

## *Introduction*

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It might be said of Maine, as Sir Carleton Allen said of Maine's great antagonist Austin: 'a student must feel that he reads Austin only in order to controvert him' (1964: 7). Allen goes on to observe, however, that

For a systematic exposition of the methods of English jurisprudence, we still have to turn to Austin. Nobody has replaced him. Austinian jurisprudence ... so far maintains its influence that it may still be described as the characteristic jurisprudence of England ... (1964: 7)

Surveying the scene 100 years after his death, an unbiased observer would be hard pressed to say as much about the current reputation and influence of Sir Henry Sumner Maine. Those who read Maine may indeed feel that they do so 'only in order to controvert him', but how many in fact read him at all? Certainly, he seems all but forgotten today in those fields in which he hoped to exercise the greatest influence: jurisprudence and legal history. The very dominance – until recently, at least – of Austinian jurisprudence suggests that Maine's historical outlook has become peripheral to the concerns of legal philosophy. The battle for the soul of legal philosophy today is a battle between utilitarianism and natural law, both of which Maine criticized as ahistorical. Maine's own historical approach, like historical jurisprudence in general, has been largely discredited, or at least marginalized. As for legal history, it is to Maitland rather than Maine that legal historians look for inspiration, and Maine's self-confident, universalist generalizations have given way to a more precise study of the actual records of individual legal systems. Moreover, to the extent that modern legal history does deal with the issue of legal change, it seems to by-pass Maine. Not once is Maine mentioned in Baker's study (1978) of how the Tudor common law reformed itself from within; and Milsom (1981) seems

to develop his theory of reclassification as an agent of change without reference to the famous Mainian triad of fictions, equity and legislation.

In this volume, Professor Woodard relates the melancholy story of the way in which historical jurisprudence in general and Maine's ideas in particular have, by a process of guilt by association, fallen into academic disfavour. Not only are there 'no contemporary advocates of historical jurisprudence' within the study of jurisprudence (see p. 228 below), but that side of historical jurisprudence which remains 'robust in the form of legal history' (p. 228) is a legal history which is closer 'to the ultra-nationalistic version of Savigny and Puchta' than to the cosmopolitan comparative law version of Maine (p. 224). This may be overstating the matter, but it is difficult to quarrel with Woodard's judgement that 'Maine is better remembered and more discussed by anthropologists than he is by lawyers' (p. 228).

The banishment of Maine to the margins of legal history and jurisprudence is confirmed by Professor Twining. He confesses to having 'actually managed to finish' *Ancient Law* as a freshman at Oxford in the 1950s; but it had been 'recommended and perceived as general background to our degree course'; and for historical jurisprudence, which was covered in a week, including Maine, he 'relied on secondary sources' (pp. 209-10). And it appears that Maine has remained as marginal to Twining's teaching as he was to his studies, so that during the past twenty years, he does not 'recall having recommended any student, undergraduate or postgraduate, to read *Ancient Law* or anything else by Maine, except perhaps his discussion of fictions' (p. 210).

The picture in legal history seems equally bleak. In one of the two leading textbooks on the subject (Milsom, 1981), Maine is not even mentioned, although the author was no less concerned than was Maine with the agents of legal change, and his own original contribution to that subject was to some extent anticipated by Maine himself. An important use of Maine's ideas is made by Baker in his legal history textbook (1979: 169ff.), where the chapter on 'Law making' is structured around Maine's identification of the agencies by which law is brought into harmony with changes in the wider society as fictions, equity and legislation. But Baker uses these categories merely as a set of convenient section headings, and the broader definitions given to these mechanisms of change by Maine

as well as his assertions about their historical sequence are rejected as 'difficult to square with the English experience' (1979: 170).

And, if Maine has been eclipsed by Maitland in the field of legal history, and driven to the margins in jurisprudence, his reputation has experienced only a slightly better fate in other fields on which his work impinges. In sociology, Maine's name appears infrequently, and his influence seems peculiarly marginal when compared to that of Marx, Weber or Durkheim; while in the field of Indian studies, Maine's influence has been weakened from two related directions: his association with imperialism and an increased tendency to study India through indigenous sources. In Victorian studies, despite the extravagant praise of one commentator, who referred to the 'epoch-making influence' of *Ancient Law* as 'not unfitly [to] be compared to that exercised by Darwin's *Origin of the Species*' (Morgan, Introduction to *AL*, 1917: v), his name has never carried the cachet of men like Mill and Bentham, not to mention such giants as Marx, Darwin and latterly Freud. And, despite the fact that 'comparative philology was, after historical jurisprudence, the chief influence upon [Maine]' (Burrow, 1966: 152), most modern linguists 'will never have heard of Maine in connection with linguistics' (Lyons, p. 294). Nor is he 'mentioned in any of the standard histories of nineteenth-century linguistics' (p. 295). He was, Professor Lyons concludes, merely 'a borrower' (p. 295).

Only in anthropology does Maine seem to have found a secure home. Thus, Professor Kuper recalls in his chapter that, when he first came to Cambridge as a research student twenty-five years ago, *Ancient Law* was one of the first books which he was assigned to read, not as general history or background, but 'as an authority', whose 'theoretical conceptions' were of current value (p. 99). Dr Abrahams testifies to a similar experience at Manchester: 'Maine ... figure[d] prominently in my first apprenticeship in anthropology; and my sense of his significance was also reinforced while writing up my doctoral research' (p. 186). In short, Maine's insights seem to have been more relevant to the relatively youthful fields of anthropology and sociology than to a legal history which was already seeking actual evidence from the archives or to a jurisprudence which already had a surfeit of *a priori* generalizations. Indeed, we might say of Maine that he was abandoned by law and rescued by the social sciences.

Yet even in these fields, Maine's reputation has been problematic.

His patriarchal theory, the central pillar of Maine's anthropological outlook, was attacked only a few years after its original formulation in *Ancient Law*, and today is fully discredited. In the words of Kuper, it 'is a very dead corpse' (p. 99). Worse still, it is not merely the particular answer which Maine gave to the question of the form of primeval society which is rejected, but the very question itself:

Within anthropology there is fairly general agreement today that we cannot reconstruct very early social forms in any detail ... In short, the issues which were crucial for Maine have passed from academic debate, and there seems little chance that his patriarchal theory will be revived within anthropology. (Kuper, p. 109)

In sociology, as Professor Shils tells us, Maine's name has fallen out of the tradition of the study of society:

or perhaps it should be said that it never made its entry. Histories of sociology scarcely mention Maine. Sociologists do not read his works very often. When his name is mentioned, it is mentioned very cursorily ... (Shils, p. 143)

And Professor Macfarlane, a self-confessed Maine addict, concedes that: 'An intelligent undergraduate could undoubtedly make a strong case for dismissing Maine.' On the basis of subsequent assessments of his work, the undergraduate would learn that each of 'Maine's supposed achievements ... was deeply flawed'. In the end, the student might be driven to ask his supervisor why he should 'waste time on a thinker whose methodology was based on an outworn paradigm, whose scholarship was shaky, whose findings were unoriginal or wrong' (Macfarlane, p. 111).

And, beyond questions as to his method, his scholarship and his conclusions, there is the related problem of what Collini calls the 'almost blatantly ideological cast of much of his writing' (p. 93). Maine's political outlook undoubtedly infiltrated his scholarship, and in *Popular Government* seems to have secured a dominant foothold. Indeed, for Professor Kuper, even *Ancient Law* 'was in essence an attack on the political and legal theories of Jeremy Bentham and the utilitarians' (p. 100). And Collini, in discussing *Ancient Law*, observes that Maine 'takes for granted the superiority of certain qualities of character, and then finds them at work in those developments he regards as progressive' (p. 90). There are, according to Collini, 'connections between this cluster of values and his individualist politics' (p. 90). Beyond this, his 'Anglican superiority to

the values of other societies' (Woodard, p. 219), his 'rhetoric of sobriety and realism, which has the effect of casting opposing views as self-indulgent or weakly deluded' (Collini, p. 91), the extent to which his ideas and expressions reflected 'the biases and prejudices common among the upper classes of his day' (Woodard, p. 218), his deployment of a 'habitual tone of grim realism . . . to provide a kind of scientific legitimation for the prejudices of the governing class' (Collini, p. 92), or a tone of voice, which 'seems to have assumed that his readers were, or should be, members of the Athenaeum Club, all of whom shared with him the values and opinions that really counted' (Woodard, p. 218), and 'the pessimistic anti-populism of his later years' (Abrahams, p. 185) – all this contributed to the decline in Maine's reputation and the marginalization of his work in this century.

But it is Maine's close association with three of the most characteristic notions of the Victorian era, 'evolution-cum-progress', 'German historical jurisprudence' and '*laissez-faire* individualism' (Woodard, pp. 221, 223, 226), which has served to render his work and ideas unfashionable, embarrassing, and to some even repellent. To a large extent, however, this is unfair, not only because what is worth preserving in Maine has been tossed out with what is expendable, but also because clearly Maine has become a victim of what Woodard calls 'guilt by association'. Yet his connection with these 'high-Victorian notions' (Woodard, p. 221) was considerably qualified. Our century may no longer hold self-confident beliefs in the certainty of progress, but then neither did Maine. Moreover, while evolutionary theory was undoubtedly abused in the form of social Darwinism, or as an apology for imperialism, this is not something with which Maine can be charged, at least not when his work is viewed as a whole. Maine could indeed be embarrassingly patronizing and insensitive: as, for example, when he went 'before the assembled students and faculty of the University of Calcutta, scions to one of the world's oldest and most sophisticated cultures, and solemnly advis[ed] them that "Except the blind forces of nature, nothing moves in this world which is not Greek in origin"' (Woodard, p. 219).

On the whole, however, Macfarlane is right in acquitting Maine of an ethnocentric abuse of evolutionary theory on the basis of a 'wide and relativistic mind that can suspend moralizing, and a curiosity that bridges different worlds' (p. 137). With rare excep-

tions, 'When we read Maine today we do not feel a patronizing, or incomprehending, tone creep into his explanations and descriptions (p. 137).

Indeed, some Anglo-Indians saw Maine's evolutionary perspective as a positive contribution towards racial understanding. 'Mutual tolerance', observed Sir Lewis Tupper, 'is easier when educated Indians and Europeans perceive that the India of today teems with analogies to the past of Europe' (Tupper, 1898: 399). Sir Courtenay Ilbert echoed the sentiment. As Darwin had shown that 'the commonest wayside flower' was related 'to the whole animated world', so Maine brought 'the most ordinary phenomena of Indian social life into organic relation with the world-wide evolution of legal and institutional ideas', thereby changing 'the attitude of the English mind to the world of India from an attitude of indifference to one of sympathetic insight' (1898: 403).

In any event, with few exceptions<sup>1</sup>, Maine's ideas about progress seem to have involved no assumption of European racial superiority, since those races which had made a successful move beyond status had done so not because of any superior genetic make-up, but simply because of their fortuitousness in getting past the stage at which law and religion are intertwined, and custom, embodied in a code, is given a sacred cast, and rendered unchangeable. Thus, there was no reason why Indians could not progress as far as Englishmen; what had held them back was not their race, but the fact that they had become stuck in the groove of an earlier stage of development, from which British ideas and administration would free them. Those Anglo-Indians who sought to preserve indigenous institutions, or at least to slow the pace of utilitarian-driven change, found support in Maine's theory of stages of development. (See also Tupper, 1898: 399). Thanks to Maine, they were not compelled to rest their case on the proposition that Indians were incapable of enjoying a system of relations based on contract. In time, they believed, that would be possible. For now, however, being at an earlier stage of development, India could not absorb the wholesale importation of British institutions; the diffusionist method of moving her forward required incremental rather than radical change.

The guilt by association which finds its source in Maine's connec-

<sup>1</sup> See *AL*: 23; cf. Bayley, p. 396.

tion with German historical jurisprudence is doubly unfair: first, to the extent that the reaction against historical jurisprudence comes simply from its German roots, this is both unreasonable, and particularly unfair to Maine, who 'was not . . . as much a Germanophile as many of his contemporaries', including Maitland, who 'was an unabashed admirer of things German' (Woodard, pp. 224, 225). Second, to the extent that modern hostility to historical jurisprudence is to be explained by its 'ultra-nationalistic' character, this is also unfair to Maine, whose outlook was always cosmopolitan and detached, and who was 'much closer, doctrinally, to pan-nationalistic comparative law' than to any particular German school of historical jurisprudence (Woodard, p. 224).

Finally, it would be difficult to defend from the charge of *laissez-faire* individualism the man who gave the world one of the most famous epigrams on the subject: 'the movement of the progressive societies has hitherto been a movement *from Status to Contract*'. His memorable formulation 'provided an entirely original justification' for *laissez-faire*. 'His conclusion was not based on legal theory; nor was it based on morality or religion . . . [but] on the long-term historical tendency of "progressive societies" which . . . had been "*from Status to Contract*"' (Woodard, pp. 226, 227). Maine's own views of morality need not have corresponded with the historical tendency which he identified; but, in fact, his generalization has both an historical and a definitional aspect: freedom of contract is 'an aspect — perhaps the most important . . . of what makes it proper to call . . . [societies] progressive' (Burrow, p. 56). The movement from status to contract 'for Maine expresses not merely an historical truth . . . but a moral polarity, which no future social development could cancel' (Burrow, p. 56). If Maine's generalization constituted a law of progress, it was 'not because future progress was certain but because no other comprehensive social development would count as such' (Burrow, p. 56).

None the less, Maine's ideas, at least when placed in the context of his methodology, are far too complex and ambivalent to be dismissed as merely a pseudo-scientific defence of a political and economic order based on *laissez-faire* individualism. Thus, Dr Bayly refers to Maine's disciples as 'conservative imperialist thinkers' (p. 393) and to their ideas as 'the natural ideology for a fragile colonial dominion' (p. 390). Yet, it was these very ideas which 'prepared the ground' for Indian nationalism (pp. 396-7). Similarly,

in discussing the active reception of Maine's ideas by the Indian civil service during the final quarter of the nineteenth century, Dewey remarks that the civilians

took over his combination of historical and comparative method, and applied his insights to Indian institutions with immense vigour and considerable subtlety. As a result, the 'lessons of Maine' were a great deal more ambivalent than the 'lessons of Bentham'. So many implications had to be teased out of an active collaboration with Maine that advocates of diametrically opposed policies could appeal to his authority. (p. 356)

What is most germane for our immediate purpose is the fact that Maine's ideas were enlisted by his disciples to reverse the *laissez-faire* policies of the Government of India and to effect a regression from contract to status; or, more accurately, from *laissez-faire* to government paternalism.

In short, whether deservedly or not, and despite pockets of resistance, from the late nineteenth century onwards, Maine's reputation declined, and his work was disregarded, if not entirely discredited, in virtually every field of intellectual endeavour which he touched. It would not be unreasonable, then, to expect a group of scholars gathered to commemorate the centenary of his death to have come, despite the inevitable pieties, finally to bury Maine's reputation, not to resurrect it. Yet, the chapters in this volume will show that something quite different has occurred: the rediscovery of Henry Sumner Maine as one of the modern age's seminal thinkers.

To Professor Jackson, it is Maine's 'attitude to history – as an ongoing process in which we continue to be implicated – [that] today once again strikes a contemporary chord' (p. 271). Moreover, Jackson finds Maine's evolutionary model a source of current 'social-scientific inspiration' (p. 272). According to this model, all societies, or at any rate all Indo-European societies, pass through certain states of legal development leading the few fortunate ones from status to contract. According to Jackson, Maine may have been correct to analyse historical development in terms of a sequence of stages, but the discipline from which he borrowed his model, comparative philology, was ill chosen, whereas modern cognitive developmental psychology, inspired by the work of Piaget, which 'relies fundamentally upon notions of systemic equilibrium within "stages", as well as suggesting universals of development from one stage to another', might more appropriately provide

support, not only for Maine's status-to-contract generalization, but for the stages in the legal development of progressive societies, fictions, equity and legislation, which he identified (Jackson, pp. 272-3).<sup>2</sup>

For Woodard, Maine, 'in the course of a few volumes ... transformed "law" from a technical and professional "box of tools" ... into a museum of past civilizations and remote societies all teeming with unexpected associations with our own legal system ... No member of the Anglo-American Bar, however rigorously disciplined to "think like a lawyer", can ever see his or her subject - law - in quite the same light again, after having been exposed to this man's works' (p. 217). For David Yale, the 'current utility' of Maine's works 'lies in his method' (p. 238). Despite its errors and omissions, '*Ancient Law* is a book which ... remains alive' because of the 'advice Maine offers on how to look for change' (p. 239).

According to Shils, 'no one writer has entered, so penetratingly and so pervasively, into the fundamental outlook of sociologists of the twentieth century as has Maine' (Shils, p. 144). Maine is a genuine, though forgotten, ancestor of sociology, whose ideas live through the 'prominent descendants' he formed (p. 143). For Macfarlane, Maine is one of the fathers of anthropology: 'much of what we are flows from his thought ... both historical and anthropological theory today would be very different without his inspiration' (p. 141). For Professor Peel, Maine is not just a founding father of the social sciences, but an ancestor, one of the 'beings of the past' who though dead 'interact[s] with the living' (p. 179). Despite 'certain vagaries in Maine's posthumous reputation ... the insistent fact', Peel observes, 'is of Maine's relative modernity, compared with many of his contemporaries' (p. 179). And this modernity is testified to by Dr Abrahams, whose 'relation to Maine ... is a working one' (p. 186). In attempting to make sense of the material he had gathered in a recent field study of succession to family farms in Finland, he:

turned to a variety of texts for guidance, and these more or less automatically included *Ancient Law*. I found it a felicitous choice, full of far more than I remembered, and anticipating much that I had learned from later

<sup>2</sup> Lyons, in contrast, sounds a cautionary note with respect to both the accuracy of Piagetian stages of language development and the utility of any analogy from the phylogenetic or ontogenetic development of language to the development of legal systems or other human institutions (p. 321).

writers. The result is that the paper in question, which was not written explicitly to extol or assess Maine, is littered with references to his ideas and comments. (Abrahams, p. 187)

If Maine's place in contemporary thought needs reconsideration, so too may the seemingly more settled question of his influence on his own time. It is not that anything contained in this volume casts doubt on Professor Feaver's judgement that 'The life of Sir Henry Maine was an achieved Victorian life' (p. 34) or that his work 'epitomized the spirit of an age' (p. 28). The transforming influence he exerted on the intellectual life of the nineteenth century is beyond question. Stein refers to *Ancient Law* as one of the two works (the other being Austin's *Province of Jurisprudence Determined*) 'which had greater influence on English jurisprudence than any other in the nineteenth century' (1980: 85). The judgement is echoed by the recent biographer of James Fitzjames Stephen, who concludes that the publication of *Ancient Law* 'arguably ... [did] for social science what Darwin had recently done for natural science' (Smith, 1988: 48). And as Burrow and Collini have observed:

the extent and profundity of Maine's influence among the intellectual class would be hard to exaggerate: he set the terms of debate not only for legal historians but for a generation of writers ... who could not easily or exclusively be classified as historians, political theorists or economists. Both Pollock and Vinogradoff virtually lived off his intellectual capital. (Collini *et al.*, 1983: 210)

What has not been generally known or has been too often forgotten is the extent to which Maine's ideas influenced the more mundane realm of practical politics and government, particularly in British India, where he served for seven years as the Legal Member of the Governor-General's Council. During his service in India, Maine seems to have been both pragmatic and visionary; in the latter role, communicating not revolutionary idealism, but a sense of purpose and direction to those charged with the carrying out of day-to-day tasks; or, in Holme's words, 'imparting a ferment' (quoted in Howe, 1942: 1,31). It was this extraordinary combination of the qualities of the clear-sighted lawyer and the far-seeing scholar which made Maine, in Dr Johnson's phrase, 'wonderfully fitted to serve [India] well' (p. 382). While he was, as Johnson informs us, responsible for over 200 separate Acts, none of them were 'striking laws', and most of them were 'recast before the century was out'

(pp. 382–3). To his contemporaries this was simply evidence that Maine ‘was no adventurous law-giver’; but, as Sir Lewis Tupper noted, he ‘limited himself to the actual requirements of his time’ (1898, quoted in Johnson, p. 383). It is in the ‘valuable services [he performed] in his professional character as a lawyer’ that Maine’s ‘low-key’ pragmatism manifested itself (Johnson, pp. 382, 383).

But Maine was also a thinker. He came to India after having written *Ancient Law*, and considering Maine’s penchant for ‘theorizing ahead of the evidence’ (Yale, p. 240), this sequence seems appropriate. Thus, he came with certain large ideas about primitive societies and one might even say a vision of the British role in India, forged not out of the usual imperial rhetoric, or out of missionary zeal, but out of his insight that the movement of progressive societies was from status to contract. It is his possession of a superstructure of ideas, and of course the particular aptness of those ideas to the Indian sub-continent, which made it possible for Maine to make ‘the whole country, and the problems of governing it, seem intelligible to his contemporaries’ (Johnson, p. 382). Dewey refers to ‘the density of the allusions’ to Maine: ‘his ideas ... crop up in official reports, in secretariat files, in speeches in the legislatures.’ (p. 355). And because his writings were ‘not only coherent and compelling but also ambivalent and ambiguous’ (Johnson, p. 385), ‘advocates of diametrically opposed policies could appeal to his authority’ (Dewey, p. 356). In short

For the very best minds who applied themselves to the daunting task of observing, recording and explaining India, it is remarkable how often Maine is the point of departure, even when the new work sets out to modify or to disagree with his own arguments ... (Johnson, p. 385)

Maine’s ideas may not have been wholly original, since they harked back to an ‘older pre-utilitarian tradition ... [which] had celebrated the virtues of India’s institutions ... [and] To a large extent ... had also inherited the “stage theory” of historical development’ (Bayly, p. 390). Maine’s ideas may not have been wholly accurate: ‘In many cases what was perceived as a tradition was in fact the product of the relative economic stagnation’ brought about by East India Company rule (Bayly, p. 395). ‘The self-contained and ageless Indian village is another myth’ (Bayly, p. 395). And the influence of Maine’s disciples may have been

overstated: to some historians, 'The influence of policy-makers and their ideologies now appeared strictly limited . . . Real change emanated from the rhythms of the Indian economy' (Bayly, pp. 391, 392). For these and other reasons, 'At first sight Maine might appear an irrelevance to modern Indian historiography' (Bayly, p. 397). None the less, 'as the ideological shadow of both nationalism and communalism, [Maine] deserves the attention of historians of the non-European world' (Bayly, p. 397).

#### A TALENT FOR GENERALIZATION

No aspect of Maine's work is more celebrated than his talent for brilliant generalization. The force of his generalizations is such that, according to Yale, they 'must command attention whether they attract or repel the reader' (p. 240). Sir Alfred Lyall refers to Maine's 'luminous generalisations' (1899: 245-6, quoted by Dewey, p. 363) and to his ability to take 'a set of facts, or a certain number of ideas and suggestions . . . [and] suddenly set them all in order by one of his weird and wide generalisations' (1898: 402, quoted by Johnson, p. 386).

According to Stein, Maine's generalizations were constructed out of the materials of an elementary course in Roman private law, but were dressed up in such 'vivid imagery and phraseology', were stated with such self-confidence, and presented themselves as so intrinsically plausible, that the reader was persuaded 'that he was being given the results of a scientific investigation' (Stein, p. 208). Peel refers to Maine's most famous generalization, the movement of the progressive societies from status to contract, as having 'so deeply entered the routine stock of social theory that we are hardly aware of it - like genes from a real biological, but forgotten, ancestor' (pp. 179-80). Maine's generalizations remain persuasive today because of their 'brilliance and authoritative air'; at the very least, they offer 'type-situations that we look out for in approaching an unfamiliar legal system' (Stein, 1980: 101, 106).

How accurately Maine's generalizations reflect the historical facts is a matter of considerable debate. As we have seen, Stein criticizes Maine for viewing 'all legal systems through the eyes of the categories established in Roman law' (p. 208), and Yale takes him to task for 'theorizing ahead of the evidence' (p. 240). Part of the problem lies in the nature of generalization itself, which, as Maine

himself wrote, 'consists in dropping out of sight a certain number of particular facts, and constructing a formula which will embrace the remainder' (*PG*: 107). 'Scholars ... are usually chary, sometimes morbidly chary, of generalization' (Allen, Introduction to *AL*, 1931: xviii); and the device is particularly problematic when applied to social and legal change over many centuries in many different societies. Maitland has adverted to this problem:

We are moderns and our words and thoughts cannot but be modern ... Every thought will be too sharp, every word will imply too many contrasts. We must ... use many words and qualify our every statement until we have almost contradicted it. The outcome will not be so graceful, so lucid, as Maine's *Ancient Law*. (Pollock & Maitland, 1968: II, 240-2).

On the other hand, there seems to be a core of truth in most of Maine's great pronouncements; in Macfarlane's words, they are at least three-quarter truths, 'enormously suggestive and almost right' (pp. 133, 134). James Fitzjames Stephen speaks of the 'intrinsic probability' of Maine's generalizations, even though they were reached 'not by any elaborate study of detailed evidence, but by a kind of intuition' (1888: 150). And Professor Fuller insists that 'we cease to worry ourselves about [the] literal accuracy [of Maine's account of the development of law] and treat it as a kind of allegory, full of insight into the processes by which law grows' (1968: 49).

Yet, if there is disagreement over the validity of Maine's generalizations, there is unanimity about their superior literary quality, a fact noted by virtually every writer on Maine, critic and celebrant alike. Dr Cocks speaks of Maine's 'lively generalizations' and of 'the succinct and assertive quality of his sentences' (p. 70). According to Woodard, Maine was 'a genuine "man of letters"' (p. 217). Sir Carleton Allen observes that 'There is scarcely a page [in *Ancient Law*] in which some memorable sentence does not stand out commandingly' (Introduction to *AL*, 1931: xviii). Johnson refers to Maine's 'talent ... for lucidly setting out complex matters' (p. 384); in an era when most books written about India were unreadable, Maine clothed his description of the essential principles of Indian institutions 'in language of consummate literary art' (Johnson, p. 384, quoting Ilbert (1898: 403)).

The question of Maine's style is, however, a tricky one. The more one identifies the literary quality of Maine's writings as the reason

for their original success and their continued popularity, the more one implies that Maine's reputation has been a victory of style over substance. Stein's remarks to some extent reflect this double-edged quality. Thus, in *Legal Evolution*, Stein writes that 'The style of *Ancient Law* was an important part of its enormous influence' (1980: 97). And, in referring to Maine's status-to-contract generalization, he notes that 'The force and style of this passage explain in part why *Ancient Law* made such a tremendous impact on publication. The authoritative ease and fluency with which Maine formulated his ideas carried great conviction' (1980: 97).

An earlier description of Maine as 'a lawyer with a style . . . [who] belongs, by method and genius, among men of letters' (Wilson, 1898: 363) is also double-edged. The appreciation was by Woodrow Wilson, who added that Maine's reputation would survive 'not . . . by reason of the abundance and validity of his thought, but by reason of his form and art' (1898: 364, quoted by Feaver, p. 35). This is not so much a case of damning with faint praise as of dismissing with praise which is inapt. The abundance of Maine's thought is testified to by the many fields which his work has influenced, the wide range of subjects which his books address and, most immediately, by the genuinely interdisciplinary nature of this volume. As has been observed in a recent book on Maine's jurisprudence:

There is an almost bewildering variety of topics in his work. It seems that he was prepared to discuss any subject. He wrote about ancient customs, modern politics, scientific theories, the development of languages, statute law, poetry, philosophy, literature, whether women are more conservative than men, the extent to which law changes society and society changes law, Roman agriculture, Greek civilization, the caste systems of India, the failings of Bentham, the achievements of Bentham, the consequences of imposing British law on societies governed by custom, the merits of American social values and many, many other matters. (Cocks, 1988: 13)

We have already discussed the controversy over the validity of Maine's thought, which may turn less on the literal accuracy of any given generalization than on the general purpose and utility of Maine's pronouncements. Indeed, even where Maine is in error, his work has proved fruitful. Stein talks of Maine 'provoking a brilliant piece of corrective research by Maitland'; in that case on the matter of the extent of Roman law influence in the thirteenth-century treatise popularly known as Bracton (1980: 109). What provoked

this research was precisely, as Stein puts it, the 'lofty and authoritative' way in which Maine discussed the matter and English legal history in general (1980: 109), or what Dr Cocks refers to as his 'tone of dismissive confidence' (p. 70). Clearly Maine never flinched from throwing down the scholarly gauntlet. His style, however, seems itself to have invited attack, 'as if the succinct and assertive quality of his sentences has stimulated attempts to rebut them' (Cocks, p. 70).

#### GENERALIZATIONS AND PARADIGMS

The power of Maine's language, the vividness of his imagery, the economy of his expression all contributed to transforming mere insights or ideas, however powerful, into axiomatic principles, or paradigms. Thus,

[Maine's] theory of 'status to contract' is couched in terms at once specific and general but with sufficient vividness to enable it to outlive such rival claimants as Herbert Spencer's more obtuse *First Principles* notion that 'Evolution . . . is a change from an indefinite, incoherent homogeneity, to a definite coherent heterogeneity.' (Feaver, p. 51)

Maine's style is undoubtedly a large part of the reason why his generalizations have remained memorable; more importantly, it is an essential ingredient in the mix of qualities which raises them to the status of paradigms. By 'paradigm' – the term is, of course, borrowed from Kuhn (1970) (as will be immediately evident, my usage does not necessarily follow his or that of his many followers) – I mean a particular formulation of a theory or a generalization which is at once authoritative and open-ended, concise and suggestive, capable of providing a principle for selecting and organizing facts or historical experience and fruitful of further research, speculation and debate. Johnson, for example, talks of Anglo-Indians stumbling upon 'a set of facts, or a certain number of ideas and suggestions . . . in a confused, unfinished way . . . [and Maine] would suddenly set them all in order by one of his weird and wonderful generalizations' (p. 386, quoting Lyall (1898): 402).

Popper and Kuhn have shown, not without controversy, that paradigms play an indispensable part in the workings of the natural sciences. Fact-gathering without the direction of a paradigm is a 'random activity' (Kuhn, 1970: 15) presenting 'a too sizable and

inchoate pool of information' (Kuhn, 1970: 17). Observation 'needs a chosen object, a definite task, an interest, a point of view, a problem'; and, above all, something 'in the nature of a theory,' (Popper, 1963: 46). All factual statements are 'interpretations in the light of theories' (Popper, 1980: 107); for 'some theory is presupposed by any observation' (Magee, 1985: 29). The alternative to seeing, say, a swinging stone as a pendulum 'is not some hypothetical "fixed" vision, but vision through another paradigm, one which makes a swinging stone something else' (Kuhn, 1970: 128). And the more ambitious the theory, the more fruitful the observation:

Most of the great revolutions in science have turned on theories of breathtaking audacity not only in respect of creative imagination but in the depth of insight involved, and the independence of mind, the unsecured adventurousness of thought, required. (Magee, 1985: 22)

What is true for the natural sciences is true as well for other disciplines. Linguistics, for example, to the extent that it is concerned with language-systems, rather than languages, depends on 'vision through [a] paradigm', since such systems 'are theoretical constructs which depend on a motivated process of idealization' (Lyons, p. 324). Law and the social sciences also rely on organizing principles to make sense of the factual universe, whether concepts such as contract or fault, theories such as evolution, or the wealth of categories in each into which facts are routinely slotted, thus at once tainting them with theory. The need for a theory, a generalization, or an organizing principle, then, is critical to all intellectual endeavour.

Several of Maine's generalizations qualify to be called paradigms, at least in the specialized sense in which I am using the term. A point of departure for legal historians, for example, is routinely provided by Maine's assertion that in the infancy of a legal system 'substantive law has at first the look of being gradually secreted in the interstices of procedure' (*ELC*: 389); according to Maitland, 'one of Maine's most striking phrases' (Maitland, 1909: 295). Even more famous is Maine's identification of the agencies of legal change as fictions, equity and legislation. The tripartite scheme is discussed in detail elsewhere in this volume (Diamond, pp. 242-55). Maine's best-known generalization, and the one which most closely approximates the features of a paradigm, is the famous sentence which

concludes Chapter 5 of *Ancient Law*: 'The movement of the progressive societies has hitherto been a movement *from Status to Contract*' (*AL*: 170).

The grip of this dictum on the academic mind has been nothing short of astonishing. The phrase turns up in the most unlikely places and has been put to the most various uses. The chapters in this volume attest to this fact. Even a subsidiary word like 'hitherto' has commanded attention and provoked debate. The very rhythm of Maine's formulation has proved irresistible, even when the context has nothing whatsoever to do with a contrast between primitive and modern society; as, for example, in Yale's observation that the development of writs of assistance in the Court of Chancery 'is closely related to the movement of Equity from discretion to definition' (Yale, 1965: 28). The generalization has been praised and damned, celebrated and dismissed, invoked and rejected, but it continues to fascinate. It has been pressed into service in anthropology, sociology, jurisprudence and legal and intellectual history. It has even served the end of biography: to Feaver, who entitled his definitive biography of Maine *From Status to Contract*, the generalization captures the essence of Maine's public and intellectual career. What Johnson says about Maine's work in general is certainly true about this, his most famous, generalization: 'It is remarkable how often Maine is the point of departure, even when the new work sets out to modify or to disagree with his own arguments' (Johnson, p. 385). The value of Maine's insight lies in the fact that it is stated with sufficient clarity and conviction to command attention and yet manages to be many things to many people, without somehow losing its core integrity. Or, to quote Johnson again, Maine's 'brilliant prose is not only coherent and compelling but also ambivalent and ambiguous' (Johnson, p. 385).

Shils notes that 'Maine's contribution to sociology may be summarized in the pregnant sentence which ends with the clause: "the movement of the progressive societies has hitherto been a movement *from Status to Contract*"' (p. 144). The particular aspect of this pregnant sentence which has been most fruitful in the sociological tradition is not the moral aspect of Maine's definition of progress, which Burrow discusses (pp. 55-7), or the historical aspect of Maine's formula, i.e. the movement from status to contract seen as a law of progress, as Maine himself at one point characterizes it (*AL*: 170), but its typological aspect, i.e. Maine's use of two ideal

types of society represented by status relationships on the one hand and contractual relationships on the other. Or, as Shils defines them, one society 'in which the collectivity was dominant and the individual recessive, the other in which the collectivity was recessive and the individual dominant' (pp. 144-5). The sharp dichotomy between status and contract, with all that entails in terms of a dichotomy of values and beliefs, is 'the aspect of Maine's work which has lived forward into sociology' (p. 145).

For over a century, this dichotomous scheme has operated as a paradigm, to the extent that it has provided a pair of concepts, status and contract, and an analytical assumption that sharply distinguished one from the other. Maine's generalization is at once part and a source of 'the tradition of the dichotomous classification of societies which had been in the process of formation from, at the latest, the seventeenth century onward' (Shils, p. 175). Tönnies, for example, may not have borrowed directly from Maine in fashioning his own distinction between *Gemeinschaft* and *Gesellschaft*, since he 'must have been pregnant with the contrast ... when he first encountered Maine's ideas' (Shils, p. 153). None the less, 'He clearly saw that what Maine called "status" was very close to what he called the *Gemeinschaft*, and what Maine called "contract" corresponded to what he called *Gesellschaft*' (Shils, p. 153). And it may turn out that there is a so far unacknowledged parallel between Maine's status-to-contract distinction and Malinowski's 'distinction between societies in which language is used primarily for communion and those in which it is used primarily for communication', since Malinowski's distinction 'is evidently very close to the distinction drawn up by Tönnies and his followers between a *Gemeinschaft* and a *Gesellschaft*' (Lyons, pp. 331-2). However that may be, so influential has this dichotomist tradition been that Shils refers to it as tyrannical and attributes to 'the rigours' of its tyranny the failure of 'eminent scholars to see that a national society must have some other elements in it than contracts, bureaucracy, rational bodies of knowledge of thought and rationalized economic organizations. Novel lines of understanding would have been opened to them had the rigour of the tyranny of tradition been eased' (Shils, p. 178). Thus, for better or worse, Maine's most famous generalization has operated, as any great paradigm operates, to preordain the selection and interpretation of the factual universe.

## THE REDISCOVERY OF POPULAR GOVERNMENT

Even the most avid votaries of Maine have spoken cautiously of the place to be accorded to *Popular Government* in the canon of Maine's works. Indeed, that is putting the matter rather generously. If Maine went into rhetorical high gear in *Popular Government*, so too have his critics. It is 'his most disappointing book', a 'tawdry crown of his achievement' (Burrow, 1966: 173). Kumar speaks of 'the splenetic outpouring of *Popular Government*' (Kumar, p. 79); Yale contrasts *Popular Government* with *Ancient Law*, the latter 'full of optimism', and the former 'a profoundly pessimistic book, deeply depressing to read' (p. 238). Abrahams speaks of 'the pessimistic anti-populism of [Maine's] later years' as being 'unattractive to many, including myself' (p. 185). Burrow, too, sees *Popular Government* as 'giv[ing] voice to the pessimism of [Maine's] later years' (p. 62). Woodard is particularly pointed in his description of *Popular Government* as revealing a supple mind 'grown dry, brittle and fanatically political', and a 'baleful vision of the future' (pp. 218, 234).

The most serious charge against the book, both at the time of its original release, and from then on, was its partisan nature: Maine had produced not a work of scholarship but a political polemic. Lord Acton called it 'a Manual of unacknowledged Conservatism' (Paul, 1913: 169). Moreover, in taking a strongly anti-democratic stance, Maine swam against the popular current of his own day and was certainly on the wrong side of history as far as much of the next century was concerned. There had always been what Feaver calls a certain 'implied political philosophy' in *Ancient Law*, and one which while it gave 'much solace' to 'Whiggish liberals' also contained 'a definite Tory strain' (p. 46). The explicit political philosophy of *Popular Government*, however, may have caused later commentators to find in Maine's earlier works more of a political message or more of an ideological motive than was actually intended or present; although few have, I think, gone as far as Professor Kuper, who finds the very structure of *Ancient Law* determined by Maine's desire to use 'The history of the development of law . . . as a stick with which to beat the modern radicals, beginning with Rousseau and ending with his particular antagonist, Jeremy Bentham' (p. 100).

Maine's modern biographer concludes that 'While *Popular Government* enjoyed a wide circulation in the months following its publi-

cation, and continued to be much admired by conservatives like [James Fitzjames] Stephen, it ultimately proved to be harmful to Sir Henry's standing as a scholar' (Feaver, 1969: 238). In his recent work on Maine, Cocks, speaking from what he describes as 'a jurisprudential point of view', rates *Popular Government* 'as a remarkable failure', a book in which Maine 'completely failed to develop any of his thoughts about legal philosophy. It was, and it remains, a great disappointment' (1988: 140). And Cocks concurs with Feaver that *Popular Government* 'did very little for Maine's reputation as a scholar' (1988: 139). Thus, there has been a tendency, among Maine's defenders as well as his critics, to slice off *Popular Government* from the rest of Maine's output, to see it as an aberration, which in no way detracts from the genuine scholarship in Maine's earlier works.

None the less, like it or not, there has been of late a revival of interest in *Popular Government*, and the chapters in this volume attest to this fact. It is difficult to ignore the obvious links between *Popular Government* and Maine's earlier works, even if *Popular Government* is, for good reasons, 'deeply depressing to read' (Yale, p. 238). Kumar, for example, while recognizing the 'difference in the style and mood' of *Ancient Law* and *Popular Government*, and a 'clear difference of intent', warns that we may be 'in danger of . . . making too much of the distinction between the two works' (p. 80), between which there may be 'a good deal of compatibility' (p. 81). At a minimum, *Popular Government* casts considerable light on Maine's general ideas and method (see, for instance, Yale, pp. 239-40). Moreover, the more one views Maine's earlier works as essentially political, the less one will find *Popular Government* to be an aberration. Maine's famous theories, and even his methodology, have been pressed into service as proof of his political agenda. Thus, for Kuper, 'The patriarchal theory is best read as a direct inversion of the radical notion of the state of nature' (p. 104). The famous status-to-contract generalization had even more obvious political implications; and 'the dictum was . . . received by Maine's contemporaries as vindication of the leading ideological currents of European society during the period of optimistic industrial expansion' (Feaver, 1969: 53). Moreover, Maine's use of the historical method was 'likely to breed caution and even inertia, a resistance to change on the grounds of the historical and "organic" complexity of society' (Kumar, p. 81). To that extent 'Maine himself was partly to blame for undermining

Benthamite individualism' (Kumar, p. 80). This was the view of Dicey, for whom there was:

no discrepancy between the spirit and intent of *Ancient Law* and that of *Popular Government*. It was the 'historical method' of the former that, breeding nationalism, racialism and imperialism, had been one of the prime agents of the break-up of Benthamite cosmopolitanism and *laissez-faire*. 'It is no mere accident', wrote Dicey, 'that Maine, who in his *Ancient Law* undermined the authority of analytical jurisprudence, aimed in his *Popular Government* a blow at the foundations of Benthamite faith in democracy.' (Kumar, pp. 80-1, quoting Dicey, 1962: 461n)

Moreover, the distrust, if not the outright terror, of legislative activity which is the hallmark of *Popular Government* may also be seen as a natural outcome of the historical method. To quote Dicey again:

Historical research . . . just because it proves that forms of government are the necessary outcome of complicated social conditions . . . suggests the . . . inference that it is a waste of energy to trouble oneself greatly about the amendment of the law. (Dicey, 1962: 460-1)

There is yet a more substantive basis on which to connect *Ancient Law* and *Popular Government*, for the latter may be seen as providing a kind of closure for the evolutionary scheme introduced by Maine in *Ancient Law*. The centre-piece of the scheme is the movement from status to contract, from a condition where a man's rights and duties arise out of status in the family, or the tribe, or the community, to a condition where his rights and duties are largely decided by his free agreement with otherwise unrelated individuals. There is, as well, another kind of movement associated with the progressive societies: a movement from rigid adherence to a primitive code to amelioration of the code, first by fictions, then by equity, and lastly by legislation. Maine himself restricts this sequence to the progressive societies (*AL*: 23-4). He does not make it clear, however, how the two developments interrelate. The movement from status to contract is essentially a legal development, contract being in essence 'a juridical conception' (*EHI*: 357). And we can assume therefore that the movement to contract depends in some way on the ability of a society to move beyond the confines of an early code, which undoubtedly provided little scope for contractual relations. In *Ancient Law*, the synchronization is left unclear, though both the Roman and the common-law experiences provide examples of an

older order of remedies serving a society based largely on property in land being supplanted through the use of fictions, equity and legislation by a new scheme of remedies serving a growing commercial society. While Maine is not much more explicit in any of his later works, in *Popular Government* he does demonstrate, if not the way in which the synchronization works, at least the way in which the parallel movements can get 'out of synch'. Man can be toppled from the progressive pinnacle of contract by the abuse by popular majorities of legislation, the ultimate result of the parallel evolutionary sequence. Now, we might be tempted to connect the arrival of a society at the final stage of the ameliorating instrumentalities, legislation, with its arrival at the final stage of progress, freedom of contract. To begin with, as previously noted, in *Ancient Law*, Maine does not explicitly attack the instrumentality of legislation as intrinsically inferior to fictions or equity, although he does observe that, in theory, 'There is nothing to prevent [the legislature] legislating in the wantonness of caprice' (*AL*: 177). As for public opinion, it seems in *Ancient Law* to be a wholly benign influence restraining the legislature, from imposing 'what obligations it pleases on the members of the community' (*AL*: 177). Moreover, in discussing fictions, Maine notes that 'They have had their day, but it is long since gone by. It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction' (*AL*: 16).

In short, each instrumentality was merely appropriate to its 'day'; and legislation, because of its rationality and its open and avowed manner of changing the law, was consistent with the rationality which underpinned a modern, capitalist, contractual society. Moreover, legal fictions were harmful to the cause of 'the symmetrical classification' of law: in other words, the codification of law. A code is a kind of legislation; and, Maine is clearly not averse to codification, at least in the limited form of an 'adaptation and simplification of existing law' (Feaver, 1969: 100).

In *Popular Government*, however, Maine takes a different view of legislation, or at least of a particular stage in the use of the legislative instrumentality, the stage at which the power of legislation falls into the hands of a popular majority. This results not in a codification of the legal system limited to pruning away archaic law and fictions and arranging what remains in a systematic order, all carried out by members of the legal profession, but the enactment upon the agitation of the masses of regulatory legislation, which restricts freedom

of contract, and which assigns rights and duties on the basis of factors other than the free agreement of man and man. The end result is an end to progress, and a regression to status. Thus, *Popular Government* ties together Maine's two historical schemes: the development of societies from status to contract, and the development of legal systems, once custom has been codified, from the concealed changes associated with fictions to the open and avowed changes associated with legislation. And it turns out that the two movements are in conflict, since popular legislation is inimical to the maintenance of a contractual order. To the extent, then, that Maine's status-to-contract dictum claims to be a law, *Popular Government* makes explicit that it is a law based on the imagery of the life-cycle.

Thus, the 'characteristic element of caution' in Maine's famous dictum ('hitherto') which qualifies its character as a 'law of progress' becomes, in *Popular Government*, a clear prediction of moral decay and death. To quote the sentence which so engaged David Yale: 'We are propelled by an irresistible force on a definite path towards an unavoidable end – towards Democracy – as towards Death' (*PG*: 170, quoted in Yale, p. 238). Thus, as Woodard observes, Maine's pessimism about the future of law causes him to change his imagery in an important way. Whereas 'His notion of "progress" carried with it the idea of motion in one direction ... from a state of moral inferiority ... to a "higher" state of moral development', i.e. from status to contract,

his notion of 'evolution' carried with it, in a human context anyway, the idea of a life-cycle ... ending inevitably in death. When, therefore, he began to doubt that his own society was moving towards a higher moral level of existence, he ... switched to the 'life-cycle' imagery of legal evolution – the last stage of which is death. (Woodard, p. 235)

And death, in the sense of the end of progress, coincided with the arrival of the final stage in the development of the legal system: legislation.

The most important reason for rediscovering *Popular Government*, however, is the astonishing topicality of many of its ideas. This is the view of Professor Feaver, who urges that 'the polemics that have contributed to make *Popular Government* so unattractive to democrats ... be balanced against the many important insights of the book' (1969: 238). Thus:

Sir Henry's concern over the potentials for political manipulation in an age increasingly preoccupied with the authority of public opinion . . . continues to have relevance, as does his critical assessment of the Parliamentary form of government as an agency for recruiting and controlling those possessed of scientific and technological knowledge. Moreover, a case can be made that the spirit of the work, in which Maine attempted to get behind the ideological beliefs of his contemporaries to reveal the gulf separating political theory and practice, makes *Popular Government* one of the earliest of the truly modern studies of British political institutions . . . [Moreover] few social scientists would nowadays dispute his assertion that great difficulties surround the creation and maintenance of democratic political systems . . . (Feaver, 1969: 240)

Indeed, in some ways Maine did not go far enough in identifying the difficulties surrounding 'the creation and maintenance of democratic political systems'. His insistence that democracy 'is simply and solely a form of government' (*PG*: 59-64), which may have been understandable at a time when the wisdom of democratic political systems was being widely debated, is a positive hindrance now, when virtually all nations pay lip-service to the democratic ideal, but when in reality few real democracies exist in the world. It is arguable that, contrary to Maine, the word does a great deal more than simply describe a system of government in which the suffrage is extended to a large portion of the entire nation. Nowadays, the word also reflects a set of attitudes and beliefs, which in fact make democracy possible. We have learned in this century that democracy, in the strict sense of popular government, cannot be imposed where democratic values do not exist, or cannot be created simultaneously with the democratic infrastructure. It is curious that Maine did not say more about this, because he clearly appreciated that the American constitution was a product in large part of an English inheritance, which included a respect for the rule of law, something essential to a constitutional system, like the American, in which the final word on the constitutionality of any action belongs to a judiciary which, as Hamilton put it, has 'neither force nor will, but merely judgement' (Hamilton et al, 1961: 490). Had Maine paid more attention to the need for a value-system to undergird a democratic political structure, he could actually have argued that a successful democracy was even more difficult to envisage; but he would not have been able so lightly to cite examples from antiquity and from the then recent history of the South and Central American republics.

If Maine failed to consider the importance of a nation's historical experience in determining the likelihood that democracy as a form of government would be sustainable there, a prospect which engages twentieth-century political scientists, he did anticipate many of the other modern concerns about democratic government. Maine already saw that Cabinet government resulted in transferring much of the legislative power from the House of Commons to the Ministers of the Crown. Not only has the Cabinet succeeded to whatever legislative powers previously resided in the Crown, but, 'it has taken to itself nearly all the legislative power of Parliament, depriving it in particular of the whole right of initiation' (*PG*: 115). The power to initiate legislation, in effect to define the legislative agenda, remains a matter of contention in the United States, where a President may be of one party and the majority in the legislature may be of another, and where, even when President and legislature are of the same party, there is a tradition of legislative independence foreign to the British model, facilitated perhaps by the fact that the President serves out his term of office, irrespective of the success or failure of his legislative programme. None the less, the leadership role taken by the President in setting priorities and focussing public attention on his agenda demonstrates that Maine's insight is as relevant to constitutional government in the United States as to Cabinet government in Britain. Moreover, one reason Maine identified as to why the initiative would pass to the executive remains relevant today: 'the inevitable difficulties produced by ... [the] numerousness' of the legislative branch (*PG*: 94): 'it now appears that the scanty attendance of Members [of Parliament], and the still scantier participation of most of them in debate, are essential to the conduct of business by the House of Commons ...' (*PG*: 94).

Maine also anticipated the problem of public opinion: how it was formed, how it was to be ascertained, the ease with which it could be manipulated. This has been a continuing theme of modern writers on democracy; and, if Maine did not foresee the effect which the extension of education to the masses would have on their ability to participate in the public debate, he has been proven prescient in recognizing the impact on what he called 'The ruling multitude' of the opinion 'of a great party leader', 'of a small local politician', 'of an organised association', or of 'an impersonal newspaper' (*PG*: 92).

Maine's discussion of the difficulty of determining what constitutes a mandate from the electorate, particularly in the context of

the power of the House of Lords to meddle with legislation passed by the Commons, is as pertinent as the recent controversy over the attempt by the Lords to amend or entirely reject the Local Government Finance Bill. In *Popular Government*, Maine noted that 'the most influential members of the House of Lords allowed that it would act improperly in rejecting a constitutional measure, of which the electoral body had signified its approval by the result of a general election' (PG: 118-19). One hundred years later, in the midst of a contentious debate over the Community Charge, a form of poll tax introduced by the Local Government Finance Bill, Lord Hailsham asserted in a letter to *The Times* (28 April 1988) that 'It is now generally considered unconstitutional for the House of Lords to reject on second reading a Government Bill introduced after a general election when the proposal embodying it was contained in the manifesto before the election.' Yet, how valid is this assumption of a popular mandate? What are its contours? In an editorial, *The Times*, for example, insisted on distinguishing between the general philosophy behind the Community Charge and the actual detail of the tax, 'which emerged later, much of it after the manifesto' (*The Times*, 20 April 1988, p. 15). A century earlier, Maine had expressed similar sentiments about the vagueness of the concept of a mandate:

What is a mandate ...? I can conjecture that it ... means an express direction from a constituency which its representative is not permitted to disobey, and ... to imply that the direction may be given in some loose and general manner. But in what manner? Is it meant that, if a candidate in an election address declares that he is in favour of household suffrage or woman suffrage, and is afterwards elected, he has a mandate to vote for it, but not otherwise? And, if so, how many election addresses, containing such references, and how many returns, constitute a mandate to the entire House of Commons? (PG: 118-19)

Despite all that has been said about the value of *Popular Government*, of its insights, of its connection with the ideas rehearsed by Maine in *Ancient Law*, of the sense of closure which it may be seen as giving, even if in a direction which many of us deplore, to the ideas of *Ancient Law*, still, as Professor Feaver says, 'it remains ... an unsatisfactory book' (Feaver, 1969: 240). Feaver points out a great many of the theoretical shortcomings of Maine's thesis (240-1); but beyond that, and beyond the view of so many that *Ancient Law* is Maine's optimistic work and *Popular Government* his pessimistic one, and a pessimism of a particularly disagreeable sort, it is simply the

case that whereas *Ancient Law* is rich and dense and pregnant with speculative possibilities, *Popular Government* seems, at least in contrast, schematic and superficial; above all, it is virtually bereft of the brilliant generalizations of Maine's earlier works: memorable phrases still abound, but they do not make the kind of 'unexpected associations' (Woodard, p. 217) which provide the reader with grand principles for ordering the world.

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