 'unquestionably many assemblages of savage men so devoid of some of the characteristic features of patriarchalism that it seems a gratuitous hypothesis to assume that they had passed through it', 'the newer theory is surrounded by difficulties quite as grave or graver.'¹² He then proceeds effectively to demolish the theory of primitive promiscuity. He also points out, as anthropologists would now accept, that Morgan's theory that matrilineal forms always preceded the later patrilineal forms is wrong. 'One of these two groups did not really succeed the other, but the two co-existed from all time, and were always distinct from one another.'¹³ He thus accepted that there is no necessary evolution through states, no ascertainable start in one particular form. This is very much

⁹1877: 514

¹⁰v-vi

¹¹ELC: 203-4

¹²203-4

¹³287

the present position in anthropology. Maine put forward an exciting hypothesis, found its limits, and accepted them; much of the subsequent work has been built within the framework which he set up with Morgan, and he is by no means discredited.

There is one further point to add here, however. We cannot now accept uncritically Maine's account of early Indo-European kinship. His theory of its patriarchal or agnatic character had not been sustained by subsequent research in at least one important respect, that is in relation to Anglo-Saxon kinship. Maine recognized that there was something odd about Anglo-Saxon kinship, writing that in the important area of joint property 'the general usage of the old Germanic peoples - it is remarkable that the Anglo-Saxon customs seem to have been the exception - forbade alienations without the consent of the male children.'¹⁴ Nevertheless, in general, he tended to assume its basically agnatic quality. As Vinogradoff stressed¹⁵ 'Maitland's elegant demonstration that Anglo-Saxon kinship was in fact cognatic and not agnatic'¹⁶ has been supported by anthropological research.¹⁷

This revision is extremely important, for it lets Maine out of a corner into which he had boxed himself by his patriarchal theories. Basically, Maine's problem was how to explain the origins of modern civilization in the 'progressive' societies. This consisted in the movement from status, or kinship-based, societies, to the modern contractual society. The essential bridge was the destruction of kinship in the feudal period. But he never solved the problem of where the magic ingredients of feudalism came from. We will return to this when considering his ideas of property. But it is worth noting here that by assuming the uniformity of the agnatic, kinship-dominated stage, he seemed to leave no room for contract. The idea of alienability, or of primogeniture, seemed to spring from a clear sky. Thus, for instance, he says that there is no concept of primogeniture or its associated ideas in Roman law, in Hindu law or in ancient German law. All children were co-owners with their family. Suddenly it emerges.¹⁸ He never solved this central puzzle. But Maitland solved it for him. There were elements in the kinship system of the Germanic peoples which already suggested an alternative to joint property and patriarchal organization; the seed was there, and the mystery of feudalism is not quite as deep as it once seemed. We will return to this.

¹⁴AL: 280

¹⁵1920: 147-8

¹⁶Pollock and Maitland, 1968: II, 240-60

¹⁷See Lancaster, 1958; Fox, 1967

¹⁸AL: 227ff

One aspect of Maine's valuable recognition of the dominating importance of kinship in simple societies was his theory that political organization had originally been based on blood or kinship and later moved to territory, which is part of that famous transition from status to contract, or as anthropologists might put it, from tribal to peasant civilization. As a grand theory, this has provided a solid foundation for much work in political anthropology; for instance, as Adam Kuper points out, the work of Evans-Pritchard and Fortes in **African Political Systems** is to a certain extent a matter of taking over this classification and standing it on its side: 'They did not present it as a classification of political systems in time, but rather in space.'¹⁹ The idea is relatively simple. As Maine expressed it, 'The history of political ideas begins, in fact, with the assumption that kinship in blood is the sole possible ground of community in political functions...'²⁰ Thus 'the idea that a number of persons should exercise political rights in common simply because they happened to live within the same topographical limits was utterly strange and monstrous to primitive antiquity.'²¹ It is one 'of those subversions of feeling, which we term emphatically revolutions, so startling and so complete' when 'some other principle - such as that, for instance, of **local contiguity** - establishes itself for the first time as the basis of common political action.'²²

This is 'one of Maine's most important generalizations: kinship and **not** contiguity is the basis of common political action in primitive societies.'²³ Anthropologists and other have only marginally qualified the insight. Evans-Pritchard leaves it unchallenged, and Sahlins approves it, drawing on Maine to make the distinction between tribal society, where we speak of the 'King of the Franks', and modern states, where we speak of the 'King of France'.²⁴ Lowie writes that 'The soundness of Maine's and Morgan's position in drawing a sharp distinction between kinship (tribal) and territorial (political) organization is beyond cavil.'²⁵ There are only three modifications or criticisms. One is put forward a a question by

¹⁹Kuper, 1973: 110

²⁰AL: 129

²¹AL: 131

²²AL: 129

²³Evans-Pritchard, 1981: 87

²⁴Sahlins, 1968: 6

²⁵1929: 377

Lowie himself, namely 'to what extent it is coterminous with the distinction between rude and advanced cultures.'²⁶ Anthropologists would probably answer that there is a broad but not exact correlation. Secondly, Schapera has pointed out that to the two principles of political organization (kinship and territory) should be added a third, namely 'personal attachment to a common leader.'²⁷ This is to be found in the South African data Schapera considers, and elsewhere. The third is really a criticism of another kind.

In his comments on Maine's book **Lectures on the Early History of Institutions**²⁸, Marx argued that 'the apparent supreme independent existence of the state is itself merely show, and in all its forms it is an excrescence of society.' Hence it 'disappears again as soon as the society has reached a stage not yet reached.' Marx strongly disapproved of 'blockhead Maine', who does not seem to realize that the emergence of the state is a retrograde step, based on class interests, 'and these in the final instance all have economic conditions at bottom. On this basis the state is built and presupposes them.'²⁹ This is a moral guild which is really too deep to bridge with argument. Marx is criticizing Maine's attitude to the State, and his view, widely shared, that it is an irreversible, necessary and probably desirable revolution. The deeper point, that Maine had elaborated and refined the distinction between pre-State and State systems, should not be lost, and is not destroyed by Marx.

The consideration of Maine's contribution to political anthropology provides a bridge to his ideas on the legal systems of early societies. Here again his work provides a foundation which is essentially sound, when modified. One modification concerns his view as to the origins of law. In several places he argued that law grew out of religion: 'We can see that Brahmanical India has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion.'³⁰ Or again, 'the severance of law from morality, and of religion from law, belong[s] very distinctly to the later stages of mental progress.'³¹ A.S. Diamond devoted much of

²⁶377

²⁷1956: 29

²⁸1875

²⁹Krader, 1976: 225-6

³⁰AL: 23

³¹16

his 445-page book of 1935, **Primitive Law**, to demonstrating that this is wrong, and without going into the details, his demolition seems fairly convincing.

Related to this is Maine's law that in the absence of the state, in early societies all law was the law of wrongs, or torts. 'All civilized systems agree in drawing a distinction between offences against the State or Community and offences against the Individual...Crimes and Wrongs, **crimina** and **delicta**. Now the penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs...of Torts.'³² Hence offences such as theft, assault and trespass are treated as torts, and not as crimes. There is clearly some truth in this; crimes are offences against the State, and if there is no State, there are no crimes. But, in fact, this has to be modified in the light of the fact that most anthropologists have found that there are some offences, typically witchcraft, incest and homicide of certain kinds, which are regarded as offences against the whole community rather than the aggrieved individual. Hence, Lowie remarks that 'in the generality of instances primitive man recognizes both torts and crimes', and produces evidence to show this to be the case.³³ Diamond points out that, partly from Maine's work, there 'has been no separation between crimes and civil injuries. But it is not so; the distinction is universal...'³⁴

A further modification can be made to Maine's theory of how legal change is effected. As John Baker has pointed out, the distinctions Maine made between legal fictions, equity and legislation as mechanisms to effect change are theoretically useful. But is 'is difficult to square' this as a universal order with what we observe, for instance, in the history of English common law.³⁵

Logically, this would lead us to consider the validity of Maine's most famous generalization concerning the movement from status to contract. But since that is the summation of his theories and deeply related to the whole methodological debate, we will put it on one side for the moment and consider some other features of his work. One of these is his idea of the original village community.

Since Maine's concept of 'community' was so important in his theories, it is worth digressing a little to elaborate some features of his argument. He believed that the difference between community-based and individual-based societies helped him to understand the origins of modern civilization and the difference between modern Europe and India. One of the major lessons, and one which it 'is often said that it takes two or three years' for a new visitor to India to learn, is that 'the vast Indian population is an aggregate

³²AL: 369-70

³³1929: 385

³⁴1935: 279

³⁵1979: 170

of natural groups, and not the mixed multitude he left at home...³⁶ He believed that this had once been the case in England and in Europe, in the Dark Ages. There had been a growth of 'Village Communities', and the 'historian of former days laboured probably under no great disadvantage than that caused by his unavoidable ignorance of the importance of these communities...³⁷ The 'naturally organised, self-existing, Village-Community' was an institution not 'specially characteristic of the Aryan races.'³⁸ Maine's ideas here were enormously influential since, as Tonnies emphasized, they formed a crucial strand in his own important work on the distinctions between community and association.³⁹ What, then, did Maine mean by 'community'?

There are a number of characteristics which, according to Maine constitute a community. Communities are 'naturally organized' that is to say the bond that unites people is a natural, rather than an artificial one. The two major bonds are kinship, in tribal communities, and territory, in village communities. One of the earliest traces of family communities which Maine could find were the 'East European (Slavonic) House Communities'. As he wrote, 'The House Community then is 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.'⁴⁰ This early bond of kinship, however, had given place in both India and Europe to the bond of locality. The 'Indian Village-Community is a body of men held together by the land which they occupy: the idea of common blood and decent has all but died out.'⁴¹ This is still a 'true Village-Community'⁴², even though there had been a transition from the earlier form of 'the Village-Community, a brotherhood of self-styled kinsmen, settled on a space of land.'⁴³ This is a modification of his earlier position. In **Ancient Law** he had put

³⁶EHI: 30-1

³⁷76-7

³⁸77

³⁹1887

⁴⁰ELC: 241

⁴¹EHI: 82

⁴²78

⁴³ELC: 327

much more stress on kinship: 'The Village Community of India is at once an organized patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it was indistinguishably confounded with their proprietary rights...'⁴⁴ Later he accepted that the basic uniting feature of communities was not kinship, but co-ownership of land: 'when a tribal community settles down finally upon a definite space of land, the Land begins to be the basic of society in place of the Kinship.'⁴⁵

The basic feature of such a community was communal land-ownership; 'the Indian forms of property in land are founded on the Village Group as the proprietary unit.'⁴⁶ There is some ambivalence on Maine's part as to what this communal ownership actually meant. At times he seems to imply, as above, that the village as a whole owned the land, and individuals were merely users: a corporate group ownership which was the spatial transformation of lineage property. This could be read into remarks such as 'the Indian Village-Community is a body held together by the land which they occupy.'⁴⁷ On the other hand he seems to recognize that in many villages such communal ownership was already a thing of the past. In **Ancient Law** he had written that the 'co-owners of an Indian village, though their property is blended, have their rights distinct...'⁴⁸ This tension between collective and private is expanded when he explains that 'Land belonged to the tribe, joint-family, or village-community before it belonged to the individual household; even when it became private property, the brotherhood retained large rights over it, and without the consent of the collective brotherhood it could not be transferred.'⁴⁹ Here a sort of 'private property' with a **restraint lignager** seems to be envisaged. At other times he puts it in another context: the 'common life of the group or community has been so far broken up as to admit of private property in cultivated land, but not so far as to allow departure from a joint system of cultivating that land.'⁵⁰

⁴⁴AL: 260

⁴⁵EHI: 72

⁴⁶VC: 185

⁴⁷EHI: 82

⁴⁸AL: 267

⁴⁹ELC: 352

⁵⁰VC: 109

He believed, therefore, that once upon a time the village community had been a collective entity in terms of landholding, both in India and early Europe. This collectivity manifested itself in terms of the absence of individual rights. Maine argued that there was no concept similar to the modern Western one of inalienable human rights in the traditional village community. 'Nor, in the sense of the analytical jurists, is there **right** or **duty** in an Indian village-community; a person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society.'⁵¹ The growth of individual rights was one of the major transformations which had occurred in western Europe, and would soon break up the natural communities of India.

Another feature singled out by Maine was 'self-existing'. By this he probably meant 'self-sufficient'. He described how Indian villages were 'total' economies, not dependent for goods on the outside world. In fact, he envisaged in the earliest stage 'a territory occupied by village-communities...at perpetual war with its neighbour.'⁵² These were little kingdoms. He described how the mixture of occupations in an Indian village seemed to cover all human needs, and wrote that 'the assignment of a definite lot in the cultivated area to particular trades....allows us to suspect that the early Teutonic groups were similarly self-sufficing.'⁵³ A final feature we may draw attention to is the fact that such communities were governed by customary, unwritten, laws. The elders claim merely to be interpreting the old customs. Maine accepts that this is often a fiction, and that really they are 'legislating' for new situations, 'Yet ...it is always the fact or the fiction that this council merely declares customary law.'⁵⁴

Maine thus created a model of a village community, with the natural bonds of blood or locality, rather than artificial bonds of money and contract, with communal ownership of some form, with economic and political self-sufficiency, and with customary law. Thus he believed was a transitional form between tribal and modern society. He was aware, however, of certain limitations to the model: these village communities, for example, were neither homogeneous nor egalitarian: 'The brotherhood, in fact, forms a sort of hierarchy' in an Indian village, in which there are dominant families.'⁵⁵ In fact, Indian village communities 'prove on close inspection to be not simple but composite bodies, including a number of

⁵¹VC: 68

⁵²VC: 192

⁵³VC: 126

⁵⁴VC: 116

⁵⁵VC: 177

classes with very various rights and claims.⁵⁶ This was, in fact, the start of a departure of reality from the model. For Maine was quite aware that his description of the Indian village community was already an idealized model of what had faded away. In Bengal, 'from causes not yet fully determined, the village system had fallen into great decay.'⁵⁷ He believed that the concepts of private property and individual rights encouraged by British law would lead the village community to disappear⁵⁸; already 'the Indian village-community is breaking to pieces.'⁵⁹

What are we to make of Maine's work on communities? Considering the time it was written and the influence it has had, it is a major contribution to our understanding of the long period between tribal and modern capitalist civilizations. It anticipates and clearly deeply influenced much of the later great sociological work of Tönnies on community and association, Durkheim on mechanical and organic solidarity and even modern peasant studies in the Redfieldian tradition. As long as we remember that Maine was setting up an archetype or hypothetical model, while recognizing that the pure form no longer existed, it can still be a useful starting-point. Yet his work needs to be modified in two major ways to make it even more valuable. In relation to India, it soon became clear that his account was very one-sided. Baden-Powell, in his work on the **Indian Village Community**, pointed out that Maine's description of Indian villages 'cannot be applied at all to one class, and that by far the largest, of Indian villages.'⁶⁰ The majority of Indian villages were of the **raiyatwari** form, Baden-Powell argued, where there was no 'ownership in common'. Thus Maine was roughly right about one-quarter of Indian villages, Baden-Powell calculated. As with the debate over kinship, it is no longer certain that communal ownership is the earliest form, just as the patriarchal theory had to give way to diversity of early forms.

Maine devotes less attention to the village community in the European sphere, but it is clear that he believed that early Germanic society had passed through this stage of village communities, a view shared by many of his contemporaries such as Seeböhm. This view has again been modified by several authorities, and notably by Maitland. As Vinogradoff wrote, Maitland 'in his criticism of Maine's theory of the village community...held that there is no evidence of original communalism.'⁶¹ He shows, for

⁵⁶VC: 123

⁵⁷VC: 104

⁵⁸EHI: 82

⁵⁹VC: 112

⁶⁰1896: 7

⁶¹1920: 148

instance, that the right in the common land 'is not communalism; it is individualism **in excelsis**.⁶² On the question of corporate property, 'England affords but few materials for an answer to this important question, for anything that even by a stretch of language could be called a communal ownership of land, if it had ever existed had become rare and anomalous before the stream of accurate documents begins to flow.'⁶³ us as far back as we can go, there is no evidence of village communities in Maine's sense.

Now we may put together Maine and Maitland again, as we did with kinship. Maine provides the hypothesis and the generalization; but he puzzled because he is left with a problem. In the earlier case, if all Indo-European societies were agnatic, how did kinship become cognatic? Maitland answers by challenging the assumption. Here, if all Indo-European societies were through a stage, after tribalism, of 'village communities', how did the curious privatized property of parts of western Europe emerge? Maitland again answers by challenging the assumption - leaving it open; communal ownership of land 'if it had ever existed.'

The idea of 'community' was not as important to Maine as the nature and basis of an individual's property rights. His ideas on property are very rich and complex, and only a preliminary sketch of a few of them can be given, in order to see how they can and have influenced us.

As a jurist, Maine realized that property did not consist in an object, corporeal or incorporeal, but in the relationship between a human being and another human being and such an object. As he memorably puts it, the 'rights of property are, in the eye of the jurist, a bundle of powers, capable of being mentally contemplated apart from one another and capable of being separately enjoyed.'⁶⁴ Like marriage, the 'bundle of powers' will have come of the same elements, but also vary from society and society. Hence he doubts 'whether proprietorship in India is to be taken to be the same assemblage of powers which constitutes the modern English ownership of land in fee-simple.'⁶⁵ Property is an amalgam of rights; the task of the analyst, whether historian or anthropologist, is to unravel 'the apportionment of the rights of which property is made up.'⁶⁶ This notion, of a multitude of powers or rights which, like strands, could

⁶²Pollard and Maitland, 1968: I, 623

⁶³I, 630

⁶⁴VC: 158

⁶⁵157

⁶⁶EHI: 207

be feared apart into different people's hands, or all come together to form the tough rope of that very recent and very extraordinary form of ownership, English freehold landholding, has great value in the comparative study of non-Western economic systems. It helps us to understand, for instance, how different rights in a woman, as labourer, childbearer, sexual partner, and so on can be 'owned' by different people in tribal societies. It enables us to understand how the rights in a resource could be allocated not as actual partitioned and permanent chunks of that resource, half an acre of a particular field, for example, but more abstractly and flexibly, as shares in the produce or as areas which changed from year to year.

As befits a jurist, Maine distinguishes these various separate rights: the right to occupy, the right to use, the right to bequeath to an heir, the right to alienate by sale or gift, the right to alienate temporarily for the purposes of drawing rent, and the right to lay conditions upon the future ownership and use of a resource, for instance by entails. Each of these is a strictly separable power, and each may be held by a different individual or larger group. Much of Maine's work is concerned with showing the way in which rights which had originally been mixed and shared by many people narrowed down and taken over by the individual.

This is all fundamental for an anthropologist, as is Maine's discussion of the way in which resources are differently classified in different societies. For example, the Romans classified resources (or 'commodities', as Maine refers to them) into **res Mancipi** (chained things), which were land, slaves, horses and oxen, and **res nec Mancipi** (free things), which were the rest.⁶⁷ English law, however, used a different distinction, between immovable objects, such as house and lands, and movable objects, such as goods and chattels. The individual's rights in a particular resource will vary depending on where it falls in the classificatory scheme of a society. Thus moveables or 'personality' may be subject to individual control, while the estate is beyond such control. Another classificatory difference which has proved useful for anthropologists⁶⁸ is between inheritances and acquisitions⁶⁹, the latter often being disposable by the individual while the former are not.

The difference between the Roman and the English classification was related to another difference which Maine considered to be of absolutely fundamental importance, namely the degree to which an asset was regarded as potentially divisible or indivisible. Again, this did not lie in any physical fact about the resource, but in the way it was classified. The Romans had a 'view of land as essentially divisible.' They note, 'as a fundamental difference between immovable and movable property, that land is divisible

⁶⁷ELC: 337

⁶⁸For instance Lowie, 1929: 232

⁶⁹AL: 281

ad infinitum, and may be always so conceived though actually undivided, while movables are not property capable of division.⁷⁰ This is a widespread feature of peasant civilizations, where land is infinitely divisible into smaller and smaller parcels between all the children.

The revolutionary change which heralded the birth of a new order of things occurred with the arrival of the belief that land was indivisible, that it was a unit which could and should be preserved undivided over long periods. This was the basis of the 'feu' or 'fee', in other words one of the basic features of feudalism. The crucial exposition of this change occurs in Maine's **Early Law and Custom**.⁷¹ Maine dates the change in England between the later twelfth century (Glanvill) and later thirteenth century (Bracton), which he says was 'the time when the most widely diffused of English tenures - socage - was just putting off the characteristics of the alod, and putting on those of the feud...the feudal view of land, which is that, when held in individual enjoyment, it is primarily impartible or indivisible.'⁷² The change, he believed, was enormous. 'Nothing can be more singularly unlike than the legal aspect of allodial land, or, as the Romans would have called it, land held **in dominium**, and the legal aspect of feudal land. In passing from one to the other, you find yourself among a new order of legal ideas.'⁷³ The basis of this new world was the concept of the impartible, individually owned, estate - the basis of modern individualism and the Western industrial world, as both Marx and Maine would have argued.

Maine's elaboration of this major difference deserves full quotation, but here we will just excerpt a few fragments. There 'is no symptom that Roman lawyer could conceive what we call a series of estates - that is, a number of owners entitled to enjoy the same piece of land in succession, and capable entitled to enjoy the same piece of land in succession, and capable of being contemplated together...if a Roman lawyer had been asked to take into his mental view a number of persons having rights together over the same property, he would have contemplated them not as enjoying it in turn, but as dividing it at once between them...A long succession of partial ownerships, making up together one complete ownership, the feodum or fee - could not have been dreamed of till a wholly new conception of landed property had arisen.'⁷⁴ The basic change was, therefore, from a system in which the land was infinitely divisible between a number of individuals, each of which held identical rights in it, to a system where the estate

⁷⁰ELC: 343

⁷¹341-6

⁷²341

⁷³342

⁷⁴ELC: 343-4

was indivisible, but different kinds of right, stretching over a long period of time, were shared out between different people. This was one of the essential ingredients of modern individualistic property systems.

It seems unlikely that the contrast between Roman and common law was quite as stark as this. Nor would historians now accept that the concept of indivisibility was invented in the period between Glanvil and Bracton, for there is no trace of an allodial landholding system in England from before the Norman Conquest. Yet Maine's insight into the importance of a new way of looking at property should not be abandoned, especially if we add to it the other two ingredients that laid the foundation for modern individualistic property law, namely primogeniture and the last will and testament.

Maine pointed out that if we add to the rule that property is indivisible the rule that it should be assigned to one individual in each generation, the eldest male, we then have the makings of modern estate property. Maine devotes considerable space to the peculiarity and uniqueness of primogeniture, originally found nowhere outside north-western Europe, and lately developed. But he is very puzzled as to its origins: this is 'one of the most difficult problems of historical jurisprudence.'⁷⁵ Maine found it difficult because he could not find its antecedents. He believed that no trace of primogeniture could be found in Roman law, in Hindu law or in the ancient German law.⁷⁶ 'No sooner, however, has the feudal system prevailed throughout the West, than it becomes evident that Primogeniture has some great advantage over every other mode of succession.'⁷⁷ Where, then, had it come from? Here Maine provides an intriguing hint. At first he seems to rule out a connection with the customs of the Germanic invaders: 'Primogeniture did not belong to the Customs which the barbarians practised on their first establishment within the Roman Empire.'⁷⁸ But soon after this, Maine muses: the 'examples of succession by Primogeniture which were found among the Benefices may, therefore, have been imitated from a system of family-government known to the invading races, though not in general use. Some ruder tribes may have still practiced it.'⁷⁹ It does indeed seem likely that male primogeniture was related to earlier forms of inheritance and succession; for instance the prevalence of gavelkind in certain parts of England shows that the various Anglo-Saxon tribes that invaded England had different customs, some primogeniture, other ultimogeniture.

⁷⁵AL: 227

⁷⁶228

⁷⁷231

⁷⁸229

⁷⁹235

If we then graft the use of wills on to indivisible estates and succession by one child, we have a formidable new property system. The importance of the will cannot be overlooked. Maine thought that 'next to the Contract' it 'has exercised the greatest influence in transforming human society.'⁸⁰ He saw how the written will was breaking up tribal and peasant societies in India, as he believed it had done in the European past. Testaments were the principal instruments employed in producing inequality.⁸¹ But their power was only unshackled when it became possible to use them to direct inheritances away from the automatic rights of heirs. This faces Maine with a problem similar to the one he faced over indivisible property and primogeniture: where did the idea of using wills to alienate property come from?

On the one hand he was convinced that the Romans invented the device - 'to the Romans belongs pre-eminently the credit of inventing the Will' - while the 'barbarians were confessedly strangers to any such conception as that of a Will.'⁸² And yet the Roman will lacked the essential power of free disposal. 'it is remarkable that a Will never seems to have been regarded by the Romans as a means of **disinheriting** a Family, or of effecting the unequal distribution of a patrimony.'⁸³ If this is true, then where did the power of alienation come from? Part of the answer, of course, lies in Christianity. If we apply Jack Goody's argument about the Church destroying the family in order to allow itself to expand in this area, then the Anglo-Saxon Church, as Eric John has shown in his work on 'Bookland', supported those who wished to dispose of their wealth away from their kin.⁸⁴ To this, however, we need to add the insight which Maine had concerning the peculiar nature of Anglo-Saxon customs seem to have been an exception' to the general customs of the 'old Germanic peoples' that 'forbade alienations'.⁸⁵ Here we have an example of the way in which, by adding Maine's Roman framework to refinements from other traditions, Christian and Anglo-Saxon we can build up some picture of how this legal revolution occurred.

⁸⁰AL: 194

⁸¹225

⁸²AL: 172, 194

⁸³217

⁸⁴Goody, 1983b; John, 1960

⁸⁵AL: 280

Let us approach these same problems from a slightly different angle and examine Maine's ideas about the growth of private property. Like Marx, Maine believed that one could speak about 'communal' ownership of land, or perhaps the absence of any private ownership, as the original state out of which all societies have evolved. Thus he speaks of 'that collective ownership of land which was a universal phenomenon in primitive societies.'⁸⁶ He argues concerning India that 'there has been sufficient evidence to warrant the assertion that the oldest discoverable forms of property in land were forms of collective property.'⁸⁷ In this way, he believed that India followed the pattern of all early Aryan societies.⁸⁸ At the most developed, this was a system of allodial holding, with individuals and households holding temporary rights of usufruct, impermanent shares in a common resource: 'the primitive conveyances of allodial land were before all things public. Land belonged to the tribe, joint-family, or village-community before it belonged to the individual household.'⁸⁹ He believed that this was a system characteristic not only of ancient and oriental societies, but even of Scotland and Ireland into the seventeenth century. The joint ownership of land whereby 'a definite area of land is occupied by a group of families', individual strips in it being allocated to each according to their need on a lottery system, prevailed quite recently in the Scottish Highlands and Ireland in the 'rundale' system.⁹⁰ The development of private, individual, property out of such communal property, 'the process by which the primitive mode of enjoyment was converted into the agrarian system, out of which grew the land-law prevailing in all Western Continental Europe before the first French Revolution', was Maine declared, 'the great problem of legal history.'⁹¹

Now we can easily point to exceptions and qualifications in Maine's stark contrast. We have already seen that India provides evidence of non-communal systems which also seem very ancient. We can find private rights of a kind in the very simplest hunter-gatherer societies. Robert Lowie long ago provided a useful survey of 'primitive communism', and while showing it to be wrong as a generalization, he agrees that 'while full-fledged communism, to the exclusion of all personal rights, probably never occurs,

⁸⁶VC: 141

⁸⁷76

⁸⁸ELC: 235

⁸⁹352

⁹⁰EHI: 102-3

⁹¹VC: 131

collective ownership, not necessarily by the entire community but possibly by some other group, is common.⁹² He concludes that 'A review of the systems of land tenure...establishes beyond doubt the reality of that primitive joint ownership which so strongly impressed Sir Henry Maine.⁹³ But this joint ownership is not usually on the part of a territorial group, but 'only within a strictly limited body of actual kindred. Further, joint ownership, while frequent, is not universal.'⁹⁴ Thus, in a modified form, 'the great problem of legal history' remains. How did Maine attempt to solve it?

An oversimplified, single-word, answer is 'feudalism'. In earlier societies and civilizations there had certainly been the concept of private property, in other words private, individual ownership of certain commodities. In Rome, for example, all things except slaves, land, oxen and horses could be treated by an individual as his private property.⁹⁵ But the great transformation, and the one to be explained, was the emergence of private property in land. This was inextricably lined to the development of the 'feu' of indivisible estate which I discussed earlier. Feudalism introduced the new notion of indivisibility, and the collapse of feudalism set the individual free to dispose of all objects on the market as his own. Without the collapse of feudalism, 'we should never have had the conception of land as an exchangeable commodity.'⁹⁶

Maine saw a number of threads coming together to endow feudalism with this new arrangement. Partly it was the unrestrained power of manorial lords over their own demesne land. The 'emancipation of the lord within his own domains from the fetters of obligatory agricultural custom' suggested 'a plausible conjecture that our absolute form of property is really descended from the proprietorship of the lord of the domain.'⁹⁷ Other powerful forces were the development of written wills, encouraged by the Church, and the granting of land by 'book' to religious bodies. Gradually rights to land came to be looked on as a personal commodity, which could be sold or exchanged just like any other commodity. He pointed out that in England titles to manorial estates, and to the copyholds within those estates, were conceived

⁹²1929: 196

⁹³220

⁹⁴221

⁹⁵ELC: 337

⁹⁶EHI: 86-7

⁹⁷VC: 162, 165

of as having been originally purchased or acquired.⁹⁸ Hence, they could be sold onto other. The internal dissolution of feudalism in England started as soon as feudalism itself, many centuries before the 'bastard feudalism' of the fourteenth and fifteenth centuries. Feudalism was the catalyst, and primogeniture was linked to 'the crucible of feudalism'⁹⁹ for instance 'the Feudal law of land practically disinherited all the children in favour of one.'¹⁰⁰ This made it possible that 'the equal distribution even of those sorts of property which might have been equally divided ceased to be viewed as a duty.'¹⁰¹

Maine's characterization of the nature of property rights within feudalism is still valuable today. He saw the central feature as the mixing of political and economic power. Feudalism 'mixed up or confounded property and sovereignty'¹⁰², every lord of a manor having both economic and judicial rights. Political power and economic power were both delegated down the same hierarchical chain. A second feature was the ability to conceive of different layers of ownership or possession within feudal tenures: 'the leading characteristic of the feudal conception is its recognition of a double proprietorship, the superior ownership of the lord of the fief co-existing with the inferior property or estate of the tenant.'¹⁰³ A third feature is that the whole system was based not on inherited relations of 'status', but on acts of will or 'contract'. In feudalism, the famous bridge from societies based on status to those based on contract was, perhaps for the first and only time, crossed. This point was memorably emphasized by Maitland. 'The master who taught us that "the movement of the progressive societies has hitherto been a movement from Status to Contract", was quick to add that feudal society was governed by the law of contract. There is no paradox here. In the really feudal centuries men could do by a contract of vassalage or commendation, many things that can not be done now-a-days...Those were the golden days of "free", if "formal" contract.'¹⁰⁴

⁹⁸ELC: 325

⁹⁹AL: 237

¹⁰⁰225

¹⁰¹225

¹⁰²ELC: 148

¹⁰³AL: 295

¹⁰⁴Pollock and Maitland, 1968: II, 232-3

If the gateway from ancient to modern civilizations as both Maine and Marx believed, is feudalism, we are pushed back to considering the origins and nature of feudalism. All that can be said here on this large and vexed question is by means of a summary of a few of Maine's insights. Both Marx and Maine saw that modern individualistic, bourgeois society had developed out of one particular form of society, the feudal one. They were alike in then tracing this feudal system back to Germanic roots. But there their paths diverged. Marx saw feudalism as a specifically Germanic system, arising out of the Anglo-Saxon social system, and basically different from the other major early systems which he delineated, the Asian, Ancient and Primitive. Maine on the other hand, was interested in the similarities over a much wider area. He posited primitive roots which led into Indo-Aryan systems. The mixture of Roman and Germanic civilization was a particular branch of a tree which also had major branches in Celtic and Indian civilization. Yet he tacitly accepted that in the other two branches, the major transition beyond a very early sort of quasi-feudalism had not occurred and might never have done so without the pressure of British civilization.

Marx never really tried to push back his researches into the origins of feudalism in England, but Maine tried to do so, though his account is clouded for lack of data, which are still not available. His view was that while it was the legal orthodoxy of his time that all that was important in feudalism dated from after the Norman invasion, much that was characteristic of the fully developed feudal system was already present in Anglo-Saxon England. The court leet, he argued, arose from the old township assemblies rather than from royal (Norman or Angevin) grants, as lawyers had argued.¹⁰⁵ The common-field and three-field systems were present in Germanic societies¹⁰⁶, 'the three-field system was therefore brought by our own Teutonic ancestors from some drier region of the Continent.'¹⁰⁷ The whole manorial system was pre-Norman, both the concept of the manor and that of copyhold tenure.¹⁰⁸ Thus while 'the ordinary text-books...practically trace our land-law to the customs of the Manor, and assume the Manor to have been a complete novelty introduced...during...feudalization,'¹⁰⁹ in fact, he argued, the Germanic landholding systems did not just die out at the Conquest, but very greatly influenced subsequent land-law.¹¹⁰ He argues that 'the primitive Teutonic proprietary system had everywhere a

¹⁰⁵VC: 139

¹⁰⁶85

¹⁰⁷200-1

¹⁰⁸ELC: 3, , 302ff

¹⁰⁹VC: 11

¹¹⁰83, 11

tendency...to modify itself in the direction of feudalism.¹¹¹ This tendency was particularly marked in England because Germanic customs were not destroyed by the reintroduction of Roman law: 'English institutions have never been so much broken as the institutions of other Germanic societies...by Roman law.'¹¹² Yet there was some trace of Romanism, an essential ingredient, for the ground in England had been prepared by a previous Romanized population.¹¹³

This tracing of the origins of feudalism in England to before the Conquest needs modification, but the central thesis was magnificently endorsed in Maitland's **Domesday Book and Beyond**, and still stands. And Maine's attempts to solve the riddle of what lay in the Germanic system to give it, when mixed with Roman civilization, a new property law, are still suggestive. He believed that he had found in early Irish law 'a feudal system (if we may so call it) dependent on cattle and kinship instead of land and tenure.'¹¹⁴ The model of the central principle of feudalism, the 'Benefice or Feud', was, he argued, 'mainly taken from that which the men of primitive Aryan race had considered as appropriate to chiefships or sovereignties.'¹¹⁵ The origins of private property thus arose from 'the ever-increasing authority of the Chief, first over his own domain and "booked" land, and secondarily over the tribe lands', a process which was beginning long before the Norman conquest.¹¹⁶ The chiefs or kings then granted benefices, or permanent, indivisible blocks of land to others.¹¹⁷ Thus, in some strange way, feudalism 'had somehow been introduced into the Western world by the barbarous conquerors of Roman Imperial territories.'¹¹⁸ These are sweeping scholars, though Maine was one of the first to examine these themes

¹¹¹21

¹¹²ELC: 167

¹¹³VC: 147

¹¹⁴ELC: 348

¹¹⁵349

¹¹⁶EHI: 115

¹¹⁷ELC: 345

¹¹⁸149

in a critical way.

Maine's ideas are deeply interlinked and difficult to separate out. Another way to approach them is to examine his central and most important generalization, that concerning the movement from societies based on status (kinship, tribe) to societies based on contract (the State). One part of this theory is shown in his treatment of individual rights. His wide sweep allowed him to see 'by what insensible gradations the relation of man to man substituted itself for the relation of the individual to his family, and of families to each other'; 'Ancient Law...knows next to nothing of Individuals. It is concerned not with individuals but with Families, not with single human beings, but with groups.' 'The point which before all others has to be apprehended in the constitution of primitive societies is that the individual creates for himself few or no rights, and few or no duties.'¹¹⁹ If we take all these points together, and then look at nineteenth-century England, Maine argued, echoing his other famous formulation, the 'movement of the progressive societies has been uniform in one respect...The Individual is steadily substituted for the Family, as the unit of which civil laws take account.'¹²⁰

One could, of course, quibble with this, showing that in some very simple societies there is extreme individualism, and little group feeling, and so on. But as a broad characterization, it has all the power and insight of a three-quarter-truth, and when restricted to the major civilizations the vast land-based peasantries of classical Europe, China, India and elsewhere, it is even more than three-quarters true. Thus, one of Maine's most thoughtful critics, Vinogradoff, agreed with him that 'the most profound difference between modern and ancient organization consists in the fact that modern society starts from individuals and adjusts itself primarily to the claims of the individual, whereas ancient society starts from groups and subordinates individual interests to the claims of these groups'.¹²¹ It is indeed a profound difference and Maine contributed to our understanding of it.

This contrast between group-based and individual-based society, the 'defamilization of society', as Weber would put it, is part of that movement from status to contract which Maine thought was the greatest of all changes. Let us first restate Maine's view of what this change was, before examining it.

'Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of

¹¹⁹Al: 185, 258, 311

¹²⁰168

¹²¹Vinogradoff, 1920: 299

social order in which all these relations arise from the free agreement of Individuals.¹²² Thus, the relations of parent to child, master to slave, male to female, based on birth and ascribed status, melt before the negotiated relations of free individuals. It is in this sense that 'we may say that the movement of the progressive societies has hitherto been a movement **from Status to Contract**.'¹²³ Thus, 'the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract...old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by convention.'¹²⁴

The first thing to be said about this vision, like to much of Maine, is that at the broadest level it is both enormously suggestive and almost right, but that it needs to be qualified in certain ways. The qualifications are well known. Firstly, as Evans-Pritchard noted, 'Maine exaggerated the victory of Contract over Status'¹²⁵; as Maitland, Pound and others have shown civilization depends to a certain extent on limiting the freedom of contract. In the same passage that Maitland noted that feudalism provided 'golden days' for contract, he continued that 'if there is to be any law at all, contract must be taught to know its place.'¹²⁶ Consequently, as Hoebel argues on the basis of Pounds's work, Maine's dictum, 'while it held for the historical development of Roman law...does not comfortably fit the phenomenon of the common law.'¹²⁷ Likewise, Hoebel, summarizing work on primitive law, suggests that 'In surveying the truly primitive societies...no specific trend in the separation of the individual from his kinship groups as a legal entity can really be discerned...the "Mainean shift" does not really become effective until after the beginning of the urban revolution in full neolithic times.'¹²⁸

A second and completely different kind of criticism is that Maine's major idea was not, in any case,

¹²²L: 169A

¹²³170

¹²⁴304

¹²⁵1981: 89

¹²⁶Pollock and Maitland, 1968: II, 283; see also Smellie, 1933

¹²⁷Hoebel, 1964, 328

¹²⁸1964: 328; cf. Diamond's criticism, in 1935: 391

original. The classic charge is, of course, made by Engels, writing after 1875 in a book published in 1884. Engels argues that capitalism, 'By changing all things into commodities...dissolved all inherited and traditional relations, and replaced time hallowed custom and historical right by purchase and sale, by the "free" contract. And the English jurist H.S. Maine thought he had made a stupendous discovery by saying that our whole progress over former epochs consisted in arriving from status to contract, from inherited to voluntarily contracted conditions. So far as this is correct, it had already been mentioned in the Communist Manifesto.¹²⁹ On the surface this seems a rather silly claim. If Marx, who read and commented on a number of Maine's works, had himself realized that he had anticipated Maine on such a well-known theory, it seems likely that he would have said so. While he was often rude about the 'blockhead' Maine, he did not claim that Maine's major ideas were merely elaborations of his own. As the editor of Marx's **Ethnological Notebooks** puts it, 'The theory of the development of society from status to contract, formulated by Maine in **Ancient Law** (1861), was implicitly accepted by Marx, who cited as an example of this theory the conversion of personal service to slavery in Russia.'¹³⁰ Yet the claim is taken seriously by Marvin Harris in **The Rise of Anthropological theory**, where he has a section boldly titled 'Marx anticipates Maine'. There he quotes from the recently discovered manuscripts of 1857-8, the **Grundrisse**, where Marx wrote 'The tribes of the ancient states were constituted in one of two ways, either by **kinship** or by **locality**. **Kinship tribes** historically precede locality tribes and are almost everywhere displaced by them.'¹³¹ Harris argues that this supports Engels' claim, though to us it looks like such a general formulation that it is not strong evidence.

Reading the **Communist Manifesto** it is difficult to see where, exactly, Engels thought Marx anticipated Maine. The most likely area concerns the famous passages on the triumph of the bourgeoisie over feudalism. Starting at the passage¹³² 'The bourgeoisie...has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn asunder the motley feudal ties that bound man to his "natural superiors", and has left remaining no other nexus between man and man than naked self-interest, than callous "cash payment"...It has resolved personal worth into exchange value...', there are several paragraphs which comment on the change from inherited, natural, non-monetized relations to those of money and, implicitly, contract. Standing in a poor light at a considerable distance, a phrase such as 'The bourgeoisie has torn away from the family its sentimental veil, and has reduced the family relations to a mere money relation'¹³³, might seem identical to some of Maine's theories. Yet while it would be

¹²⁹1884, 96

¹³⁰Krader 1972: 36-7

¹³¹1968: 227

¹³²p. 70

¹³³Marx and Engels, 1848: 70

equally foolish to deny that there are deep differences. There is no talk here of status of contract explicitly, there is no realization that the shift had occurred before feudalism reached its peak, and there is little realization of the political and legal correlates.

And yet there is something in what Engels says. That something arises from the fact that both Marx and Maine, along with all the great thinkers of the middle and later nineteenth century, were working within a general framework of evolutionary or semi-evolutionary thought which gave them common problems - the reasons for the emergence of modern capitalist and individualist civilization. And they all drew on overlapping traditions of thought, particularly the prophets of the Scottish Enlightenment.

This leads us to our last major concern, Sir Henry Maine's methodology. As usual, there are two contrasted views on this. On the one hand there are those who feel that his greatest claim to our interest lies in his methodological achievement, that he introduced and exemplified a new comparative and historical approach which laid the basis for the discipline of anthropology and comparative jurisprudence. Others try to extricate him from his methodological framework, 'saving' some of his best 'insights' from what they consider a totally unsatisfactory evolutionary paradigm. As usual, both are partly right.

Before considering the central question of Maine's relation to evolutionism, we may briefly note some of his other contributions to modern anthropological method; in these he was not the only proponent of the views, but one of the earliest and clearest. Maine, like other great thinkers, was able to stand back and question his own society's assumptions, and to see the apparently natural as cultural. This is anthropology's main task today, as it has always been; he saw 'the difficulty of believing that ideas which form part of our everyday mental stock can really stand in need of analysis and examination.'¹³⁴ He saw the need to go back deep into history and to distant lands. Speaking of earlier works, 'there is one remarkable omission with which all these speculations are chargeable, except perhaps those of Montesquieu. They take no account of what law has actually been at epochs remote from the particular period at which they made their appearance.'¹³⁵ Like Durkheim later, he saw that in order to understand the complex, one should understand the simpler. 'It would seem antecedently that we ought to commence with the simplest social forms in a state as near as possible to their rudimentary condition...we should penetrate as far up as we could in the history of primitive societies.'¹³⁶ This is another major feature of social anthropology.

¹³⁴AL: 171

¹³⁵118-19

¹³⁶119

Maine clearly distinguished between the contemporary function, and the reasons for the origins of institutions. 'But the warning can never be too often repeated, that the grand source of mistake in questions of jurisprudence is the impression that those reasons which actuate us at the present moment, in the maintenance of an existing institution, have necessarily anything in common with the sentiment in which the institution originated.'¹³⁷

All this pushed him into considering the institutions which existed as described in very early documents, or in accounts of primitive societies in Europe and India. He was well aware that this effort of imaginative reconstruction, the leap of intellect involved, was extremely difficult. He warned of several of the dangers, and heeded the warnings, on the whole, in his own work. 'The mistake of judging the men of other periods by the morality of our own day has its parallel in the mistake of supposing that every wheel and bolt in the modern social machine had its counterpart in more rudimentary societies.'¹³⁸ He stressed again and again the difficulty. 'At the beginning of its history we find ourselves in the very infancy of the social state, surrounded by conceptions which it requires some effort of mind to realize in their ancient form.'¹³⁹ This was particularly hard for an affluent Victorian lawyer and academic surrounded by what all considered to be the summit of civilization. 'The favourite occupation of active minds at the present moment...is the analysis of society as it exists and moves before our eyes; but, through omitting to call in the assurance of history, this analysis...is especially apt to incapacitate the inquirer for comprehending states of society which differ considerably from that to which he is accustomed.'¹⁴⁰ When we read Maine today we do not feel a patronizing, or in comprehending, tone creep into his explanations and descriptions. He has the wide and relativistic mind that can suspend moralizing, and a curiosity that bridges different worlds. By placing his own civilization alongside remote ages and the simplest societies, he foreshadowed much that was best in the anthropology of the next century.

The question of Maine's methodology inevitably leads us to consider his ideas of change and evolution. Here there is a muddle. This confusion is partly the result of Maine's own writings, which can be contradictory, and partly the result of a misunderstanding both of the evolutionary paradigm and its effects.

¹³⁷ 189

¹³⁸ 310

¹³⁹ 171

¹⁴⁰ 310

To paraphrase Maitland on feudalism, it would be possible to argue that Maine was one of the most evolutionary of social thinkers, or one of the least evolutionary. Indeed, an assortment of distinguished writers have argued both positions with confidence, and we may cite just a few. A number of anthropologists seem to assume that was one of the central 'evolutionary' thinkers. Thus, David Pocock feels that we can 'excise the genetical argument and still profit from the discussion that remains';¹⁴¹ Adam Kuper writes of 'classical evolutionist anthropology (notably Morgan and Maine)...'¹⁴²; Marvin Harris lumps Maine with Morgan and the other evolutionists and rejects Lowie's attempt to suggest that he was not an evolutionist.¹⁴³ On the other side, Robert Lowie devoted considerable effort to arguing that 'that profound and in the highest sense historically-minded thinkers, Sir Henry Maine', 'that champion of sane historical method,'¹⁴⁴ 'may occasionally drop a word of homage to "continuous sequence, inflexible order, and eternal law in history", but this sop to regnant fashion agrees neither with his practice nor with his philosophy.'¹⁴⁵ Evans-Pritchard has argued that Maine 'broke away from the attempt to formulate general laws of universal validity'¹⁴⁶, and Gellner, in his Introduction to Evans-Pritchard¹⁴⁷, believes that 'Maine constituted an interesting exception' to nineteenth-century evolutionary thinking. 'Maine's vision of human history was rather of the characteristically twentieth-century "Gatekeeper" kind; "the stationary condition of the human race is the rule, the progressive the exception"...'¹⁴⁸ Interestingly, Gellner's quotation here, presumably from **Ancient Law**, is almost word for word identical to a passage by Maine in his last work, **Popular Government**, where he affirmed that 'The natural condition of mankind...is not the progressive condition. It is the condition not of changeableness but of

¹⁴¹1961: 24

¹⁴²1973: 110

¹⁴³1968 189-90

¹⁴⁴1929: 383, 423

¹⁴⁵1937: 51

¹⁴⁶1981: 89

¹⁴⁷1981

¹⁴⁸Evans-Pritchard, 1981: Introduction, xxviii

unchangeableness. The immobility of society is the rule; its mobility is the exception.¹⁴⁹

The whole problem has been elegantly discussed by John Burrow, who shows that Maine was both a dichotomist and an evolutionist. Maine thought 'in terms of a dichotomy of progressive and unprogressive. Maine was not a determinist evolutionist...' On the other hand, much of his inspiration and several quotations do suggest that he thought in terms of stages, one likely to lead into another. Yet, after considering Maine's views on Roman codes, for instance, Burrow suggests that 'Maine, far from being one of the leaders of evolutionary thought, is rather behind the times - thinking in terms of conscious adaption to circumstances rather than the mechanical, involuntary adaptation of Spencer and the neo-Darwinists.'¹⁵⁰ Looking at it from another angle, a large part of Marx's later irritation with Maine seems to have derived from the fact that Maine was not evolutionist **enough**; Maine thought that time had stopped with the supreme achievement of the modern individualist nation state and could not see, as Marx saw, that this was just another stage through which societies must pass towards nirvana.

It is tempting to leave the argument here, to agree with Burrow that 'Because Maine was not a systematic thinker, and because he never fully recognized the conflict between the historical and scientific elements in his intellectual equipment, it would be possible, by selective quotation, to make out a convincing case for either view of him', and that all we can do is to show both aspects of his work and agree that they are not compatible.¹⁵¹

Or we can avoid the dilemma by arguing that the contradictions can be explained by the fact that Maine's thought and writing straddle a major paradigm shift. Ideas which developed before 'Evolutionism' was developed were pre-Evolutionary. Then came Darwin and 1859. Thereafter, attempts were made to try to fit them with a completely new set of theories. This seems to be the recent interpretation put forward by George Stocking. He argues that 'Maine's thinking was defined in a pre-evolutionary epoch, and in nonevolutionary terms', but 'quickly found a place in the postevolutionary milieu.'¹⁵² Thus 'Maine's later works all reflect a continuing attempt to sustain the argument of **Ancient Law** in a postevolutionary temporal and developmental context.'¹⁵³ There is something in this, but it

¹⁴⁹PG: 170, quoted in Burrow, 1966: 160

¹⁵⁰1966: 163, 169

¹⁵¹1966: 164

¹⁵²1987: 117

¹⁵³126

gives far too much weight to the publication of the Darwin-Wallace thesis in 1859. Arguments about evolutionary development had been much in the air throughout the decade when **Ancient Law** was being drafted, and it is difficult to believe that Maine was unaware of them. Instead of looking at the contradictions a negative and needing to be explained away or apologized for, it is more fruitful to see that both evolutionary and non-evolutionary strands were necessary for Maine's work.

Without the evolutionary impetus, not specifically of Darwin, but of a mood that was much deeper and which we witness in many of the works before the publication of **The Origin of Species**, for example the work of Robert Chambers and Herbert Spencer, it is difficult to see how Maine could have been pushed into progressing beyond the Developmentalist theories of the later eighteenth century. In a broad sense, Vinogradoff must be right that to the Darwinian and evolutionary tendency 'we are indebted for the rise of anthropology, and of sociology, of the scientific study of man and of the scientific study of society.'¹⁵⁴ It is thus a necessary ingredient, and it is significant that one of its most noted qualifiers, F.W. Maitland, 'challenged not the method itself, but rather the indiscriminate way in which the comparative anthropologists worked out their ideals.'¹⁵⁵ Without some deep interest in long-term changes and the possible relations of cultures over long periods, without asking the large questions concerning the origins and development of man and civilization, Maine's work would have been impossible.

On the other hand, as a man open to empirical refutation, as an historian and lawyer, he was simultaneously aware of the dangers of mechanical evolutionary thought. This was an opposition based on the external evidence, the obvious facts of no simple progression of stages, but also from a theoretical objection: 'no universal theory, attempting to account for all social forms by supposing an evolution from within, can possibly be true.'¹⁵⁶ Diffusion was too patently the cause of much change, as Maitland was again to stress.

One could have several reactions to discovering that there is a basic contradiction in Maine's thought. One is to sigh, to lament the fact that he was 'not a comprehensive or systematic thinker', that 'his views were, in fact, something of a rag-bag', and, as one treats rag-bags, pull out of them bits of cloth when needed to fill in the holes in one's arguments. I think we proceed further if we see the contradictions, which we still face today, as necessary and productive tensions. It was necessary for Maine **both** to believe in a certain evolutionary framework **and** to show, in practice, the exceptions to the evolution. Evolutionism provided the guiding hypothesis, the assumption of links, which he could then explore, but only partially confirm.

¹⁵⁴Vinogradoff 1911, 581

¹⁵⁵Vinogradoff, 1920: 148

¹⁵⁶Burrow, 1966: 165, quoting Maine

We may illustrate this interpretation with one example. Maine has often been criticized for having an evolutionary view concerning the movement from status to contract, and more specifically the movement from patriarchal, kin-based, societies, to modern cognatic, state-based systems. As we have seen, he was heavily criticized by McLennan, Morgan and others for this evolutionary perspective. The difficulty is that it is not all clear how widely Maine meant his theory to apply. On the one hand there are chance remarks which suggest that he hoped that the theory would be valid as a description for all human societies. On the other, as many authorities have pointed out¹⁵⁷, Maine set very definite boundaries to his comparative surveys...he upheld the ethnographical limitation confining them to laws of the same race. In his case, it was the Aryan race, and in his **Law and Custom**, he opposed in a determined manner the attempts of more daring students to extend to the Aryans generalizations drawn from the life of savage tribes unconnected with the Aryans by blood.¹⁵⁸ The truth is that in **Ancient Law**, Maine left the question deliberately open as to how far his series of changes was likely to apply beyond the area from which his data were drawn. As further evidence emerged, he saw that he was describing the characteristics of just one civilization. The hope and belief of the possibility of general laws of evolution provided the impetus for the search; the results of his own and other research provided the limits of the generalizations. If we think in terms of models, the contradiction in Maine's thought is not quite so bizarre. Like Weber, he contrasted ideal types, benchmarks, extremes of society. He then looked to see how far societies had moved between these extremes. We can see with hindsight that his belief that such tendencies were irreversible and his belief that societies always moved, if they moved at all, in one direction are both wrong. But the ideal types he set up, the benchmarks he gave us, are indispensable guides.

Lucy Mair wrote that Tylor is 'often described as the father of British anthropology', though 'some of us might prefer to trace paternity to Maine or even Morgan.'¹⁵⁹ In true promiscuous mode, anthropology has many fathers, and it is clear that Maine is one of them. Like all fathers, he was reacted against by the next generation, often unfairly. We, the grandchildren and great-grandchildren, can now look back with a mixture of admiration and affection. We recognize that much of what we are flows from his thought; there can be no doubt that both historical and anthropological theory today would be very different without his inspiration. As with all ancestors, we need not approve his every action. But despite all the limitations, he still lives and speaks to us. It is perhaps not inappropriate for one of his great-grandchildren to end by quoting Pollock's tribute to him in the year of his death: '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...'; 'At one master-stroke he forged a new and lasting

¹⁵⁷For instance, Schapera, 1956: 2; Burrow, 1966: 232

¹⁵⁸Vinogradoff, 1911: 582

¹⁵⁹Mair, 1972, 23

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bond between history and anthropology.¹⁶⁰

The contributors to this volume, an unusual combination of lawyers, historians and anthropologists in this age of specialization, attest to that lasting bond.

¹⁶⁰Quoted in Grant Duff, 1892: 48, 76