

Law and Modern Social Thought (LAW 214.2)

Study Guide: Henry Maine

Maine's *Ancient Law* was a work of enormous influence in the period after its publication in 1861. For his English reading audience, it proved the most popular and widely read of the several attempts in the nineteenth century to construct an "historical jurisprudence". One way to characterize Maine's jurisprudence is to see it as a variation on the more general nineteenth-century concern to conceptualize society in terms of broad patterns of historical development. Whereas Marx (and Comte and Spencer) develop a "science of society" that provide a theory of social evolution, Maine develops a "legal science" that provides a theory of legal evolution.

1. From Ancient to Modern. Maine's most famous claim was the thesis that the legal manifestation of the development of progressive societies could be best understood as a shift "from status to contract" (Ch. 5, last paragraph, last sentence). The influence of Maine's *Ancient Law* in his own lifetime seems in part owing to the brevity of this formula, and to the cultural reassurance it seemed to provide about the "advanced" character of European society.

Be sure to read chapter 5 with special care so as to obtain a clear idea of Maine's meaning in the formula "status to contract". (Much of the detailed analysis of legal history set out in chapters 6-10 can best be understood in terms of this generalized summary of legal development.) In considering the argument of chapter 5, you are likely to encounter little trouble in following what Maine understands by a society involving complex contractual relations. Much less familiar, though, is the social world he describes as dominated by "status" conditions. Here you need to follow his account of "the Patriarchal Theory" of social organization (Ch. 5, paragraph 6, ff).

2. Legal History in Ancient Law. Prior to unveiling his summary characterization of societal development in chapter 5, Maine develops (in chapters 1-4) a more technical apparatus for dealing with familiar elements of legal change that seem to have obtained in many societies. He offers a general account of the social conditions that led to the enactment of ancient codes (chap. 1), and how these ancient codes affected later legal development (chap.2). And he offers a comparative analysis of the major mechanisms of legal change: fictions, equity and legislation (chap.2). Thereafter, he pursues the unusual fate and impact of "equity" in Roman law (chapters 4-5).

Again, you should read these opening chapters with care, and obtain at least a rough sense of how Maine is seeking to connect social change and legal change. You may find it helpful to think of chapters 1 and 2 as an attempt to formulate the general processes of legal development.

In chapters 6-10, Maine pursues his legal history and his general thesis concerning social progress by examining specific areas of law (testaments, wills, contracts, etc.). I have assigned virtually none of this material, chiefly because the material quickly gets very technical and intricate. Still, it is in these chapters that Maine seeks to substantiate how in fact the Roman legal world managed its progressive development away from status. For those of you who would like to engage with this more detailed legal history (and I encourage you to do so), I can recommend reading the discussion on the early history of wills (chapter 6, paragraphs 1-15) or the treatment of the early history of property (chapter 8, paragraphs 11-21).

3. Historical Jurisprudence. One of Maine's favorite devices for clarifying his methods is to contrast his own historical or comparative jurisprudence with the rival legal sciences of others. Rousseau and "state of nature" theory is identified as the "great antagonist" of the historical method (chapter 4, paragraph 10). But, Maine also identifies other antagonists, such as the English jurists, Bentham and Austin (see chaps 4, 5, 9). For our purposes here, you can associate the jurisprudence of Bentham and Austin with the approach to law adopted by Baccarat: purposively -conceived and designed legislation is taken as a model for law in general.

You will find it especially helpful to try and recover why Maine thinks his historical researches serve to render so suspect what earlier theorists tended to treat as the essential attributes of man, law and society. You may find it useful to consider the fairly straightforward example Maine cites in criticism of Montesquieu at chapter 9, paragraph 4. In general, though, you will need to reflect on the more extensive treatment of Rousseau and his school at chapter 4, paragraphs 9-12.

4. Race and Language. One of the important intellectual sources for *Ancient Law* was the developing field of historical and comparative philology. (Some of this intellectual debt is clarified by Maine's later lectures on "Village Communities" and "The Effects of Observation of India"; pp.431-6, 439-43.) It is philology that furnishes Maine with his grouping of the "Indo-European" or "Aryan" communities, and which encourages him to treat the current society of India as furnishing a model for the general form of the "ancient" Aryan society. I will try to clarify some of these points in class. Still, in reading these lectures you will find it useful to recall the basic historical thesis of *Ancient Law*. According to Maine, how do we go about identifying India as a social type?, how do we go about comparing India and England?, what does Maine mean in suggesting that in nineteenth century India "the Past is the Present" (p.431)?

We will devote two seminar meetings to Maine's jurisprudence (September 16 and 23). At the first meeting, we will concentrate on the more methodological concerns of *Ancient Law*: his effort to create an "historical" or "comparative" form of jurisprudence; the way he distinguished his approach from the methods of rival theorists; his reasons for thinking that the interpretation of legal institutions always required historical perspectives; etc.

At the second meeting, we will discuss Maine's understanding of modern society in terms of the increasing range of social relations which were ordered through the mechanism of contract. His treatment of modern society in these terms will be supplemented by the assigned, photocopied material from *Herbert Spencer on Social Evolution* (a brief selection from Spencer's *Principles of Sociology*) and Sidgwick's *Elements of Politics*. In anticipation of the seminar discussion on September 16, please prepare a brief written answer (about 2 pages in length) to either of the following questions:

1) Why did Maine regard "the philosophy founded on the hypothesis of a state of nature" as "the great antagonist of the Historical Method" (*Ancient Law*, chapter 4, paragraph 10)? Why did he believe that an understanding of ancient society would serve to undermine this rival theory of law and morals? (You might find it useful to consider the preliminary comments to chapter 5, paragraphs 1-23.)

2) What were Maine's reasons for claiming that all legal practices – even modern legal practices - required historical interpretation? (In reflecting on this question, you

might find it useful to consider a passage in chapter 7, paragraph 9, of *Ancient Law* (which I did not assign), where Maine observes that “Nothing in law springs entirely from a sense of convenience. There are always certain ideas existing antecedently on which the sense of convenience works ...”.)