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# Maine's Ancient Law and Legal Theory

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# MAINE'S *ANCIENT LAW* AND LEGAL THEORY

by Stephen G. Utz\*

## I. INTRODUCTION

Thought about the law seems to pass through stages that stress either legal philosophy, practiced as we now conceive it in ahistorical terms, or legal history—one to the exclusion of the other. In the fourteenth century, English legal scholars gained perspective on the imported rationalism of Roman procedural law, enthusiastically embraced in the previous century, by compiling digests of the substantive law that celebrated the continuity of native legal institutions.<sup>1</sup> Ahistorical works of the Tudor period like St. German's *Doctor and Student*<sup>2</sup> and Hales's *Oration in Commendation of the Laws of England*<sup>3</sup> were forgotten under the Stuarts because of the resurgence of interest in the evolved integrity of historically grounded legal reasoning, as signaled by Coke's championing of Littleton's *Institutes*.<sup>4</sup>

Law reviews are again full of essays that respond to questions both broad and narrow in terms of contending ahistorical overviews. Although the larger theories of the past are under attack, two of the more powerful of these, legal positivism and legal realism, remain central to numerous debates. More importantly, our conception of legal theory has come to be shaped by the work of legal philosophers whose inter-

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1. On thirteenth century developments, including the Romanizing trend, see *Introduction* to 3 BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIE* (S.E. Thorne ed. 1968). In the fourteenth century, two anonymous works reinstated interest in specifically English antecedents and their historical genesis—the OLD TENURES and the OLD NATURA BREVIVM. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 162 (2d ed. 1979).

2. ST. GERMAN'S *DOCTOR AND STUDENT*, (Selden Society No. 91, T.F.T. Plucknett & J.L. Barton eds. 1974).

3. J. HALES, *ORATION IN COMMENDATION OF THE LAWS OF ENGLAND* (1540). See J.H. Baker, *Introduction* to 2 SPELMAN'S *REPORTS* at 42 (Selden Society No. 94, J.H. Baker ed. 1978).

4. E. COKE, *COMMENTARY ON LITTLETON* (1628). See J.H. BAKER, *supra* note 1, at 165; F.W. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* (1901).

ests, by recently revived tradition, are framed in ahistorical terms, and who conceive their task to be the construction of timeless models of the law and legal systems. Natural law theory, legal positivism, and legal realism—to mention a few examples—qualify as theories of law. It is generally assumed that legal history has only a subordinate role in the theoretical process.

For an important part of the nineteenth century, however, legal history was central to theory. Between the maturity of legal positivism, which may be dated by the publication in 1832 of John Austin's *The Province of Jurisprudence Determined*,<sup>5</sup> and Holmes's<sup>6</sup> or Pound's<sup>7</sup> first essays in realism, the mandarins of legal speculation had little to say about the nature of law that was not well-rooted in attempts to understand the legal past. Holmes's *The Common Law*<sup>8</sup> and John Chipman Gray's *The Nature and Sources of the Law*<sup>9</sup> are the best known examples of this orientation. To the extent that we still read these authors, however, we tend to ignore the historical dimension of their work and think of what remains as a fragmentary and unsuccessful alternative to the timeless overviews that preceded or have displaced them. Holmes and Gray, especially, figure in current discussions, if at all, only as transitional figures on the way to legal realism or contemporary forms of legal positivism. This distorts our understanding of their work and of what sometimes appears to be a cycle of legal orthodoxies. More importantly, it deprives us of the insight into legal institutions which is still vital and for which historically-minded theorists struggled.

The interregnum to which Holmes and Gray belong is neglected in part because its contours are no longer apparent. The inaugural figure of the period was Sir Henry Sumner Maine (1822-1888). *Ancient Law*, his first legal publication, set the tone and in large part scouted the subject matter of the higher levels of all legal scholarship in England and this country for roughly forty years.<sup>10</sup>

Its reception was startling and immediate. Maine's introduction

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5. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed. 1954).

6. O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167 (1920); O.W. HOLMES, *Law in Science and Science in Law*, in *COLLECTED LEGAL PAPERS* 210 (1920).

7. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1905).

8. O.W. HOLMES, *THE COMMON LAW* (M. Howe ed. 1963).

9. J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* (R. Gray 2d ed. 1921). Gray's ideas were already known from his lectures at Harvard during the years 1896-1900 and 1901-1902. *Id.* at vii n.1.

10. G. FEAVER, *FROM STATUS TO CONTRACT: A BIOGRAPHY OF SIR HENRY MAINE 1822-1888*, at 41-65 (1969). Most of the biographical information about Maine in this article derives from Professor Feaver's splendid book.

modestly declared the work's scientific aspirations, and these, which the book's first readers doubtless thought were amply fulfilled in its program, sounded a chord most recently heard in the geology of Lyell and the biology of Darwin. The fresh thrust of these scientific innovators still had not met the defining limits of broad intellectual assimilation. Lyell and Darwin had, however, already assumed the mantles of sages, and their as yet unfamiliar methods seemed to find authority essentially in the objective observation of easily discovered remains of the past. Geological formations and fossils were there to be construed and to yield comprehensive understanding of the present. The new recognition on which Lyell's and Darwin's methods rested was that the past and the present were firmly linked. *Ancient Law* appeared the year after *The Origin of Species*. It declared that the phenomena of law were also susceptible of an evolutionary exegesis. Maine described the remains of primitive legal systems as "crusts" that held the mystery of the origin of modern legal institutions.<sup>11</sup>

The huge influence of *Ancient Law* on Maine's contemporaries attests to the fulfillment of its methodological premise, at least for its original audience. The public associated Maine with Bentham and Austin, not as a like-minded thinker, but as a legal sage. Maine was honored with successive professorships, commission posts, and knighthood. He had a major influence on the entire legislative program of the British government in India.<sup>12</sup> His closest followers included the legal historian Sir Frederick Pollack,<sup>13</sup> the criminal law theorist and reformer Sir James Fitzjames Stephen,<sup>14</sup> and, in this country, Mr. Justice Oliver Wendell Holmes, Jr.<sup>15</sup> The first seminar at an American university, taught by Henry Adams at Harvard, used Maine's writings as principal texts for fifteen years.<sup>16</sup> On the continent, Emile Durkheim and Friedrich Tönnies acknowledged his influence, and British and American critics of his views on the importance of the family as a legal unit in primitive societies did the spadework of modern sociological theories based on relations of kinship.<sup>17</sup> The very diversity of the inspiration Maine imparted, however, seems to work against our ability to

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11. H. MAINE, *ANCIENT LAW* 2 (Everyman's Library ed. 1977).

12. G. FEAVER, *supra* note 10, at 65-74, 87-110, 196-211.

13. *Id.* at 118, 130.

14. *Id.* at 146; D.A. WINSTANLEY, *EARLY VICTORIAN CAMBRIDGE* 152 (1940).

15. G. FEAVER, *supra* note 10, at 130-32; M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870*, at 193-95 (1957).

16. G. FEAVER, *supra* note 10, at 132-34.

17. *Id.* at 133-34.

read him as a legal theorist.

Among lawyers, Maine is chiefly known today, not as a general theorist of law, but as an expositor of Roman law, as a contributing founder of (theory-neutral) legal anthropology, and as the patriarch of modern English studies in legal history. *Ancient Law* is remembered primarily for the observation that progress in the law, until Maine's time, was a development from status to contract.<sup>18</sup> On this point, history has deprived the historian of his banner. Any casual critic can now cite examples from twentieth century law that strike a different course, if not from contract back to status, then at least in some other direction. The irony deepens when it is noted that Maine only superficially shaped his material to support the ostensible laissez-faire theme of *Ancient Law* and that his interest lay rather in exposing the historical experience that enables law to fulfill its task.

This article examines the theoretical dimension of *Ancient Law* with a threefold purpose: to throw light on why Maine the historian selected and handled historical data as he did, to show how his work gave successors the analytical tools with which to transform the legal positivism of their day, and to illustrate the mutual importance of legal history and legal theory.

## II. *Ancient Law* SAMPLED

Although Maine wrote as a historian, his works belong to legal theory. It is paradoxical, therefore, that while they were also designed to influence legislation and the practice of law, and did so, their peculiar combination of historical and theoretical concerns largely accounts for the neglect from which Maine suffers today among theorists.

Maine's place in the evolution of legal theory, however, is also obscured by his own style. Although a brilliant aphorist and great teacher, he could rarely bring himself to summarize even a lengthy investigation. This may not have been entirely because Maine preferred the oracular mode of presentation, as he certainly did. To a degree, his subject matter resisted summary by its multivalence on both the larger

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18. As a legal historian, Maine's significance for the present lies in a score of fundamental observations. He was the first to appreciate and call attention distinctly to the reverence for law in early communities, the thoroughgoing formalism of archaic law, the predominance of procedural over substantive rules in early legal systems, the wide discrepancy between ancient and modern standards of legal proof, the essentially modern character of individual property rights and ability to dispose of property by will, and the late appearance of the distinction between tort and crime. See H. MAINE, *ANCIENT LAW* at xvii (F. Pollock ed. 1906).

and smaller scale. On the larger scale, *Ancient Law* refuses to settle into the mold of either an introduction to Roman law or a comparison of present law with Roman antecedents: it seems also to promise a direct critique of some aspects of modern legal theory. There are less general ambiguities as well, in great number. Throughout the apparently historical survey, Maine takes note of structural features of legal systems that confirm or rebut prevalent views of the nature of law. The details of his criticism are dispersed and must be gathered; to that end, it is useful to review the chapters of *Ancient Law* that conclude with *The Early Law of Property*.

The gist of *Ancient Law* is a narration of the progress of legal systems from primitive to modern forms. This aspect of the book's program overshadows the rest for some recent commentators.<sup>19</sup> Perhaps Maine's political views apart from his legal writings have seemed to amplify his discussion of progress in the law to the disadvantage of the actual argument of *Ancient Law*. With that possibility in mind, we should take great care to sift his words for confidence in historical progress. Maine self-consciously and gingerly handles the distinction between primitive and modern, with its Whiggish connotations. The sequence of legal epochs in his view proceeds merely from "the distinction between stationary and progressive societies."<sup>20</sup> Beyond that, Maine is content to observe that the process he distinguishes is the outcome of opaque, inexplicable cultural urges that are responsive to a wide range of environmental and political stimuli.

Maine certainly does not imply that progress in this sense represents a triumph of good over inferior institutions, or fulfills some theoretical blueprint.<sup>21</sup> The hesitancy with which he describes what amelioration he does find infects the famous generalization, mistakenly regarded as the capstone of *Ancient Law*, that "the movement of the progressive societies has hitherto been a movement *from Status to*

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19. See G. FEAVER, *supra* note 10 *passim*.

20. H. MAINE, *supra* note 11, at 13. Maine tries to establish an empirical foundation for the distinction by noting that "much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record. . . . Law is stable; the societies we are speaking of are progressive." *Id.* at 14, 15.

21. For example, although Maine uses Roman law as a stalking horse for the progress of legal systems generally, he contrasts the Roman leap from unwritten to codified law and beyond with Indian and Chinese examples, and intimates that religious hegemony in India and political hegemony in China account for the parallelism of these societies up to a point in their development and their divergence afterwards. *Id.* at 14.

*Contract.*"<sup>22</sup> The telltale "hitherto" became an increasingly weighty qualification of the generalization as Maine extended the research on which *Ancient Law* was a first report, and his later efforts concentrated less on progress than on the sagacity of early forms of law.<sup>23</sup>

Moreover, the first five chapters of *Ancient Law*, although ostensibly about the sequence of legal epochs, anticipate the book's later concentration on the developmental autonomy of law. Maine describes the first epoch, that preceding the epoch of customary law, as dominated by isolated judgments of heroic kings or other sovereign authorities, legal decisions that "depended partly on divinely given prerogative, and partly on the possession of supereminent strength, courage, and wisdom."<sup>24</sup> When aristocracies arose, in the form of either military or religious oligarchies, the judgments of the authorities were no longer grounded on direct inspiration but on implicit reference to a body of rules. The "juristical oligarchy," by claiming to monopolize legal knowledge and to possess exclusively the principles for resolving disputes, ushered in the second epoch, that of customary law.<sup>25</sup> Maine reasonably supposes that it was partly in order to consolidate oligarchical power and partly to assuage complaints about its abuse that customary law was first written down.<sup>26</sup>

Since the known Roman law, with which Maine is especially concerned, belongs to the age of legislation—all Roman law descends in

22. See H. MAINE, *supra* note 18, at 100.

23. When he returned to teaching from the government post in India to which the success of his first book catapulted him, the law of property, not that of contract, dominated his scholarly thought. In 1871 he published *VILLAGE-COMMUNITIES IN THE EAST AND WEST*; four years later, *LECTURES ON THE EARLY HISTORY OF INSTITUTIONS*, primarily a work on the development of the law of land tenure in almost all the documented early legal systems; in 1883, *DISSERTATIONS ON EARLY LAW AND CUSTOM*, again primarily a work on early property law; and in 1888, *INTERNATIONAL LAW: THE WHEWELL LECTURES*, his analysis of the *jus belli* based on the Roman law of occupancy. Taken together, these lecture series and numerous related articles throw into high relief the ambivalence of the strategy of *Ancient Law*. In his Rede Lecture at Cambridge in 1875, Maine said:

We are perhaps too apt to consider ourselves as exclusively the children of the age of free trade and scientific discovery. But most of the elements of human society, like most of that which goes to make an individual man, comes by inheritance. It is true that the old order changes, yielding place to new, but the new does not wholly consist of positive additions to the old; much of it is merely the old very slightly modified, very slightly displaced, and very superficially recombined.

H. MAINE, *The Effects of Observation of India on Modern European Thought*, in *VILLAGE-COMMUNITIES IN THE EAST AND WEST* 2-5 (3d ed. 1876).

24. H. MAINE, *supra* note 11, at 6.

25. *Id.* at 7.

26. *Id.* at 8-9.



theory from the Twelve Tables and later statutes and edicts—the choice of isolated judgments and unwritten custom as a starting point has a tangential purpose. In a confidential tone, Maine warns the “English student” that in *Ancient Law*, law is to be understood in a broader sense than that of Austin’s analytical definition, which equates law with the general commands of a sovereign, backed by sanctions for disobedience.<sup>27</sup> Apart from Maine’s sketch of his legal epochs, however, he does not separately characterize the underlying legal phenomena.

Within the epoch of written law or codification, Maine asserts that efforts to change the law fall into several historically distinct patterns. He identifies three instrumentalities—legal fictions, equity, and legislation—that are responsible for these modifications.<sup>28</sup> Legal fictions are the oldest of the instrumentalities, while equity and legislation, respectively, are later, at least in terms of their substantial and prolonged dominance in the legal process.<sup>29</sup>

At this point, it will be helpful to anticipate the implications of Maine’s discussion of legal fictions, equity, and legislation, although Maine himself offers no signposts of their significance for the later development of his themes. In *Ancient Law*, he gradually extends the reader’s awareness of how law grows under pressure of social events, not exclusively or even principally through the efforts of kings or legislatures, but in large part through the official acceptance and manipulation of custom. After the earliest stages of their development, the legal systems Maine considers allow this influence of social reality on legal rules to acquire official force, especially through the deliberations of tribunals. Thus, Maine’s recognition of the distinct characteristics of legal fictions and equity pushes to the fore the judicial, or more broadly the interpretative, function within the legal systems.

Fictions, equity, and legislation are all agencies for *making* law,

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27. See *infra* notes 91-94 and accompanying text.

28.

A general proposition of some value may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. . . . My own belief is that remedial Equity is everywhere older than remedial legislation; but, should this be not strictly true, it would only be necessary to limit the proposition respecting their order of sequence to the periods at which they exercise a sustained and substantial influence in transforming the original law.

H. MAINE, *supra* note 11, at 15.

29. *Id.*

despite the elaborate pretenses by which the first two seek to disguise their operation. Maine classifies as legal fictions the common law subterfuge of "finding" new rules in old precedent and the Roman law acceptance of *responsa prudentium*—scholarly opinions on substantially new questions of law—as mere interpretations of law already codified.<sup>30</sup> Maine's account of equity and of its outgrowth, natural law, is similarly skeptical of the claims for continuity within the legal system that the doctrinal foundations of equity were evidently meant to support.<sup>31</sup> But he cautions the "student of Bentham" not to confound fictions, equity, and legislation, because of the differences among them that the public and even lawyers take for granted. The significance of this point is left unexplored.<sup>32</sup>

Maine thus leads the reader to expect that the next three chapters, on legal fictions and on the law of nature and equity, will illustrate these epochal transitions and explain their functional importance. Instead, the chapters trace the historical origins of natural law and explain the modern transformation of the *jus gentium*—the Roman law applicable to disputes involving noncitizens—into international law. Maine criticizes these later uses of natural law as spurious appeals to a higher authority than that of custom or the will of the people. He vehemently endorses Bentham's arguments that natural reason and the state of nature are faulty theoretical constructs. Yet he expresses sympathy with legal emendation based on these foundations within less modern legal systems. Just as he considers beneficial the legal fictions by which *responsa prudentium* were brought to bear on Roman law, Maine finds evidence of the reasonable and even essential part played by Roman *aequitas* in the simplification of formalistic early institutions. Natural law seems to him pernicious only in the form revived by Rousseau, and then only because "natural law" was used to support a priori legislation.<sup>33</sup> The Roman *jus gentium* had permitted "careful observation of existing institutions" to suggest "judicious purification"; modern natural law condoned a new order "wholly irrespective of the actual condition of the world and wholly unlike it."<sup>34</sup> Maine finds in this a parable of the evils of "Benthamism,"<sup>35</sup> the radical use of reme-

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30. *Id.* at 15-16.

31. *Id.* at 27-29.

32. *Id.* at 17-18.

33. *Id.* at 51.

34. *Id.* at 52.

35. *Id.* at 76.

dial legislation, and advocates the "Historical Method of inquiry" as a corrective.<sup>36</sup> The implications are not clear. A historical approach to current flaws of a legal system may be that of the practicing lawyer who prefers to seek change through the courts than to lobby for a new statute, or it may be that of the legislative gradualist. In either case, Maine's apparent point is that the accumulated wisdom of existing law is a better starting point than the blank page.

The historical narrative resumes in the next chapter, *Primitive Society and Ancient Law*, with an account of the transition from the Twelve Tables of Rome to legislation designed to remedy longstanding custom. Maine dwells on the role of *patria potestas* and the artificially extended family as a legal entity. The institution of the Roman family permitted kinship relations, rather than legal relations, to determine the distribution of personal and property rights, as in all primitive societies, without interference by legal institutions.

Ancient jurisprudence . . . may be likened to International Law, filling nothing, as it were, excepting the interstices between the great groups which are the atoms of society. . . . [T]he sphere of civil law, small at first, tends steadily to enlarge itself. The agents of legal change, Fictions, Equity, and Legislation, are brought in turn to bear on the primeval institutions and at every point of the progress, a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals.<sup>37</sup>

This pattern points the way to Maine's generalization that the movement of progressive societies has been from status to contract.<sup>38</sup> The famous generalization comes at the end of the chapter.

The last half of *Ancient Law* seems to promise more on the movement from status to contract. The chapter headings which refer to testamentary succession, property, contract, and crime suggest an orderly working out of the anthropological theme in each of these departments

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36. *Id.* at 52-53.

37. *Id.* at 98.

38.

The individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract.

*Id.* at 99.

of the Roman law. Thus, the chapter on succession might have shown later Roman and modern European testamentary law to be the flexible counterpart of early, rigid transmission of property along kinship lines; the chapter on property might have shown that the noncontractual features of title and possession gradually gave way under the Praetorian edicts to contractual sales and leases; the chapter on contract might have chronicled the disappearance of formalistic restrictions on bargaining freedom; and the chapter on criminal law might have shown that the undifferentiated tort and criminal law of the distant past gradually shrank to the role of regulating the interstitial relations among groups not bound by contract.

The last chapters of *Ancient Law*, however, depart in many directions from Maine's ostensible historical thesis. The discussion of testamentary succession focuses its energy on the various ways in which Roman family wealth was transmitted along lines of agnation, or descent, in defiance of the wishes of individual owners. Maine compares the head of the Roman family and the English corporation sole to stress that the will of the individual testator was presumed to govern only in limited ways.<sup>39</sup> The law of succession did nevertheless develop from rules dictated by status towards greater individual freedom, but along the way the legal primacy of the family outlasted for a while the slow dissolution of society into individuals with primary legal property rights.<sup>40</sup> This survival provides a novel explanation of the Roman requirement for individual testamentary or intestate succession that the *universitas juris*—all the rights and duties of the individual—pass to the Roman heir (who alone could be the designated recipient under a will). The public, irrevocable, and inter vivos character of the older Roman will confirm its origin in the legal personality not of individuals but of families.<sup>41</sup> The intervention of Roman equity eventually created an alternative to the early will under civil law,<sup>42</sup> and Maine traces with relish the legal fictions by means of which Roman citizens finally took advantage of the less privileged but more convenient plebeian will.

Maine's theme, however, appears to be the idiosyncrasy of the original formalistic will and of the collective legal unit behind the will,

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39. *Id.* at 109-10. This part of Maine's discussion foreshadows Holmes's great objective in *The Common Law*, the refutation of a Kantian account of the foundations of law, to which we shall return. See *infra* notes 70-83 and accompanying text.

40. *Id.* at 109.

41. *Id.* at 106-07.

42. *Id.* at 124.

whose intransigence within the comparatively enlightened society of the late Republic expressed human desires not reducible to those of individual testators. The allocation of power within Roman society thus overcame for a while the state's yearning to invest its individual constituents with legal autonomy, even though something like the civil society of Hobbesian and Enlightenment philosophy had already taken shape. Doubtless, an explanation of this phenomenon can be found in the strife among orders within the Roman oligarchy that ultimately broke the back of the Republic.<sup>43</sup> What interests Maine appears, however, to be the unevenness of legal institutions, reflected in the law governing the transmission of personal wealth.

In the next chapter, *Wills and Succession*, Maine offers an account of the origin of primogeniture in English law. The rule of the descent of real property to the eldest son represented a development in two stages. In the first, a prefeudal form of primogeniture arose throughout Europe with the emergence of hereditary village chieftaincies, primarily in collective estates that "were neither altogether free nor altogether servile."<sup>44</sup> In the second, this "barbarous," early primogeniture, which was compatible with the reversion of the land held by a hereditary chieftain to common ownership,<sup>45</sup> was transformed into the permanent estate of the individual successor. These developments suggest contact with technical Roman law notions of property and were aided by the feebleness of central civil authority at a time when families, by concentrating power in the same hands, were growing stronger.<sup>46</sup> The strength of succession by primogeniture served to remedy the weakness of civil authority.<sup>47</sup>

Maine gives close attention to the paradoxes of the apparent social regression precipitated by the diffusion of the more sophisticated Roman law concepts into a socially primitive medieval environment and extended by the popularity of the resulting mechanism of infeudation between feudal vassals and their lords. The argument takes him well off the path of his exposition of Roman law and does little to confirm the succession of legal epochs through fictions and equity to legislation. The tale is told with detail about medieval institutions and relieved by

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43. See, e.g., M.I. FINLAY, *THE ANCIENT ECONOMY* 44-51 (1973); R. SYME, *THE ROMAN REVOLUTION* 11-27 (1939) (familial and clientele groups within the order of *nobiles* and *equites*).

44. H. MAINE, *supra* note 11, at 137.

45. *Id.* at 139.

46. *Id.*

47. *Id.* at 139-41.

comparisons with Hindu and other non-European counterparts of primogeniture.

By this point, however, the submerged center of gravity of *Ancient Law* has shifted irrevocably away from the historical scheme that seemed to give the book its structure. The contrasts between customary and written law, the diversity of law-making agencies, and even the movement from status to contract have receded. To the extent that a new theme emerges, it is the irrelevance of sovereign power, whether exercised by kings or by the civil state through a duly constituted legislature, to the growth and amelioration of the law. Maine sometimes writes as if legal doctrines have a life of their own, stimulated by major economic and demographic changes without conscious intervention by any central power. At other times he stresses the role of the officials, whose charge it is to preserve legal usages, in creating or at least tolerating subterfuges that rationalize or improve traditional rules. The supporting discussion consists of a wealth of comparisons between early European and non-European village and tribal communities.<sup>48</sup> Since land tenure dominates even in the excursus on succession, through the review of primitive, mainly agricultural legal collectives, it is not surprising that Maine should return to this genetic aspect of the law of property to bridge the gap between status and modern legal relations.

Maine's survey, in the next chapter, of the *Early Law of Property*, is not a survey at all. It gets no further into a discussion of Roman law than to stumble over the foundations of the concept of possession that continental civilians were laying in the nineteenth century. Indeed, even these foundations are examined indirectly. We discover as the chapter unfolds that Maine intends to deal with the role of possession in the broader justification of modern legal systems generally, rather than with the significance of possession as the putative cornerstone of a separate department of rules governing rights in things.

The chapter begins with the supposed natural modes of acquiring property and, in particular, with property rights based on occupancy. It considers the assumed antiquity of possessory rights in the light of the well known claim in Justinian's *Digest* that the primitive law of nature grounds such rights.<sup>49</sup> Justinian's compilers were relying on a brief pas-

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48. It is tempting to speculate on the possible influence of Maine's account of village communities on continental political thinkers. See, e.g., P. KROPOTKIN, *MUTUAL AID: A FACTOR IN EVOLUTION* 96 (1925).

49. It is more convenient to begin with the older law, and it is clear that the natural law is the older, seeing that it is the product of Nature herself and so coeval with the human race, for civil

sage in Gaius discussing the law of nature and the natural modes of acquiring property. Gaius himself gave only a few examples—the capture of wild animals, dominion over riparian accretions and vegetation on land—and made little of their priority and significance in the law.<sup>50</sup>

For this appeal to antiquity, Maine has only scorn. He has already proposed what persists as the modern view of the relationship between primitive law and natural law.<sup>51</sup> He believes that ancient jurists mistook the usages of earlier societies for generally acknowledged law and dignified these ancient usages by classifying them as natural law.<sup>52</sup> Without more, he quickly moves to a sketch of the adaptation of the law of occupancy in the post-medieval period to prize law and its deplorable extension to the law of conquest.<sup>53</sup> The latter provides another example of the willful misappropriation of the fables inherent in primitive emendation of written law.

Maine then examines Blackstone's endorsement of the natural law grounding of the law of occupancy or possession. Blackstone presents the law of property as a natural development from the physical appropriation of unowned things.<sup>54</sup> Quoting Blackstone at length, Maine dis-

rights only came into existence when states were first founded, magistrates appointed and laws written down. DIG. JUST. 41.1.1.

50. 1 THE INSTITUTES OF GAIUS: TEXT WITH CRITICAL NOTES AND TRANSLATION ¶¶ 66-79 (F. de Zulueta ed. 1946).

51. H. MAINE, *supra* note 11, at 26-35.

52.

The older juriconsults had doubtless observed that such acquisitions were universally sanctioned by the usages of the little societies around them, and thus the lawyers of a later age, finding them classed in the ancient *Jus Gentium*, and perceiving them to be of the simplest description, allotted them a place among the ordinances of Nature. The dignity with which they were invested has gone on increasing in modern times till it is quite out of proportion to their original importance. Theory has made them its favorite food, and has enabled them to exercise the most serious influence on practice.

*Id.* at 144.

53. These early components of the *jus gentium* still have a place in our own international law, but we are more familiar with the law of occupancy from the standard first-year property course in our law schools. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), and *Armory v. Delamirie*, 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1772), regularly introduce competing rights to possession of lost or abandoned property. *Pierson* moreover relies on a score of civilian authorities, including the *Institutes* themselves, Gaius, and Grotius. The American recognition of these authorities is intriguing. Our reliance, however, on a modern European version of the Roman natural law had two powerful antecedents in Blackstone and Bentham. See *infra* notes 59-60.

54. At first, according to Blackstone, the right to possess goods or land was transient, lasting only as long as a person's use. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769), at 2-4 (S.N. Katz ed. 1979). As human beings proliferated, however, "it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used." *Id.* at 4.

mantles the premise that possession in the nontechnical sense of appropriation could have played such a role. The supposed genesis of legal possession in mere actual possession defended by the power of the possessor is ramshackle.<sup>55</sup> Even if grabbing played a part in the early allocation of possessibles,<sup>56</sup> the mystery surrounding the importance of possession in the law as we know it shrouds not the respect accorded powerful possessors but the respect that emerged at some point for the possessory right.<sup>57</sup>

Maine rejects the claim of natural law theorists that possession was critical to society's recognition of a property right in the adverse possessor. Their mistaken genetic account exactly reverses plausibility. He observes that

[i]t is only when the rights of property have gained a sanction from long practical inviolability and when the vast majority of the objects of enjoyment have been subjected to private ownership, that mere possession is allowed to invest the first possessor with dominion over commodities in which no prior proprietorship has been asserted.<sup>58</sup>

The doctrine of prescription, according to Maine, requires too settled a status quo to be compatible with the uncertainty and collectivity of possession that characterize primitive societies. The "true basis" of the doctrine is "not an instinctive bias towards the institution of Property, but a presumption arising out of the long continuance of that institution, that *everything ought to have an owner*."<sup>59</sup>

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55. "[W]e might fairly ask whether the man who had *occupied* . . . a particular spot of ground for rest or shade would be permitted to retain it without disturbance. The chances surely are that his right to possession would be exactly coextensive with his power to keep it. . . ." H. MAINE, *supra* note 11, at 149.

56. See H.F. JOLOWICZ & B. NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 143 (3d ed. 1972).

57. Again, in our property law courses, the usual progression is from cases involving the rights of finders as mere possessors to the full ownership rights of adverse possessors. No serious suggestion is put forward that finders represent the simpler case of which adverse possessors represent the more complex. Nevertheless, the order of presentation implies a gradual building of legal notions on one another. H. MAINE, *supra* note 18, at 150.

58. *Id.* at 151.

59. *Id.*

Maine's conclusion that the natural law theory of possession reverses the order of history underscores an irony of common law adherence to the logic of possession in this country. Within twenty years of *Pierson v. Post*, Chief Justice Marshall in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), affirmed the sovereignty of the new United States over the long peacefully-held Indian lands within its territory, by right of discovery and possession in succession to British possession of the North American continent. The elaborate opinion on this pre-constitutional inci-



From the observation that individual possession acquires legal significance only within an order already biased in favor of individual ownership, Maine reorganizes the investigation into the origins of the law of property. The priority attributed by civilians, Blackstone, and many nineteenth century common lawyers to possession makes the system of property rights seem to spring into existence as a system, without passing through stages of gradual appropriation of tangible things

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dent of federal sovereignty still scintillates with the disingenuity of the expanded *jus gentium*. Marshall's pen seems to hesitate:

[As the great nations of Europe] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. . . . In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. . . . While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives.

*Id.* at 573-74.

Such were the practical consequences of natural law in Maine's time. Another practical legal decision, to which he was closer, was the British viceregal decision not to dismantle the village community in India, despite strong pressure from commercial European interests and Benthamite social theorists to do so. See G. FEAVER, *supra* note 10, at 87-109. Maine was appointed Law Member of the Viceroy's Council because of the celebrity of *Ancient Law*. *Id.* at 62. He invoked his own works in defense of the wisdom of ancient ways for a developing society against Benthamite arguments grounded in radical individualism. H. Maine, *Panjab Tenancy* (October 19, 1868), in M.E.G. DUFF, SIR HENRY MAINE: A BRIEF MEMOIR OF HIS LIFE WITH SOME OF HIS INDIAN SPEECHES AND MINUTES 279-80 (1892). This episode is tied to the chapter in *Ancient Law* on property because Sir Erskine Perry, the translator of Savigny's treatise on possession, was Maine's opponent on the Council. See G. FEAVER, *supra* note 10, at 83, 99, 103. See also *infra* notes 71-72 and accompanying text. Although neither prevailed in the debate over codification of existing Indian law, Perry, from his new post at the India Office in London, favored a political solution that gave native law commissioners license to shape land and commercial law, while Maine was for a written settlement of traditional legal rules. Maine feared that Indian lawgivers would impose Western ideas too willingly. As he wrote his friend Grant Duff, Gladstone's new Under-Secretary for India, "I am greatly afraid that the law commissioners have formed a radically false notion of the India of the present day. I admit . . . there is much to countenance an impression that India is a field for the application of a diluted Benthamism." G. FEAVER, *supra* note 10, at 102-03.

Maine's aim, like that of his successor and former student Sir James Fitzjames Stephen, was "to combine the legal anthropologist's awareness of the needs of local diversification with the organization of law into general categories of simplified rules." *Id.* at 101. Interestingly, John Stuart Mill wrote to congratulate Maine on the first piece of Indian traditionalist legislation, the Punjab Rent Act of 1868, as stemming the tide towards the supremacy of contract and landlordism on the English model. *Id.* at 97-98. But when *Ancient Law* was written, these events lay in the future.

by individual owners.<sup>60</sup>

Maine also criticizes the view of Rousseau that the sudden appearance of a full-blown system of property law is due to the assent of individuals to a social compact. So to interpret the acceptance of law by the governed, we must mistakenly assume that ancient societies were otherwise prepared to respect the acts and motives of individuals. According to Maine, we may not safely think of the social fabric as "some shifting sandbank in which the grains are Individual men, that according to the theory of Hobbes is hardened into the social rock by the wholesome discipline of force."<sup>61</sup>

After dismissing social compact theories, Maine contemplates the historical puzzle of how the individual emerged as a legal unit. He assembles the facts then known about the history of collective landholding in India and the early Teutonic and Slavic equivalents of the village-community. In the East the village-community never took on a feudal structure as it did in the medieval West. All village-communities, however, were agnatic ownership units—extended and artificial families that alone were capable of owning real property. This origin makes intelligible the gradual and disparate emergence of individual property rights. Maine shows that a gradual dissolution of village-communities accounts for the separation of the law of personalty from the law of realty. As common ownership comes into conflict with the free circulation of goods, it occurs to many early societies that property can be classified according to kind.<sup>62</sup> Land, the more dignified and older possession, is subject to legal rules of transfer that reflect the receding collective form of ownership. Because personalty is subordinate to other forms of property rights, it is freed from the "fetters" which antiquity had placed on other owned things.

Maine urges that "by a gradual course of innovation the plasticity of the less dignified class of valuable objects is communicated to the classes which stand conventionally higher."<sup>63</sup> In Roman law this gradual separation and reunion within the law of property, like the subdivision of a cell and reunion of the zygotes, is recognizable in the distinction between *res Mancipi* and *res nec Mancipi*.<sup>64</sup> The former class of

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60. Blackstone and our property courses, with a different emphasis, attempt to supply a genesis of sorts by presenting property rights in the order of their conceptual complexity as if their structure had also grown gradually more complex. See *supra* note 57 and accompanying text.

61. H. MAINE, *supra* note 11, at 151-52.

62. *Id.* at 160.

63. *Id.*

64. See, e.g., H.F. JOLOWICZ & B. NICHOLAS, *supra* note 56, at 137-39.

things in Roman law consisted primarily of land and things closely associated with the use of land, such as slaves, oxen, horses, and agricultural equipment. The latter class was made up of other tangible things, all belonging to the class of movables. Maine stresses the parallel but independent development of common law rights in real and personal property. Real property law in England clung to the feudal concept of seisin, which exalted the ritual of freehold transfers. Personalty developed less fettered forms of transfer because the interest of the law in such property was not as ancient.<sup>65</sup>

The last pages of *The Early Law of Property* move on to another puzzle about property, the apparent replication in feudal tenures of the Roman distinction between civil and equitable ownership of land. German legal historians among Maine's contemporaries believed that a similar bifurcation of ownership in pre-Roman Teutonic law anticipated the Roman forms of ownership, which must be rationally grounded because they were Roman. According to the German school, the medieval *Leges Barbarorum* transformed this distinction into the dual proprietorship of the feudal lord of the fief and his tenant. Maine argues that the line of descent was more humble. In the late Roman imperial period, the Roman state pensioned off its adjutant legions with grants of *emphyteusis*, a qualified proprietorship in border lands conditioned on a duty of military service. Barbarian monarchs, familiar with this arrangement through the *emphyteuta* of their own subjects who were former Roman soldiers, simply copied it. Thus, the feudal companions of the sovereign took their place in a tradition established for the regulation of Rome's second-class citizens.<sup>66</sup>

The uncomfortable fit of *The Early History of Property* into either of the historical theses usually believed to be the only burdens of *Ancient Law*—the movement from status to contract and the sequence of legal epochs based successively on codification, legal fictions, equity, and legislation—is a clue to Maine's theoretical purpose. It has already been suggested that the chapter bewilders expectation in part by offering neither a survey of Roman property law nor a historical account of the Roman and common law concepts of possession. Instead, it provides a historical critique of alleged philosophical foundations of the possessory rights of individuals—first those based on occupancy and prescription and then those based on the feudal separation of seignory and ten-

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65. H. MAINE, *supra* note 11, at 161-67.

66. *Id.* at 173-78.

ancy. Maine's attacks on the natural law view of the former, represented by Blackstone, and on the rationalist account of the latter, advanced by German scholars of the Roman law, are not digressions. Maine intends them to shed light on the legal concepts transmitted by Roman and other early legal systems to modern legal systems. His critique of modern legal phenomena, however, remains implicit. On most twentieth century readers it appears to be lost altogether. In the next section, a review of the use of *Ancient Law* by two of the most perceptive theorists of the generations after Maine will show that the implications were clear enough to alter decisively the appeal of legal positivism.

### III. MAINE'S INFLUENCE ON HOLMES AND GRAY

A precis of *Ancient Law* can give only a glimpse of the broad picture of law that Maine conveys and cannot at all reproduce Maine's celebration of the strength and grace, as well as the autonomy, of law as a system of human solutions to practical problems. He dwells on the paradoxes of legal growth and decay with an attention that overflows the bounds of enthusiasm for historical inquiry. There is a speculative undercurrent to the enterprise. It has already been noted that *Ancient Law* exercised almost from the year of its publication a great influence on political and sociological theory. It remains to be shown that, far from distracting attention from the philosophical project of the preceding generation of legal theorists, Maine's book did more than any other work of his time to refine and promote it. Moreover, Maine gave his followers a conceptual framework and the analytical tools with which to bring legal history to bear on the arguments of Bentham and Austin, the reigning legal positivists. Maine's influence on Oliver Wendell Holmes, Jr.'s *The Common Law* and on John Chipman Gray's *The Nature and Sources of the Common Law* was a branching theoretical contribution to the emergence of legal realism and more recent theories. Although Holmes and Gray reacted differently to what they learned from Maine, their evident kinship as legal thinkers is largely attributable to the developed portrait of legal phenomena in *Ancient Law*.

Since Holmes and Gray are sometimes grouped with the later American legal realist movement, a warning is perhaps in order. As theorists, neither resolutely embraced the radical tenets of the realists—skepticism about the obscurity of the notion of legal rules, skepticism about supposed restraints on judicial reasoning, or belief in the

acceptability of social engineering by official agencies whose powers are ostensibly limited to the task of interpreting legislation. Both Holmes and Gray, however, at times supplied arguments that could be marshalled in favor of these positions. These American theorists nevertheless share or seem to share with Maine the conviction that the facts support a less cynical understanding of the law.

#### A. *Holmes*

Holmes met Maine in London in the 1860's, and had breakfast with the elder scholar and his student Frederick Pollock. The three corresponded thereafter.<sup>67</sup> As a law student, Holmes had read *Ancient Law* more than once. He later confided to Harold Laski that Maine's work inspired the "philosophic passion" on which he acted in writing *The Common Law*.<sup>68</sup> Holmes's book bears the stamp of this model and was evidently intended to do for the common law what Maine had done for Roman law. Holmes's chapters on property, in particular, are closely akin to Maine's.

Although Maine questioned the analysis of possession in legal theories based on natural law, the social compact, and the Romanizing idealism of the German jurists, Holmes took as his adversary only the German doctrine. His chapter on "Possession" is an attack on the "Kantian or post-Kantian philosophy" in terms of which "most of the speculative jurists of Germany, from Savigny to Ihering," had accounted for the legal respect accorded possession.<sup>69</sup> How they explained the leap that Maine singled out as crucial, from transitory control of an object to the possessor's entitlement to legal protection, was important because, in their view and increasingly in the view of British and American lawyers, this first legal property right was basic to all others.

The philosophical doctrine that supported the German edifice derived, through Hegel, from Kant's *Rechtslehre*.<sup>70</sup> A philosophical solution of practical legal problems was not Kant's objective, but by the mid-nineteenth century had become part of the agenda of a philosophical school of jurists.<sup>71</sup> The Romanizing vogue, for which Maine was

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67. G. FEAVER, *supra* note 10, at 130-32.

68. 1 THE HOLMES-LASKI LETTERS 429 (M. Howe ed. 1953).

69. O.W. HOLMES, *supra* note 8, at 163.

70. See I. KANT, *METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE* (1797).

71. In Germany, Savigny and later Ihering, Bruno, Gans, and Windscheid renewed the interest of civilians in the Roman origins of the continental legal tradition. See W. FRIEDMANN, *LEGAL THEORY* 158-62 (1960) (Savigny's historical school). See also O.W. HOLMES, *supra* note 8, at 163-66. That tradition had taken over Justinian's *Institutes* in early medieval times and, in succes-

partly responsible, while not a serious threat to the common law tradition, made serious claims for the superiority of rules derived from Roman law. As the study of Roman law gained in popularity both on the continent and in common law countries, civilians began to read Roman law as philosophy and as a cynosure of reform. Roman precedent also attracted common lawyers. They studied Roman law, they said, as an exercise to sharpen the legal intellect and as a source of comparative study. But the power of the continental approach to Roman law was not lost on common lawyers: Savigny, for example, was frequently cited by nineteenth century American legal scholars. Property law, the primary focus of the German philosophical Romanists, had also become an obsession in England and America.<sup>72</sup>

Holmes does not describe the scope of the Romanizing threat to the common law, but a near relative of the new German scholasticism was already present in the formalism of American law later openly denounced by Holmes and dismantled by the legal realists.<sup>73</sup> Holmes takes property law as the most telling example of the incompatibility of the post-Kantian theory with the common law tradition.

Holmes's survey of English and American property law is openly an argument against the *Willenstheorie* of German jurists. According to the theory Holmes attributes to Kant's followers, the legal rights of a possessor necessarily arise, independently of any legal system, through the appropriation of a thing by a first possessor because that act of appropriation is an expression of the essence of the human being, free will.<sup>74</sup> This "internal juristic necessity"<sup>75</sup> not only grounds prop-

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sive waves of reform and reinterpretation, had radically adapted the Roman legal framework to accommodate local law. By 1800 traces of the original categories of Roman law were preserved in a vastly more complex whole that needed pruning. Zeal for reform took a speculative turn, seeking to justify simplification as a return to the *soi-disant* natural law embodied in Roman precedent. This theoretical strategy became more subtle under the influence of Kant and Hegel. See W. FRIEDMANN, *LEGAL THEORY* 106-38 (1960). Instead of attributing the authority of Roman concept to reason as revealed in the universal recognition of certain rules, the philosophical school of jurists subjected reason itself to a priori analysis, in the manner of Kant as revised by Hegel, with results that went beyond natural law as intuitive consensus to the necessity of somewhat less than intuitive basic legal norms.

72. See, e.g., J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 89-91 (1909) (Savigny's is one of two prevailing theories of law); *id.* at 278 (from 1803, when Savigny's *System des heutigen römischen Rechts* was published, through 1865, there appeared 120 books and articles on possession).

73. Touster, *Holmes A Hundred Years Ago: The Common Law and Legal Theory*, 10 *HOFSTRA L. REV.* 673, 685-86 (1982).

74. See I. KANT, *supra* note 68, at 366-67. Holmes's reading may not have been fair to Kant. Holmes characterizes the view of the philosophical jurists in this way: "Possession is to be pro-

erty rights generally, but also corroborates Roman law in admitting only owners and adverse claimants to have possession of what is in their custody. Bailees cannot be possessors because their possession, which can be challenged by bailors, is not entitled to absolute respect.<sup>76</sup>

Holmes's response is that "a far more developed, more rational, and mightier body of law than the Roman, gives no sanction to either premise or conclusion as held by Kant and his successors."<sup>77</sup> He demonstrates the early availability of possessory remedies to bailees at common law and the admissibility of title as a common law defense to a possessory action.<sup>78</sup> It is not unfair to characterize his treatment of property law in *The Common Law* as perfunctory and incomplete as a survey of the area. He does not consider such central topics in the common law of property as estates in land, title by accession, and the protections accorded the bona fide purchaser. Even within the narrow scope of common law possessory rights, Holmes has little to say that does not directly flesh out his counterexample to the Roman analysis of possession.

Thus far, the focus of Holmes's two chapters corresponds with that of Maine's single chapter on property. The coincidence shows more than that both writers sometimes subordinated historical inquiry to theoretical purposes. Maine's historical explanation of the double ownership of land in feudal systems counters the German jurists' argument that the Roman distinction between quiritarian and bonitarian ownership coincided with the equally longstanding Teutonic legal tradition that distinguished legal and equitable ownership. Holmes cites the difference between Roman and common law rules concerning possession to show that the conceptual basis of the Roman rules was not inevita-

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tected because a man by taking possession of an object has brought it within the sphere of his will [and] the will of any individual thus manifested is entitled to absolute respect from every other individual. . . ." O.W. HOLMES, *supra* note 8, at 163-64.

75. See Holmes, Book Review, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1879)), reprinted in 10 HOFSTRA L. REV. 709, 710 (1982).

76. Holmes himself was capable of reasoning from the inner logic of legal concepts. He defends the common law with the argument that legal duties are logically antecedent to rights because the nature of law is to constrain rather than to liberate; that since legal protection of possession excludes others from interfering with the object held, "it would seem that the intent which the law should require is an intent to exclude others," which may be limited to some others or all the world; and, hence, that the intent of the bailee is sufficient in principle to give him possession, even though his intent is not "absolute" in the Kantian sense. O.W. HOLMES, *supra* note 8, at 173-75.

77. *Id.* at 166.

78. *Id.* at 130-62, 166-67.

ble. Both Maine and Holmes resist a continental conception of law that made the "ideal in law . . . the *logical* integrity of the system as a system."<sup>79</sup>

What affirmative insight into law does Holmes or Maine offer in this regard? Notoriously, that "the life of the law has not been logic; it has been experience."<sup>80</sup> But is this not a merely negative lesson? Holmes can easily be cast as a skeptic, doubting theories of law and celebrating the amorphous wisdom of the common law tradition, with its Janus-faced reliance on precedent and readiness to emend and enlarge.<sup>81</sup> When he wrote *The Common Law*, however, Holmes was much closer to the issues of positivism and German idealism, and the influence of Maine propelled him towards a still recognizable alternative to these theories.

*The Common Law* has a deeper theoretical thrust than Holmes's declared concern with contemporary German opponents makes explicit. What was wrong with the gestalt of law as a self-validating expression of the individual human will was not just that it claimed inevitability for Roman law concepts, but also that it suppressed the role of evolutionary change in the law and completely discounted the fact-specific reasoning of law-making agencies. In his discussion of bailment, for example, Holmes is more than mildly pleased with the linkage between the facts of cattle keeping and the common law right of the bailee to recover bailed goods from third parties.<sup>82</sup> To defend a positivist dichotomy of law and morals (or metaethics), it would have been enough to write, as Holmes did, that this shows Roman rules about possession not to have been the only conceivable and workable ones. The relevance of the origin of the common law bailee's right and of other common law refinements<sup>83</sup> of the legal concept of possession is twofold. They not only show that a divergence of legal rules from the Roman model is possible, but also illustrate how such differences arise—through the response of law to its environment.

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79. Holmes, *supra* note 75, 10 HOFSTRA L. REV. at 710.

80. O.W. HOLMES, *supra* note 8, at 1.

81. See, e.g., H.L.A. HART, *Jhering's Heaven of Concepts*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 265, 267 (1983) ("Holmes was the spiritual godfather of a school of sceptical American jurists whose most extreme development was to be found in the loosely-knit group of writers known as the 'legal realists'. . .").

82. O.W. HOLMES, *supra* note 8, at 131-36.

83. See, e.g., *id.* at 140 (application of bailment concepts to royal detention of prisoner of war); *id.* at 143-54 (evolution of bailment rules applicable to the common callings and especially to common carriers).



In Holmes's book and in his later essays, this recognition, which builds on Maine's work, becomes both a framework of legal historiography and the keynote of an analysis of law. As historian, Holmes naturally believed that legal reasoning can sometimes import a sense of practical matters and of the wishes of society into the process of extending the law. He also came to hold that it *should* do so, and that an understanding of this process is crucial to an understanding of law. In a famous passage, Holmes called attention to a pervasive ambiguity in the notion of the law of a particular society. From one very limited point of view, he observed, the content of the law is merely what the bad man can get away with, i.e., the courses of action the law does not attempt to restrain.<sup>84</sup> This conception of the law need not be a static one; it can accommodate prediction of what the police and the courts will restrain under changed circumstances. It is nevertheless an impoverished conception of the law because it omits the aspect of the law that is present in the attitudes of the well-intentioned legal subjects and that is made explicit in the official reasoning of the law's interpreters. Although Holmes did not so label this difference of viewpoint, the "bad man's" view of law captures only an "external point of view" towards law—the point of view of an outside observer or of the recalcitrant legal subject who does not use the dictates of the legal system to determine what is legitimate within it. The richer or "internal point of view" belongs to those who enter into the spirit of the system, at least to the extent of accepting it as justifying or ruling out some courses of action.<sup>85</sup>

Holmes's comments on the bad man are an important extension of Maine's way of viewing the content of the law, but they concern a legal phenomenon that Maine was the first to study. Under the scrutiny of Maine and Holmes, the ironic contrast between the historical origin and the timeless cast of legal rules is not disturbing, as it was for Bentham. The contrast exposes the seemingly universal characteristic of law as susceptible of both the external and the internal points of view. The possibly bifocal vision of those who comply with the law is not peculiar to societies that recognize the judicial function. It is striking in those societies, however, because the law speaks for itself most elaborately through courts of law. Holmes's celebration of the common law was a forceful if inconclusive reflection on this aspect of the judicial

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84. O.W. HOLMES, *The Path of the Law*, *supra* note 6.

85. The distinction was first stated and given its current description in H.L.A. HART, *CONCEPT OF LAW* (1961). See *infra* notes 107-18 and accompanying text.

function. It left unanalyzed the paradoxes of a theory of law as separate from morality but nevertheless 'charged with self-justification.

Holmes considered *The Common Law* a "dead" work not long after its publication, its arguments were so generally accepted.<sup>86</sup> Maine's influence, however, continues to be felt elsewhere in Holmes's thought on the nature of law. One of Holmes's best statements of the evils of formalism encapsulates Maine's comparative discussion of legal fictions in *Ancient Law*.<sup>87</sup> The great, later essay, *The Path of the Law*,<sup>88</sup> might almost have been ghostwritten by Maine. Its celebration of incremental change as the best course of legal reform, its strong admonition that the history of law deserves study by practical lawyers, its objection to the confusion of moral and legal principle are all closely reminiscent of Maine's writings.<sup>89</sup> Maine's view of the judicial process seems to have taken root in Holmes's mental constitution.

## B. Gray

When Maine's apparently passing remarks on the merits of the German school of Roman law, natural law theory, social compact theory, and legal positivism are assembled, they remarkably anticipate the critique of early legal positivism for which John Chipman Gray has

86. Letter from O.W. Holmes to Joaquim Nabuco (Jan. 3, 1908), *quoted in Introduction to O.W. HOLMES*, *supra* note 8, at xi.

87. Holmes was only slightly extending Maine's analysis of reasoning from precedent when he wrote:

The form of continuity [in the law] has been kept up by reasoning purporting to reduce everything to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements.

The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views.

Holmes, *supra* note 75, at 234, 10 HOFSTRA L. REV. at 710. According to Holmes, "No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is." *Id.*

After describing the common law myth of the derivation of new legal rules from precedent, Maine says:

It is true that in the wealth of legal principle we are considerably poorer than several modern European nations. But they, it must be remembered, took the Roman jurisprudence for the foundation of their civil institutions. They built the *debris* of the Roman law into their walls; but in the materials and workmanship of the residue there is not much which distinguishes it favourably from the structure erected by the English judicature.

H. MAINE, *supra* note 11, at 24.

88. O.W. HOLMES, *The Path of the Law*, *supra* note 6.

89. See, e.g., H. MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 342-400 (1875).

deservedly won principal credit.<sup>90</sup> Indeed, Gray's accomplishment owed much to a careful digestion of *Ancient Law* and Maine's later lectures.

For Maine, analytical jurisprudence, the creation of Bentham and Austin, was the dominant theory of law. Its first tenet is the basis of all forms of legal positivism, that whether a norm is a law is a matter of fact distinct from whether it should be the law.<sup>91</sup> Austin supplied a general factual criterion of legality in the *chef d'oeuvre* of positivism, *The Province of Jurisprudence Determined*.<sup>92</sup> It is, briefly, that laws are general commands of a sovereign, backed by threats of punishment for noncompliance. Maine, as we have seen, argued in the first pages of *Ancient Law* that Austin's criterion does not fit societies that live by customary law.<sup>93</sup> A command is general in the required sense if it enjoins or forbids all acts of some description. A command issues from a sovereign, who may be an individual or a body of individuals such as a legislature, if the bulk of a given society is in a habit of obedience or submission to the lawgiver, and the lawgiver is not in turn in a habit of obedience to any superior.<sup>94</sup> Not until legal advances have taken place do the isolated judgments of legal authorities command that general acceptance and acquire the generality assumed in Austin's analysis.<sup>95</sup>

90. See H.L.A. HART, *supra* note 85, at 121.

91. See J. BENTHAM, A FRAGMENT ON GOVERNMENT 7 n.1 (W. Harrison ed. 1948).

Bentham's *Fragment on Government* and INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), the two works of this author most widely known in the nineteenth century, contain no very clear analysis of the criterion by which the factual question of legality should be decided.

92. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1832 (H.L.A. Hart ed. 1954). But see J. BENTHAM, OF LAWS IN GENERAL (1782); H.L.A. Hart, *Bentham's Of Laws In General*, in ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 105, 108 (1982) (Bentham's recently discovered work inspired Austin's *Province*). Maine's first reference to Bentham's and Austin's positivism in *Ancient Law* accurately restates Austin's criterion of legality, and cautions the English student that while

[t]he results of this separation of ingredients [sovereignty, commands, generality, sanctions] tally exactly with the facts of mature [legal systems], the notion of law entertained by the generality is even now not quite in conformity with this dissection; and . . . the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham [sic] determined.

H. MAINE, *supra* note 18, at 4-5.

93. But see Pollock's notes, in H. MAINE, *supra* note 18, at 20-22.

94. J. AUSTIN, *supra* note 92, at 193-94.

95. Gray's view of the nature of law can be traced to Maine's thesis about the priority of isolated judgments to customary law, expressed in the passage from which the statements at *supra* note 92 are drawn, and to Maine's observation there and elsewhere that Bentham and Austin appear to define law ad hoc, consistently with mature legal systems, but inconsistently with many known legal systems of the past and present. J.C. GRAY, *supra* note 72, at 297.

As Gray himself makes plain, this observation had a decisive influence on his dissent from positivism.<sup>96</sup> Gray begins with the difficulty of fitting judges into the framework of persons obedient to the commands of a sovereign.<sup>97</sup> The law, he urges, is not an aggregate of individual laws on the model of statutes but rather a system of rules applied by the courts. To reduce that system to an aggregate of separate laws is not justifiable.<sup>98</sup> The inescapable conclusion, in Gray's view, is that "[r]ules of conduct laid down and applied by the courts of a country are coterminous with the Law of that country, and as the first change, so does the latter along with them."<sup>99</sup> Gray, of course, goes much further than Maine: he also concludes that the obedience or submission of the population does not matter.<sup>100</sup> He does not believe, apparently, that there is no abiding system of law, or that every decision of a court, by adding to the body of law, changes it.<sup>101</sup> Yet Gray regards the distinction between finding (pre-existing) law and making (new) law as feigned in cases of first impression.<sup>102</sup> It is only a short step to questioning the distinction between cases of first impression and other cases, as both Maine and Holmes did, though without embracing the "rule skepticism" of later American legal realism.<sup>103</sup>

Concentration on the role of Maine's law-making agencies, legal fictions and equity, and on correlative perspectives of legal interpretation, led Holmes and Gray to stress nonlegislative sources of law and,

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96. J.C. GRAY, *supra* note 72, at 87, 91.

97. *Id.* at 87.

98. *Id.* at 88.

99. *Id.* at 102.

100. *Id.* at 105-07.

101. This view, held by at least some of the American legal realists in the generation after Gray, is best described, in H.L.A. Hart's phrase, as "rule scepticism." Gray anticipates rule scepticism. H.L.A. HART, *supra* note 85, at 121.

102. J.C. GRAY, *supra* note 72, at 96-102.

103. On the flimsiness of the distinction between "finding" and "making" law, Gray closely follows Maine. Explaining the breadth of his usage of the term "legal fiction," Maine describes the myth of "finding" the law:

With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts comes before an English Court for adjudication . . . [i]t is absolutely taken for granted that there is somewhere a rule of known law which will cover the facts of the dispute. . . . Yet the moment the judgment has been rendered and reported, . . . [w]e . . . admit that the new decision *has* modified the law. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same. . . .

H. MAINE, *supra* note 18, at 18-19.

Gray reached the same conclusion. See J.C. GRAY, *supra* note 72, at 228-32.

consequently, to reject some features of the positivism of Bentham and Austin. It also created paradoxes. If law and morality should not be confused, as Maine and Holmes strongly believed, on what basis do we appraise judicial decisions that change or extend the law? Holmes evidently thought that the standards of appraisal are a proper part of legal reasoning, though they reflect an "experience" that is "outside" the law.<sup>104</sup> If judges add to the body of the law in deciding novel cases, does not Gray's characterization of the law as what judges decide fail to select the abiding unity of particular legal systems? That the canonical sources that judges rely on in reaching novel decisions can be enumerated with some measure of completeness does not make the equation of "the Law" with an ever-changing body of decisions any more satisfying as a definition.<sup>105</sup> Indeed, the openness of legal systems to the influence of outside forces and the changeability of legal systems impugn the entire project of defining "law" in the manner contemplated by the Analytical Jurists. Neither Holmes nor Gray commented explicitly on this overarching difficulty. The kinship of American legal realism to the work of these two forerunners shows itself especially in the weakened condition of the definitional task to which Holmes and Gray continued to pay apparent respect.

If the positivists' confidence in the existence of a factual criterion of legality waned temporarily under Maine's influence, in what way did the urge to theorize about law in general retain its force for Holmes and Gray? Why are they still to be ranked with legal theorists? Two answers to these questions are possible, although only the first seems to have much currency. It is that, by their destruction of key elements of Austinian positivism, Holmes and Gray united themselves with the theoretical tradition as dependent skeptics, theorists by virtue of having made *il gran rifiuto*.<sup>106</sup> But neither writer accepted the radical course of denying that the theoretical enterprise has a point or that the integrity of legal systems can be discerned. What they continued to think worthwhile as matters for commentary at a very general level were the shared elements of legal systems by which their historical continuity and autonomy are recognizable. Maine had powerfully demonstrated that these elements are in some sense of the essence of law.

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104. See *supra* note 87 and accompanying text.

105. An enumeration of the sources is ostensibly Gray's response to the predicament in which his theory leaves the project of defining "law." See J.C. GRAY, *supra* note 72, chs. VIII-IX.

106. See, e.g., White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971).

#### IV. THE CONTINUED FORCE OF MAINE'S WORK: THE DISSENT FROM POSITIVISM

Maine's dissent from classical legal positivism supplied Holmes and Gray with both a general orientation and specific instruments for the dissection of that legal theory. But Maine's criticism of the form of positivism he knew has also found a place, whether through his own writings or those of the realists, in a resurgent positivism. Recent positivists place much greater emphasis than did Bentham or Austin on the role of the judicial system both in declaring and in making law.<sup>107</sup> They accordingly pay much closer attention to the attitudes of judges and other officials of the legal system in legal reasoning.<sup>108</sup> The distinctive character of law in force is no longer thought to lie in the power or threat of a sovereign to punish noncompliance.<sup>109</sup> The ultimacy of a definite sovereign is not considered essential to the individuation of a legal system.<sup>110</sup> Furthermore, variations in the extent to which different societies acknowledge or habitually obey the officials of their legal systems receive explicit recognition and the "pathology" of changing or emerging legal systems is a topic to which the defenders of positivism, wary of counterexamples, devote their explanatory efforts.<sup>111</sup>

To show more fully how recent legal theory echoes Maine's work, a hazardous survey of current positions and debates would not prove worthwhile. The present state of jurisprudence in America and England does not lend itself to summary.<sup>112</sup> This much, however, is perhaps beyond controversy: positivism, in one or another revised form, commands the intuitive assent of a very large fraction of those who give any thought to the broader puzzles of the law, and recent efforts to capture the attractions of positivism have been enormously varied. Given that variety, even an attempt to delineate a generic positivism would be doomed to failure. It may be excusable, instead, to take the work of a central figure as, if not representative, at least suggestive of what current theorists take as their starting point.

Some of the attractions of positivism and some of the arguments

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107. See, e.g., H.L.A. HART, *supra* note 85, at 77-96 (distinction between primary and secondary rules, which gives the judiciary a special role in positivism).

108. *Id.* at 114.

109. *Id.* at 27-35.

110. *Id.* at 49-76.

111. *Id.* at 114-20.

112. See McCormick, *Contemporary Legal Philosophy: The Rediscovery of Practical Reason*, 10 J. L. & Soc'y 1 (1983).

for a positivist orientation have been most forcefully charted in H.L.A. Hart's landmark of revision, *The Concept of Law*.<sup>113</sup> The impact of the book is felt twenty-two years after its appearance. Hart has probably done more than anyone else to revitalize interest in an ahistorical criterion of legality akin to Bentham's and Austin's.<sup>114</sup> He did this by reformulating many of the issues that blur together in the seemingly persistent question, "What is law?" If the question makes sense, as Hart argues that it does, it requires an ahistorical answer. Some desiderata of an overall definitional theory of law seem clear. Such a theory should show: that legal systems are composed, in a sense analyzed by the theory, of rules or other more inclusive parts; that the manner in which legal systems are held together, and differentiated from each other, is the same for all legal systems worth considering; and that the compositional principle distinguishes law from other normative phenomena.

If a positivist theory is one that offers a factual criterion of legality, these desiderata seem to favor positivism. A factual distinction between law and all else must satisfy the last of them. A factual criterion, because it is not itself normative, that is, because it does not tell us what ought to be *the* contents of *any* legal system, can also accommodate the differentiation of legal systems, and yet find shared features. The remaining desideratum poses more of a problem, even for positivism. What holds individual legal systems together obviously eluded the Analytical Jurists, as everyone now acknowledges. A part of their analysis nevertheless seems still to have been correct. If mere facts about the world determine the contents of different legal systems, the relevant facts must at least include those we mean when we say that the communities of people over whom the legal systems claim authority habitually obey, comply with, and recognize these legal systems as legitimate. The fact of compliance, for brevity, must be the focus of this phase of a positivist account of law.

Hart's account of the factual criterion of legality contrasts the manner in which ordinary subjects comply with and respect laws, with the manner in which officials of a legal system reason about and administer the same laws. The contrast rests on a further distinction between primary rules of a legal system, which require human beings to do or abstain from certain actions, and secondary rules, which specify

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113. H.L.A. HART, *supra* note 85. See Hacker, *Hart's Philosophy of Law*, in *LAW, MORALITY AND SOCIETY* 1-4 (P.M.S. Hacker & J. Raz eds. 1977).

114. See *supra* note 91 and accompanying text.

how "the primary rules may be conclusively ascertained, eliminated, varied, and the fact of their violation conclusively determined."<sup>115</sup> Among the secondary rules of a legal system, on Hart's theory, there must be a rule of recognition, a rule that determines which rules belong to the system. The relationship among the rules of a system, however, does not consist merely in their being selected for inclusion by the rule of recognition. It also depends necessarily on the fact that at least some members of the community whose legal system it is take the "internal point of view" with respect to the included rules: they not only "record and predict behavior conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behavior."<sup>116</sup> Merely to note that a norm is in fact part of a given legal system is to note the "external" fact of its inclusion in the system. Judges and other officials must also take the internal point of view in accepting secondary rules as critical common standards of official behavior.<sup>117</sup> Hart would dismiss as unimportant and perhaps pathological those legal systems that lack these characteristics: the union of primary and secondary rules, and officials who take the internal point of view towards the rules of the system.<sup>118</sup>

It has already been noted that Maine believed his investigations to be damaging to the role Austin attributed to the legal sovereign.<sup>119</sup> Recent positivists generally dispense with the sovereign.<sup>120</sup> Maine, however, seems also to have improved our understanding of the fact of compliance. He was first to notice what sounds very much like the internal point of view towards laws: "there is more in actual Sovereignty than force, and more in laws that are the commands of sovereigns than can be got out of them by considering them as regulated force."<sup>121</sup> Reacting against what he thought were Austin's oversimplifications, Maine attended closely to the role of custom in judicial reasoning. If in

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115. H.L.A. HART, *supra* note 85, at 78-79, 92.

116. *Id.* at 96.

117. *Id.* at 113.

118. Hart's most important critics, Ronald Dworkin and Joseph Raz, object to some of the details of the picture summarized here. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-45 (1977); J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1970). See also T. MORAWETZ, *THE PHILOSOPHY OF LAW: AN INTRODUCTION* 28-38 (1970). Their objections accept that the difference between the compliance required of officialdom and that required of other people, and the internal point of view, are important elements for a workable theory of law.

119. See *supra* note 94 and accompanying text.

120. Hart's arguments for that result are the most elaborate. H.L.A. HART, *supra* note 85, at 49-76.

121. H. MAINE, *supra* note 89, at 361.



declaring the law judges draw on usages of the community, they evidently do not always or often do so because they suppose the king or the legislature wishes it. Maine comments that Austin's ahistorical account, in this respect, "assumes Courts of Justice act in a way and from motives of which they are quite unconscious."<sup>122</sup> The extensive survey in *Ancient Law* of legal fictions (in Maine's sense), of equity, and of the constant pressure of archaic social institutions like the village-community, underscored for Holmes and Gray the errant path of the law in which incremental change results from the efforts of officials to purify and adjust the law to its underlying purposes and the needs of the community. While Maine did not single out or describe the internal point of view, much of *Ancient Law* is a focused history of its varied guises.

As for the special role of officials in legal systems, Maine, of course, shaped his account of the epochs of customary and written law to counterbalance the overemphasis on executive power in Austin's theory. This threw the interpretative task of judges and other legal authorities into high relief, as Maine's influence on Gray indicates. Holmes's indebted account of the continuity of the law brought together lessons scattered throughout *Ancient Law*, but closely assembled in Maine's chapter on legal fictions.

Contemporary positivists offer an account of law that resembles Austin's at least structurally. They believe that the complex pattern of compliance with the law of any distinct legal system is, in principle, an ascertainable external fact that determines whether any putative rule of law is in fact a law of the system in question. The ultimate rule may be so complex as to resist formulation, but its existence is the crucial fact that elevates rule-governed behavior to lawlikeness.

Maine had all the analytical ingredients needed for reaching a similar conclusion, but he never singled the problem out for consideration or put the ingredients together. It appears that he did not think the search for a criterion of legality worthwhile. The qualitative differences among the ways in which different societies comply with their own laws seemed to Maine too great to be usefully assimilated in a single analytical account of legality.<sup>123</sup> Whether he was insensitive to a valuable definitional search or reasonably more devoted to saving the phenomena that have variously prompted definitional theories is perhaps not an

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122. *Id.* at 364.

123. H. MAINE, *supra* note 18, at 377-85.

important issue. What does matter is that our understanding of the general groupings of facts that provide the test of both definitional and more modest analyses of law owes more to Maine than to any other single scholar. Maine's commitment to theoretically sensitive observation and his realization of that commitment are his most important legacy.

## V. CONCLUSION

The peculiar combination of historical and theoretical themes in *Ancient Law* changed the course of legal theory. Maine inaugurated what should be recognized as an alternative approach to the problems about the nature of law to which positivism was and remains a prevailing solution, an alternative that was expanded in the work of Oliver Wendell Holmes, Jr., and John Chipman Gray. Maine also developed analytical tools that contemporary positivists find useful in their own inquiries. Despite the current style in legal theory, which gives little weight to historical study of the law, the time for learning from the legal past, and from Henry Maine, its great explorer, is perhaps not over.