THE ORIGIN, ESSENCE AND DEVELOPMENT OF SIR HENRY SUMNER MAINE'S THEORY OF THE ORIGINAL VILLAGE COMMUNITY

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THE ORIGIN, ESSENCE AND DEVELOPMENT OF SIR HENRY SUMNER MAINE'S THEORY OF THE ORIGINAL VILLAGE COMMUNITY

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I. INTRODUCTION

The problem, the nature of earliest land settlement, in the form of the village community, occupied a large part in the theories of several generations of social thinkers. During a period from about 1850 to 1900, the theory of the village community as the form of earliest land settlement came to the fore and found general acceptance, and then declined in the face of a multitude of destructive and reinterpretive factors.

We can first ask two questions: (1) Why does such a problem as early land settlement concern social thinkers? (2) Why did the specific theory of the village community recommend itself to the several generations of scholars that accepted it? In answering the first question, we can well turn to Barnes and Becker, who trace sociology from lore to science.[1] They find four problems that present themselves to social thinkers. What was the earliest condition of man? What was the general trend of the process of social development? By what stages has the human race arrived at the present societal organization? Are there really cycles in social affairs, which will demonstrate that history repeats itself?[2] These are the very questions to which the advocates of the village community thought they had found some answers.

To the historians the problems connected with the earliest forms of land settlement, and the original relationships of the people within the group are important. As Ashley says in his

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1. H. Becker and H.E. Barnes, Social Thought from Lore to Science (Boston, 1938).
2. Ibid., p. 743.

introduction to F. de Coulanges' work, "Neither for the government of the parish nor for the government of the nation is it possible to construct an historical theory which does not rest, consciously or unconsciously, on some view as to the position of the body of the people."[1]

We are apt to lose sight of this fact here in America. The growth and development of rights and duties stems largely from a relatively recent date, when their general nature was fixed and defined. Americans were able, by a priori methods, to speculate on social origins and then create a society conforming with this philosophic speculation, within limits. In Europe, opposed to the speculative tendencies, there appear historical and traditional tendencies. One manifestation of this opposition was the struggle between the a priori and rational enlightenment culminating in the French Revolution, and the historical and traditional reaction of Romanticism. As will be pointed out more specifically later, it is with the last element - Romanticism - that the village community theory begins its growth.

The second question, why the village community theory recommended itself to several generations of scholars, will be answered in the body of this paper. It forms one of the main problems which will be answered in one of two ways. One, to trace the development of the village community theory and its relation to the total social picture, and two, to center that development around the person of Sir Henry Sumner Maine.

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1. Fustel de Coulanges, The Origin of Property in Land (London, 1892., 2nd ed.), p. vii.

Maine occupies a central position. A generation or two of scholars worked with aspects of the theory before him and a generation or two afterwards, and essential elements of the theory took shape in his hands.

The problem then is to trace the factors and influences on the one hand social, and on the other scientific (not that they are not related) leading him to his theories. Next we must see what is original with Maine and trace his influence upon others and on the village community theory. Finally we can see what sort of a jumping-off-place the theory provided for subsequent scholars, the nature of the acceptance, modification and reaction, and the tenor of the theoretical speculation and empiric investigation.

It is inductively that this paper proceeds. The analysis of one man - Maine - leads, in its logical implications, to the wider field of the sociological research of the period, and to the still wider field of the whole tenor of thought in the West during this era.

II. SOCIAL FACTORS IN THE ACCEPTANCE OF THE VILLAGE COMMUNITY THEORY

At this point it is well to look at some of the factors leading to the acceptance of the village community theory by many scholars in such fields as history, sociology, anthropology and jurisprudence, economics and political science.

Briefly let us look at the early form of the Mark theory[1] as for instance developed by Justus Moser and Jakob Grimm.

> The acceptance of the Mark doctrine . . . was undoubtedly largely due to the circumstance that it fitted into the general scheme of early political developments . . . The fundamental ideas of that scheme were in brief these: That the German people is to be looked upon as originally composed of freemen, enjoying a substantial equality, governing themselves in mass meetings, and administering justice in popular assemblies; that the rulers were at first simply magistrates acting with a delegated power, and that it was only in Merovingian and Carolingian periods that grants of conquered land to favored individuals, on the one side, and a more or less compulsory subjection of the great body of freemen to their more powerful neighbors, on the other, led to a growth of land lordship and feudalism.[2]

This was the political aspect of the problem and the proof of it was closely dependent on proving that certain legal and economic conditions had existed; chiefly, that land ownership was communal and that agricultural practices were largely communally practiced or regulated. Accepting the above factors seemed to provide the best explanation for such institutions as the manor, and still historically justified, such reforms as the peasant emancipation movement.

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1. The Mark theory deals with certain types of village communities, and the so-called Mark associations, thought to be typical of areas settled by Teutonic tribes. The Mark concept expanded and modified, became the basis of the village community theory. The relation of the village community to the Mark association, and its relation to individualistic and communal viewpoints concerning early land holding is made clear in Pitirim Sorokin, A Systematic Source Book in Rural Sociology (Minneapolis, 1930) Chap. IX.

2. William J. Ashley, "Early Teutonic Society", International Quarterly, VIII (1904), p. 241.

It is significant that Germany, the nation to make the strongest reaction to the French Revolution and the rational Napoleonic era, in the form of Romanticism, was the country to develop a strong historical school, which justified this romantic national movement with such historical theories as the one just given concerning the Mark theory. Not only did this theory show the uniqueness of the German nation and the folk character of its government, it justified uniqueness. For "instead of being traced to the deliberate will of the legislator, its (law) formation was assigned to the gradual working of custom."[1] Or, as Savigny said, "the law of a nation was as dependent on its history as its language or religion."[2] This type of thinking was an obvious reaction - whether valid in itself or not - to the Napoleonic endeavors to modify existing national laws and institutions, and to the generally anti-historical thought of the Enlightenment.

The nineteenth century was undoubtedly one in which natural science came to a great flowering, and it was to influence almost all other fields. The idea of growth and development and logical inter-relation of elements in time are certainly fundamental concepts for history; when natural science took this group of ideas over and crystallized them in the form of evolutionary doctrines, the ideas came back to history, sociology and anthropology in a rather rigid form, which profoundly affected the course of work for some time in these fields.

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1. William S. Holdsworth, The Historians of Anglo-American Law (N.Y., 1928), p. 67-8.
2. Ibid., p. 67.

III. THE FORERUNNERS OF MAINE

Maine was not the first to accept the village community theory. Many others had worked to develop the village community theory before Maine, and he relies on them for much of his theory and evidence. Thus, before entering into a detailed study of Maine and his theories on the village community, a look at his forerunners seems in order. Maine's forerunners can be separated into two types: those that were important to Maine in regard to theory, and those that were important to him in regard to method (One man, however, may represent both types). I have chosen to deal with the method aspect later, when developing the analysis of Maine's method. I recognize that method is closely bound up with theory and, in fact, I shall attempt to show it is in the case of Maine; but dealing with method historically is of minor importance in this paper and it is sufficient to illuminate the methods used, merely pointing to a few historical antecedents. However, in the case of the theory itself, the historical treatment is of importance. For one object is to trace the development of the theory sufficiently to provide an adequate explanation for Maine's acceptance and expansion of the village community theory.

The theory which Maine came to accept originated from two lines of development, each of which had a somewhat different approach. The two lines were the English and the continental - largely German. They were never completely separate and they inter-reacted, but there was a definite trend to each.

The purpose, then, in addition to tracing the forerunners of Maine, is to give the reader the general tenor of the discussion concerning the village community during a large part of the

nineteenth century. I have made no attempt to be exhaustive, as there are several essays that trace the history of this idea in one manner or another.[1] But I have included more material than is, perhaps, essential to my first purpose in the hopes of providing a context for my primary aim in this section: tracing the sources of Maine's ideas on the village community. Thus the reader may grasp briefly the nature of the arguments of specific authors. Included are those alone who stand in direct relationship.

We must take up the English and German schools to trace the development of the village community theory up to Maine.

We can assume (and we often have actual references by Maine) that Maine had read or at least received the ideas about the village community that were developed in England.

We start with Kemble in 1849, who, standing under the influence of the German school, (Moser and Grimm, etc.) used the idea of the large Mark association as one basis for political development. Palgrave, in 1869, in his History of the Anglo-Saxons, plays some part in furthering the village community idea; but it is Stubbs in Select Charters (1870) and in Constitutional History (1874) who is of almost equal importance to Maine in establishing the village community doctrine. Freeman, in The Growth of the English Constitution (1872) depending on the work of Kemble, Palgrave and Stubbs, only adds further weight to the already popular trend. Finally,

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1. Charles M. Andrews, "The Theory of the Village Community," American Historical Association Papers (N.Y. 1891).
   W.J. Ashley, "Early Teutonic Society," International Quarterly, vol. 8 (1904), 236-261.
   Alfons Dopsch, The Economic and Social Foundations of European Civilization (N.Y. 1937) ch. I.

it is Nasse, in The Agricultural Community of the Middle Ages (1872) who first attempts a real proof of the village community in England and its relation to the manor. It is upon the work of Nasse that Maine largely depends for his English evidence. It should be mentioned here, however, that Nasse himself depends in a large part on the Elementary and Practical Treatise on Landed Property (1804) of William Marshall. There are several other, documentary sources of Maine's English evidence which will be mentioned later in the development of his theory. The same will hold true for Maine's Indian evidence, which largely consists of his observations, documents, and reports of Indian government officials.

For the Irish evidence, Maine largely relies on the works of O'Curry and Sullivan; especially Sullivan's introduction to Eugene O'Curry's Manners and Customs of the Ancient Irish (1873).

Without further introduction, let us proceed to a more detailed account of the positions of the above men.

According to Kemble[1] the Mark

> system which the German conquerors introduced into every state which they founded upon the ruins of the Roman power . . . (was as follows) land may be held by many men in common, or by several households, under settled conditions, . . . the smallest and simplest of these common divisions is that which we technically call the Mark . . . This is the first general division, the next in order to the private estates, or alods, of the Marksmen: all its name denotes, is something marked out or defined, having settled boundaries, . . . It is a plot of land on which a greater or lesser number of freemen have settled for the purpose of cultivation, and for the sake of mutual profit and protection; and it comprises a[2] portion both of the arable land and pasture, in proportion to the numbers that enjoy its produce . . . we cannot discover a period at which this organization was unknown[3]

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1. John M. Kemble, The Saxons in England (London, 1849).

2. Ibid., p. 36.

3. Ibid., p. 37.

> (in the records of our forefathers) . . . when we first learn anything of their domestic condition, all the German tribes appear to settle on arable land surrounded with forest and pasture, and having some kind of property in both.[1]

Kemble is inclined to believe that the individual family's portion of the arable (the private estate) is in some degree fixed; and when moved, it is because of agricultural necessities. "Even if under peculiar circumstances, any Marksman obtained a right to essart or clear a portion of the forest, the portion so subjected to the immediate law of property ceased to be Mark."[2] The Mark land was owned by the community and bordered the arable on all sides, originally to protect it. The smaller communities grew and coalesced and tended to convert to arable the Mark land not on the new extended borders. The infringement on Mark land was largely prevented by the "holiness of the forests",[3] but with the furthering of Christianity, this factor decreased, and the public law of the state became more and more their guarantee. The state dealt with these lands by its own sovereignty,

> and the once inviolate land may at once be converted to public uses, . . . No longer necessary as a boundary, from the moment when the smaller community has become swallowed up and confounded in the larger, it may remain a commons, be taken possession of by the state as folcland, or become a source of private estates, . . . it seems even to have become partible and appurtenant to private estates in a certain proportion to the arable.[4]

> (The Mark was also) a voluntary association of freemen, who laid down for themselves, and strictly maintained, a system of cultivation by which the produce of the land on which they settled might be fairly and equally secured for their service and support; and from participation in which they jealously excluded all who were not born, or adopted, into the association.[5]

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1. Ibid., p. 38.
2. Ibid., p. 43.
3. Ibid., p. 50.
4. Ibid., p. 50.
5. Ibid., p. 54.

> ... (Concerning the Mark, Kemble states), I represent them to myself as great family unions, comprising households of various degrees of wealth, rank and authority . . . all recognizing a brotherhood, a kinsmanship.[1]

> The history of Europe knows nothing of a period in which there were not freemen, commons, nobles and serfs, . . . that every German was, in the beginning, Kaiser and Pope in his own house may be true in one sense, . . . nevertheless, the Germans lived under some government, civil or religious, or both.[2]

Kemble finds it impossible to believe that the Germanic nations originated in solitary households or families, rather, some kind of military organization came before settlement, determining much of its character.[3]

One of Kemble's primary interests, however, is the subject of personal rank and in the Teutonic scheme it is the individual freeman that lies at the center.[4] The natural divisions are into the free and the unfree, however, he finds that the ideas of freedom and equality are not inseparable. Having a voluntary union of freemen does not exclude the possibility that these unions were originally, or later became, based upon terms of inequality. "The noble is one of the freemen, and is made noble by the act of the free: the free are not made so by the noble."[5] The essential distinguishing character of the freeman, "which he never entirely loses under any circumstances, is that he aids in governing himself."[6]

This rather extensive statement of Kemble's position has been undertaken here because it is he who largely introduces the previously mentioned ideas of Justus Moser and Jakob Grimm concerning early

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1. Ibid., p. 56-57.
2. Ibid., p. 123.
3. Ibid., p. 125.
4. Ibid., p. 128.
5. Ibid., p. 131.
6. Ibid., p. 134.

Teutonic society and the Mark concept into England and many of the later English writers merely follow in Kemble's footsteps. As will be noted later, Moser and Grimm come from a period in the development of the Mark theory when there was less emphasis upon the communal nature of the Mark and more emphasis upon the existence of individual freeman, who might voluntarily partake in the formation of a Mark association by relinquishing some of his rights as an individual. We have seen that Kemble follows this line of thought. It should be mentioned here that later, in the further development of Maine's theories, it will be shown that Maine differs considerably from Kemble in giving less importance to personal rank, the free versus the unfree, the voluntary nature of the village communities, and especially the nature of land ownership. We do see, however, in Kemble, the element of the patriarchal family and the idea of kinship beginning to play a role in the village community theory which Maine was later to greatly expand.

William Stubbs in his Select Charters[1] seeks the first traces of national history not in Britain but in Germany. Using Tacitus,[2] he finds Germans occupying "fixed seats instead of annually changing their pastures . . . but they are not so far settled as to have divided the land amongst individuals. The several communities allot annually their arable lands among the freemen: these have their own several homesteads; but the pasturelands are not only held but used in common, and the whole land of the settlement belongs to the community."[3]

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1. William Stubbs, Select Charters (Oxford, 1874, 2nd ed.). first edition published 1870.
2. Germanica.
3. Ibid., p. 3.

Stubbs also shows the relationship of the comitatus, nobility and kings to the society. "The king then represents but the unity of the tribe, the princeps, the authority of the community, the dux, the influence of personal pre-eminence."[1] The comitatus groups fight for the princeps. At the bottom are the tenants "paying rent and holding land under the free."[2]

When we look at the Teutonic influence in early history

> two points stand out with clearness, - (1) that the Teutonic occupation of Britain was a migration and not a mere conquest, and (2) that the nations so migrating came from a settled country, and must be credited with the same amount of organization here which they possessed at home . . . The tie of kindred is strong, but it does not supercede, nay, it carries with it the organization of the vicus (Mark community) and the pagus (an aggregation of vici of the same tribe), probably also that of Civitas (an aggregation of pagi) . . . the progress towards political union in England does not begin with the aggregation of units. There is no reason to doubt the substantial truth of the traditions which ascribed the origin of the kingdoms of Kent, Sussex, (and others) . . . to the conquests of single chieftains.[3]

Thus, in England from the seventh to the eleventh century

> the people occupy settled seats; the land is appropriated to separate townships and in these certain portions belong in their entire possession to alodial owners, whilst others are the common property of the entire community; and there are large unappropriated estates at the disposal of the nation. Each of the townships has an organization of its own; for certain purposes the inhabitants are united by the mutual responsibility of the kindred, for others, they are under the authority of their reeve.[4]

The above material taken from Stubbs' Select Charters shows us his conclusions about the nature of land settlement in England under the Teutonic tribes. For more material on these tribes before migration one turns to his Constitutional History of England (Oxford, 1874) vol. 1, which deals extensively with the Mark theory of land settlement, relying largely on its great expositor,

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1. Ibid., p. 5.
2. Ibid., p. 5.
3. Ibid., pp. 6-7.
4. Ibid., pp. 8-9.

G. L. von Maurer (dealt with in section on German scholars which follows). We know that Maine had read Stubbs[1] and there seems to be no essential conflict between Stubbs and Maine. Stubbs is stressing the later and more transitional forms between the early kinship group and the political society. Apparently, Stubbs would not have the autonomous village community existing in England, as the transition has already in part diverged from the kindred type towards the political form prior to the migration.

Freeman[2] depends upon Kemble, Palgrave and Stubbs as one can see from the title. The book is largely concerned with political forms rather than property. Freeman goes to a small commonwealth in Switzerland to show the original democracy of the "Aryan Race". "Democracy, in the sense of Perikles, demands that every freeman shall have a voice in the affairs of the commonwealth; it does not necessarily demand that every freeman should have an equal voice. It does not forbid the existence of magistrates clothed in high authority . . . respect for ancient birth or even an attachment for an hereditary line of rulers."[3]

Maine had read Freeman and makes use of his Swiss example of early communal democratic practice.[4] Freeman, like the men he depends upon, is largely concerned with tracing English political development, but the theories developed must go back to the original position of the various elements of the society and original

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1. Henry S. Maine, Lectures on the Early History of Institutions (New York, 1878). p. 104. (Hereafter, Maine, Hist. of Inst.)

2. Edward A. Freeman, The Growth of the English Constitution (Leipzig, 1872).

3. Ibid., p. 29.

4. Henry S. Maine, Village Communities in the East and West (New York, 1880), p. 9. (Hereafter, Maine, Vill. Comm.) Maine cites Freeman concerning the fact that villagers sank in status to various types of villeinage. Ibid., p. 138.

authority for the development of the political power. In doing this he did not come into disagreement with Maine's theory, but stressed other, and often later, elements.

Maine's English forerunners do not deal much with the autonomous village community, with its kindred structures. The emphasis is upon a territorially structured society representing that later development which we call political.

It is Nasse[1] who first attempts to develop for England a comprehensive theory attempting to show the transitions and agricultural life that preceded the manor. Early in his work he shows that previous sources are inadequate, especially Kemble.

> Of more recent inquirers, it is well known that Kemble has sought to show, that the constitution of the Anglo-Saxon commonwealth was founded on Mark associations. But Kemble was never in a position to prove the agrarian community upon which these Mark associations were founded, and it is with full justice that the careful author R. Schmid says, "that true Mark associations (i.e. communities) existed, the organization of which was founded on a community of pasture and wood rights, has never been proved by Kemble", . . . With regard to the smaller village communities, which are distinguished from the great Mark associations of the "ga" and "serie" - mentioned exclusively by Kemble - . . . we can learn nothing from Kemble.[2]

Nasse's primary object was to discover the evidence of the ancient community in the use and culture of land. He found remains of the old state of community of land in England still preserved. His evidence came from "the report of The Select Committee on Common Inclosure, 1844," and descriptions published by the then Board of Agriculture. Nasse also relies on the work of William Marshall,

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1. Erwin Nasse, The Agricultural Community of the Middle Ages (London, 1872, 2nd ed., translated by Col. H. A. Ouvry).

2. Ibid., p. 14.

previously mentioned, who believed that "several centuries ago the soil of nearly the whole of England lay in unenclosed conditions and was more or less in a commonable state . . . Private property first came into vogue with arable land, on which private use, in relation to common use, had a longer duration."[1]

Continuing the discussion of property, Nasse goes on to state that

> there is much that indicates that at the time from which our Anglo-Saxon sources date, since their first formation, a permanent separation of pasture and grassland had been the rule[2] . . . We can obtain additional proof of the occurence . . . of a husbandry regulated on the principle of a community[3] . . . When we consider the internal grounds (it appears) quite natural that a village community, with intermixed fields, compulsory cultivation (flurzwang), and a permanent separation of arable land and constant pasturage, had also a common pasturage, that this common pasturage existed as a component part of the village community in later times. Meadows also there were which, like the arable land, were private property, but subject to a right of common use for pasturage after the hay harvest.[4]

As has been shown, Nasse's work centers around forms of property holding and cultivation rather than around the political aspects that earlier English historians had utilized or around the kindred aspects which Maine was later to use. However, Nasse forms one of Maine's chief sources for his English evidence,[5] as Nasse was fundamentally in agreement with Maine's views. The work is merely of a more specialized character and does not really attempt

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1. Ibid., pp. 10-11.
2. Ibid., p. 21.
3. Ibid., p. 23.
4. Ibid., pp. 27-28.
5. Maine, Vill. Comm., p. 168. Maine states Nasse's purpose in this manner: "Nasse has attempted to connect the actual condition of landed property in much of England at the end of the last century as shown in various publications of Marshall, with the early English forms of tenure and cultivation as known to us through the labors of English and German scholars."

to get at the very early forms of society which will be shown to be important to Maine. We see that Nasse apparently accepts the idea of private property in land as a later development arising out of the use of the arable, from William Marshall, and it will be seen that this is fundamentally a view of Maine.

W. K. Sullivan's extensive introduction to Eugene O'Curry's work[1] as well as O'Curry's work itself provide a great deal of the material which Maine uses in dealing with the early Irish. However, Maine does not fully accept the views of Sullivan which are delineated in the following quotation.

> I believe that the right of individuals among the Irish and so-called Celtic inhabitants of Britain to the absolute possession of part of the soil, rests upon a certain, perhaps more certain, evidence than among the Anglo-Saxon and Germanic peoples.[2]

This is his answer to M. Henri Marten's History of France (vol. I, p. 33) when he says,

> that at first the tribe was the only proprietor among the Celtic nations: and he adds, that traces of this early Communism are very evident in the Irish Brehon Laws.[3]

Sullivan distinguishes four types of societies in Europe resulting from different methods of land-holding. (1) Owners of large estates; (2) those holding part of the land as a separate estate but holding forest and waste in common (e.g. markgenossenschaft[4]);

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1. Eugene O'Curry, Manners and Customs of the Ancient Irish (London, 1873), vol. I.
2. Ibid., p. cxxxviii.
3. Ibid., p. cxxxviii.
4. It will be seen in the demonstration of Maine's theory, that the markgenossenschaft differs from his concept of the original village community by having private ownership of the arable which he considers a later development in the evolution of the village community. He would not think of the markgenossenschaft as the original form of settlement.

(3) those which held all kinds of land in common[1]; and (4) those who held no land, or had only its temporary usufruct.[2]

> We may safely conclude that more than half the occupiers of the land held by some kind of tenure which gave them a fixed property in the soil.[3]

Maine, largely relying on the work of these two scholars - Sullivan and O'Curry - of ancient Irish history, holds an opinion quite different from theirs concerning individual property and land, believing that some time considerably after the first settlement upon the land communal forms of holding the arable gave way to private. It must be remembered that the written sources from which the reconstruction is made all date from the period antecedent to that with which Maine deals. Therefore Sullivan, dealing only with what was the specific form of the society contemporary with his evidence finds individual property; Maine goes on to interpret certain elements of this evidence as indications of an earlier stage when the land-holding was not private. It is with this Irish material that Maine encounters the greatest difficulty in maintaining a unity between the facts and his theory. This will become more apparent when we take up his theory of the village community in detail.

The German historians were the ones largely responsible for the development of the Mark theory (which is closely related to the

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1. In type 3 the divided land is in intermixed holdings to insure equality and agriculture is carried on in a communal way. Lots remain in individual possession until a new drawing. This type is found in Russia, and Sullivan relies in part on the Studien of von Haxthausen for the details of Russian communal life. Von Haxthausen is also a source for Maine's material on Russia.

2. Eugene O'Curry, Customs and Manners of the Ancient Irish (London, 1873) p. cliv.

3. Ibid., p. cliv.

village community theory). The German mark becomes a standard used in analyses of other forms of village communities throughout the world. Maine also uses the Mark in this manner for two reasons. First, Maine was strongly influenced by "Aryan Race". Moreover, he maintained that one Teutonic form was the Mark, and that it had spread in its essentials, over a large part of Europe and England, and this was the area of major interest to Maine. The second reason for accepting the Mark as a primary type is that he stood in continuity with the line of German scholars who had developed and worked out the Mark theory.

The only German scholar to whom Maine makes much reference is G. L. von Maurer, and even in this case it is doubtful from what he says if he had read much if any of von Maurer's works at first hand. However, his ideas concerning the Mark certainly stem from von Maurer, and in fact we can assume that Maine's interest in the village community theory largely stems in last instance from the influence of von Maurer and the German school of historical theorists about the Mark. (The English historians dealing with the village community in one way or another extend from the German school.)

Therefore it is necessary to take up some of the ideas of von Maurer and to show the nature of their influence upon Maine. But von Maurer, while adding much to the Mark theory, does not stand alone, but is influenced by the trend of German historical research. There is no intention here of showing the development of historical research and theory concerning the problems of the Mark in Germany after it has been done by such men (who have already been mentioned) as C. Andrews, W. Ashley, and most admirably by the great German

scholar Alfons Dopsch. But perhaps an outlining of a few high points would be in keeping here, to show the development to Maurer and his ideas as they came to Maine.

Dopsch[1] considers that Justus Möser "may today be regarded as one of the founders of German economic history."[2] Möser begins with private property and the separate homestead as the original form of land settlement. However, he admits of the Mark in the common ownership of portions of the land other than the arable. Out of this arose the Mark association. Common usage extended only to the land unsuited for private purposes and better adapted to extensive use.

K. F. Eichhorn, in Deutsche Staats - und Rechtsgeschichte in 1808, develops Möser's theory, but shows the Mark association "to be merely a form of unification binding together privately-owned and isolated settlements. Eichhorn expressly rejected the idea of common ownership of inherited landed properties and only allowed co-ownership."[3]

Eichhorn in his later editions of the above work shifted his position more and more in favor of a powerful Mark association and he shows a system of Mark law arising and even the character of ownership of the arable appears to be more like usufruct than private ownership. In time Eichhorn's "Mark theory was destined to become the cornerstone of the whole constitutional and legal history of the country."[4]

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1. Alfons Dopsch, The Economic and Social Foundations of European Civilization (New York, 1837).
2. Ibid., p. 6.
3. Ibid., p. 7.
4. Ibid., p. 8.

Another aspect of the Mark theory was the belief in the original freedom of and participation in the government by all freemen. This idea also stems from Möser and was developed by Eichhorn. Möser had limited his theories to his section of the country and the role of the Mark association to one of minor importance. His theories were generalized and transformed by his successors, such men as J. K. Zeuss. The common land attributed by Möser to the nature of the land and of agricultural practice was transformed by various legal arguments into an extended Mark association theory, and the idea of private ownership began to disappear.

One of the most important elements of method which Moser introduced and which seems to run through the whole development of the Mark theory, including the village community theory of Maine, (More will be said of this matter when dealing specifically with Maine's methods.) is the method of proceeding from present conditions to the past. Möser assumed that, in the area of his studies the conditions of land-holding were relatively unchanged from early times.

"Georg Hanssen, in his Ansichten über das Agrarwesen der Vorzeit, published from 1835 onwards, materially assisted in spreading this new criterion in Germany, . . . He realized the novelty of his procedure, and felt that it was helping with the progress of historical study."[1] The tendency was to ignore the rule that sources must be contemporary.

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1. Ibid., p. 13.

In 1854 G. L. von Maurer's work Einleitung zur Geschichte der Mark-Hof, Dorf-und Stadtverfassung und der öffentlichen Gewalt came forth stating that (according to Dopsch)

> the state, . . . like the individual, is more or less the creation of its own history, which, like nature, is subject to certain rules and laws . . . the constitution of the state, . . . originated in interconnecting arrangements about land and property, and, above all in the Mark . . . It is true that G. L. von Maurer's work altered to some extent the old theory of Möser. The separate homestead system as the basis of the whole development . . . did not appear convincing to Maurer. On the contrary he thought that the village was the starting point 'the first cultivation of the land was not carried out by individuals but by whole families and tribes.'[1]

Von Maurer had also come to the conclusion that whole territories such as Bavaria and Alemania had originated from the early Mark.[2]

The ideas of the German school, especially von Maurer, concerning the village community were in part expressed in the essay of Morier[3] which Maine uses extensively in part of his work (This essay is quoted and its relation is shown later to Maine's theory. Maine incorporated it into his theory and I have followed his structure.)

Maine apparently has little disagreement with the general orientation and the concepts developed by the German as have been discussed above. His disagreements, while not explicitly brought out, would lie in his belief in the strong influence of Roman law and institutions, which had an obscuring effect upon primitive conditions in large parts of Europe and England.[4] That is one

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1. Ibid., p. 14.
2. Ibid., p. 17.
3. J. W. Probyn, ed., Systems of Land Tenure in Various Countries (London, 1881).
4. Henry Maine, Lectures on the Early History of Institutions (New York, 1878), p. 104. The other obscuring effect was the formation of centralized governments in the West.

reason why he considers the analysis of Hindu and Irish institutions especially important, as these two areas of Aryan population were never submerged in Roman culture. This in turn forms a prime reason for the comparative method. Maine wished to rebuild the past of Teutonic and Anglo-Saxon laws and institutions by comparison with Indian and Irish ones which he assumed to have remained in an earlier form.[1]

The more detailed points, such as nomenclature showing minute differences in land-holding or cultivation that enter into the research on the specific systems found in Germany do not figure prominently in the work of Maine and there is little to indicate his wide familiarity with them. It is the general apects of Maurer's ideas that are main points of reference for Maine's Teutonic materials. Ashley concludes that von Maurer's works "are all elaborations and expansions of one simple theme; they find the Mark system back of village life, all manorial life, and even all town life of medieval Germany. They present no real advance in doctrine over the original 'Introduction to the history of the constitution of the mark, the manor, the village and the town' (1854) . . . When Maine says that von Maurer's 'conclusions were very gradually developed', the speech betrayeth him."[2]

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1. Maine, Vill. Comm., pp. 18-19.

2. W. J. Ashley, "Early Teutonic Society", International Quarterly, VIII (1904), p. 240.

IV. MAINE'S GENERAL ORIENTATIONS AND THEORIES

In studying the basic unity of Maine's thought and centering it around his village community theory, we not only come to an understanding of Maine himself but to an understanding of the mentality, philosophy, and frame of reference of most of those who were dealing with the village community theory. We see their basic conflicts with other schools of thought, and with other historical trends, we see their inter-relation to the society and to what extent their thought on this subject is a manifestation of the era, or of various elements in the society. Although Maine differed from most of the others delaing with the village community theory favorably, by being conservative he shares much in common with his fellow workers. The village community theory, growing out of the romantic historical reaction, can well be used by conservatives like Maine, but with the return of the Enlightenment - like reforming spirit and the various socialistic movements, the use of the village community theory was turned around and the progressive evolutionary character which it had under Maine was changed to a belief that the early communal stage was the type which society should seek to emulate in part or at least to admire.

It is in the above sense that this paper is especially sociological, as the interest centers not on the historical validity of the village community, but in the village community theory and its relation to the men and environment wherein it was developed.

While Maine stands in the romantic line of development in a reaction from the anti-historical tendency of the Enlightenment, he does not stand for the concept of uniqueness (and this is where

he follows the lead of natural science) which pervaded the Romantic trend. Stemming in part from such sources as Savigny's school, he combines this historical interest with his generalizing mentality which would seem to be not only due to the influence of natural science but a characteristic of one trained in the law. Law is based on the fact that situations which have happened in the past will occur in sufficiently the same manner to be included under a generalized rule.

The lawyers and political economists in the Bentham-Austin trend of thought, which is quite like the Enlightenment in character, in that man is optimistically seen as a rational being who can easily solve his problems on this earth by the use of reason. Maine opposed this interpretation of the nature of man as something easily molded by reason so that society can be changed almost instantaneously - as was supposedly to occur in the French Revolution - by showing that man gets most things by inheritance and is little subject to radical change. Into this conservative frame of reference the evolutionary ideas best expressed by Darwin fitted quite well. The change was slow and it was built upon all that had preceded it.

The evolutionary schema is a fitting center for a reconstruction of Maine's mentality and method. Maine is a logical whole, that is the effects[21] of the social milieu, his use of past historical investigations, his conservatism, his primary interest in jurisprudence, his belief in evolution, his methods of historical investigation, his variety of theories are all elements of one mentality that can best be explained in an inter-related manner. The explanation of one part involves the explanation of the whole. This very fact

makes Maine an excellent demonstration of the era; he is of it and it is of him, without any basic contradictions except those implicit in the society itself.

The dominating force in many men's lives is their profession, and Maine was no exception. He was a lawyer and teacher, and a specialist in historical jurisprudence. At this time there were two general schools of thought in England about law. There was the analytical jurisprudence of Austin with the utilitarian influence of Bentham, which was opposed by the more historical view of Maine. Vinogradoff states Maine's opposition: "Maine's opposition was directed not only against the theories of the state of nature and their various applications in law and politics, (but also against) analytical jurisprudence, as expounded by Bentham and Austin . . . an attempt to establish general principles and to deduce their consequences not as a system of natural equity or as the necessary attributes of human nature, but by the analysis of the principal ideas of judicial intercourse at the present time."[1] These men looked upon custom as friction. The whole system is too a priori and rationalistic for Maine to accept. It is here that the evolutionary ideas of Maine enter. Evolution in history or law need be no more than the idea of process and development of the present out of the past. For this type of thinking Maine turned to Germany where out of Romanticism and in connection with it there was the historical school of Savigny and Eichhorn. "It may be said, then, that the German historical school showed Maine above all that laws

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1. Paul Vinogradoff, The Collected Papers of Paul Vinogradoff (Oxford, 1928), II, 177. (Hereafter, Vinogradoff, Papers.) Further disagreement with Austin and Bentham can be found in Henry Maine, Village Communities in the East and West (New York, 1880), p. 67.

and institutions grow and are not made, and that human nature is subject to little change . . . (and) most men dislike change."[1] Here was a justification of conservative philosophy.

There are primarily two choices in developmental or evolutionary historical thinking. The idea of unique development, that each law or institution is the unique product of its unique past - and this was the trend of the Romantic historical school - or one could accept unilinear evolution with the whole human race or large segments of it passing through certain given stages of social development. Maine did not accept either view. He specifically states that he was not a strong unilinear evolutionist. "So far as I am aware, there is nothing in the recorded history of society to justify the belief that, during the vast chapter of its growth which is wholly unwritten, the same transformations of social constitution succeeded one another everywhere, uniformly if not simultaneously."[2]

Maine was not completely in the Romantic camp either. Maine recognized that the "historical method as practiced by the German school was insufficient and had to be supplemented from other sources."[3] As whole periods and problems were lost in darkness, thus, the necessity for the comparative method in addition to the historical.

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1. Benjamin E. Lippincott, Victorian Critics of Democracy (Minneapolis, 1938), p. 177. "Maine claimed an affinity with some of the best known defenders of organic development and conservative principles in English law and politics - Burke and Sir James F. Stephen." Vinogradoff, Papers, II, 179.

2. Henry Maine, Dissertations on Early Law and Customs (London, 1883) p. 219.

3. Vinogradoff, Papers, II, 185.

The comparative method was "the only possible basis for inductive reasoning in social science and for inquiries as to the laws of social development."[1] The comparative method is a denial of uniqueness and an affirmation of "science, in the English sense of the word; that is, of exact knowledge based on observation and aiming at the formulation of laws."[2]

Maine's student, Vinogradoff, tells us that "of the exponents of natural science and inductive philosophy, Darwin seems to have impressed him most, but Whewell, Mill, and Spencer had also been studied by him."[3]

Maine was so much under the influence of natural science that he believed that "supremacy . . . (was) reserved for the natural sciences."[4] In addition, "if indeed history be true, it must teach that which every other science teaches, continuous sequence, inflexible order, and eternal law."[5] Following the natural sciences it is not surprising that he shared much of the crude empiricism which was then the scientific method.

There were two other sources in addition to natural science for his comparative method. "Some part of this work of comparison had already been attempted by Maurer, but he limited himself to the Slavonic and Scandinavian countries . . . Sir Henry Maine, has

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1. Ibid., II, 186.
2. Ibid., II, 182.
3. Ibid., II, 183.
4. Maine, Vill. Comm., p. 271.
5. Ibid., 265-6.

applied the comparative method to India."[1] Maine, taking his village community theory in large part from Maurer, had precedent in using the comparative method. The justification of the comparative "historical method" - "a method at once historical, in the sense of being based on chronological data arranged in sequence of development, and comparative, in the sense of being based on an induction from customs of different peoples living in the same stage of growth"[2] - lies in part in the assumption of an "Aryan Race". The "Aryan Race" was a concept developed out of comparative philology and the discovery of the Indo-European language group, from which was posited an "Aryan Race", which, according to Maine, once had a common stock of institutions. The race split and elements of it modified and developed the common heritage at different rates. The "Aryans" in India lagged far behind. Thus, contemporary institutions and laws in that country represent a past stage in the West. Using the comparative method, we may fill in the gaps in the history of the West with Indian evidence. Maine admits that the comparative historical method is subject to a greater variety of factors, reducing the similarity of development, than is comparative philology, but he still believes in its possibility.

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1. Fustel de Coulanges, The Origin of Property in Land (London, 1892; 2nd ed.), p. 106. "The first attempt at universal comparison (was) . . . Laveleye . . . in 1874."

2. Ernest Barker, Political Thought in England from Herbert Spencer to the Present Day (N.Y., 1915), p. 164.

Evolutionary parallel development is implicit in the historical - comparative method. We must assume many evolving societies, and that these societies are evolving under sufficiently universal influences or laws, so that comparisons are possible. The statement of the general evolutionary schema is made by Maine in his broadest and most underlying law or generalization: that social evolution runs from "status" to "contract" - from positions fixed by membership in the group to which an individual belongs to positions freely determined by contracts to which the individual pledges himself. Status lies at the beginning of evolution and contract at the end.

What was the original basis of society? What were the original bonds of fiction or truth that held people within the status and role system of the early society? Maine's answer was that kinship - fictional or real - was the original basis of all lasting societies; kinship was, also, the basis of social solidarity. The concept of kinship and the forms of social relationships arose out of the basic unit of the family. Thus we reach Maine's patriarchal theory.

Let us consider Maine's theory at length. The patriarchal element seemed essential to the village community as Maine understood it, and this is natural when we consider that Maine's evidence came largely from cultures with strong patriarchal power.

Maine, in endeavoring to indicate some of the earliest ideas of mankind as they are reflected in Ancient Law, and to point out "the relation of these ideas to modern thought",[1] was not concerned

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1. Henry Maine, Dissertations on Early Law and Custom (London, 1883), p. 192. (Hereafter, Maine, Custom).

with the problem of ultimate origins. He wanted to show the real rather than the assumed history of institutions and found "the route beyond a certain point obstructed by a priori theories based on the hypothesis of a 'state of nature'".[1] In surmounting this barrier Maine made use of the patriarchal theory, tracing it through antiquity back to Plato and Aristotle. His theory postulated the origin of society in separate families, held together by the authority and protection of the eldest valid male ascendant. This stage of development is not claimed for all societies. Maine says that it is strongly indicated in Roman law and in Hindoo, (and also somewhat in Slavonian and Greek; more doubtfully in Teutonic law.)

The patriarchal theory, at least in its implications for the village community theory, followed a course of modification in the works of Maine. It is urged fairly strongly in Ancient Law and in Village Communities in the East and West. In the Early History of Institutions the implications of the patriarchal theory seem to be modified by the introduction of the chief, tribe and comitatus groups, concepts strongly influencing society and exerting strong pulls against patriarchal power.[2] In Early Law and Custom we find, as shown above, that Maine states that the patriarchal theory is indicated in various early law codes. Maine, in the work just mentioned maintains one generalization from his Ancient Law "That not . . . all early societies were formed by descent from the same ancestor, . . . (but, those with) any permanence or solidity either

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1. Maine, Custom, p. 192.

2. Robert H. Lowie, The History of Ethnological Theory (New York, 1937). In this work (p. 99) we find reference to Heinrick Schurtz, a pupil of Ratzel, who "for the first time summarized those associational activities independent of blood-ties which previous treatises had ignored. The picture of primitive society was thus radically altered." Maine, in the course of his works, moved somewhat in this direction.

were so descended or assumed that they were . . . primitive groups, . . . wherever their ingredients recombined, it was on the model or principle of an association of kindred. Whatever were the facts, all thought, language and law adjusted themselves to the assumption."[1]

What has just been quoted is important to Maine in that he stated it in Ancient Law and maintained it all the way through his works and, also, stated it finally in his Early Law and Custom. Yet it is not expressly a patriarchal theory as we meet it in the village community concept. It is merely a statement of the predominance of kinship form in the formation of societies. One cannot equate kinship with patriarchal relationships. Maine's use of the terms is sometimes not explicit, but he does use kinship in the larger sense. His position becomes clearer as seen opposed to that of J. F. McLennan and H. Morgan. They deduce "all later social order from the miscellaneous unorganized horde. (In their account they derive) the smaller from the larger group, not the larger from the smaller."[2] That is, the family is created by increasing restriction within the promiscuous horde. Maine, as stated in the patriarchal theory, has society arising by the increase in size of the family through descendants - and those included by fictions like adoption - staying under the same authority or in close relationship.

The patriarchal theory comes into conflict with the village community theory in the following way. Postulating that society originated in the patriarchal manner and that larger groups grew

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1. Maine, Custom, pp. 199-200.

2. Maine, Custom, p. 200.

out of it, and therefore at the expense of it; and if, as Maine admits, the tribe was formed before the settlement on land, then how can we accept the village community as a group of almost autonomous patriarchal families each receiving an equal share of the communal land?

In the kinship society the individual did not exist. He was a member of the total society or, on the lowest level, a member of a patriarchal family. Social relations existed between families and were carried on by the patriarch (e.g. The whole family was responsible for the crime of an individual member). The relations within the family were often autocratic but between the families largely democratic.

In escaping from this system of kinship and fixed status relations, permanent settlement on the land is important. The nomadic hunters or herders finally settled in a fixed spot and commenced agriculture. The form of settlement is the village community (or perhaps the household community made up of an extended patriarchal family instead of many families as in the village community). The settlement is on the kinship basis. The communal land of the kinship group is merely ownership in common by those with blood in common. Even the family (certainly not the individual) does not own land, but only uses parts of the arable. However, the reason this settlement is such a crucial stage in the development of civilization according to Maine's status and contract system, is that two new forces are released which are to shatter the old system. First, settlement allows the acquisition of all kinds of property and the gradual building up of economic differences between individuals, which in time leads to patterns of dominance and

submission. This ramification is sometimes called the "overgrown churl" theory of the origin of the manor, where certain individuals rise out of the social level into positions of authority through economic means which express themselves in time in terms of private or superior land rights, and thus the manor. Settlement certainly makes for the continuous operation through generations of uplifting or depressing economic conditions. Land is the most secure basis for building wealth and power. The earlier ways such as flocks or personal prowess are less secure and do not tend to operate as consistently.

The second factor tending to shatter kinship relationships after settlement was the origin and development of territorial relationships in opposition to kin relationships. The early kings (e.g., kings of the Franks) were tribal kinship leaders. In connection with this there now arises what Maine calls political power based on the rising territorial feelings. There takes place a fundamental change in the structure of the society. The obligations of kinship fade in favor of the new political obligations.

The freeing of the individual from extensive kinship obligation is begun. This type of transition is seen in the history of Greece with its wandering tribes and kinship structure which changed into political societies. Maine very clearly points out the transitional use of legal fictions. That is, the kinship organizations as a fiction are used long after the political structure is established and the supposed kin groupings have lost all meaning as to blood ties and the members are assigned to the kin groups on the basis of territory. The use of fictions, however, provides a basis for social solidarity in situations for which there is no precedent.

One other conflict implicit within Maine's theory should be pointed out here. That is that Maine was, in part, what is now called in anthropology a functionalist: he believed that modifications in one part of the culture modify the whole; that a culture is a logically inter-related and interacting whole; and it is, therefore, the product of all the elements in its history, and unique. This puts a severe limitation on the comparative method of Maine. It cannot be the comparative method of Westermarck[1] where discrete phenomena are collected and removed from the cultural context. Maine does not stress comparison of isolated phenomena but rather the comparison of larger social structures. Furthermore, Maine had some basis for believing that he was working with a cultural unit. His comparisons are largely between elements of what was then considered the "Aryan (Indo-European language group) Race", which he assumed had had originally a common cultural background, as is indicated in the fact that words denoting a rather high level of culture are found to have the same word root throughout the race, revealing that the cultural good or institution was developed previous to separation.

At this point a brief demonstration of the method as applied to India seems appropriate.

Maine believed that the original elements could be disentangled from the present to give a picture of the past. Thus, in India, observing Indian communities in the present, he attempts to distinguish the nature of the earliest Indian communities by (1) assuming

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1. Edward Westermarck, A Short History of Marriage (New York, 1926).

that there has been little change from earliest "Aryan" settlement in India, (2) that these changes can be sufficiently eliminated from our picture so that we can realize a generalization about early "Aryan" communities in India, and then with this community in hand, proceed to compare it with other "Aryan" communities and to assume that it gives us useful information about past stages among the so-called "Aryans" in the West.

To do all this in India he has first to reject, in part, the earliest writings, such as the code of Manu, as being strongly influential. He has to show the insignificance of caste, and to reduce the importance of the state which has existed in India for thousands of years.[1]

Baden-Powell[2] also points out Maine's misinterpretation of the existing Indian evidence.

The material on India has been given in an attempt to point out concretely some of the difficulties and errors to which the comparative historical method as used by Maine is subject, involving as it does two primary elements, dangerous in practice: (1) moving cultural elements in time; and (2) in space, for the purpose of analogy or identification. The comparative element of the method is typical of this type of work done by anthropologists of that period. The tendency when faced with new customs and institutions from strange parts of the world was to fit them into Western concepts and place them on an evolutionary scale with the West at the top.

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1. Maine, Vill. Comm., passim.
2. H. Baden-Powell, The Indian Village Community (London, 1896).

The generalizations which were then build up were of an evolutionary character and usually showed what was thought to be the trend of humanity. Thus Westermarck has a history of human marriage and Morgan has Ancient Society (1877), Bachofen, Das Mutterrecht (1861) and Maine has the evolution from status to contract. The modern generalization is usually of a different character, more functional in nature; instead of an evolutionary history of marriage we have an analysis of the functions and meanings of marriage, and comparatively arrived at attempts at universal definitions. The truth expressed in Maine's theory of development from status to contract is largely removed from the fixed evolutionary context in the Gemeinschaft and Gesellschaft theory of Tönnes.[1] Spencer only equates the status to contract theory with his own evolutionary schema.

Now that we have dealt with the mentality of Maine and the influences at work upon him perhaps it would be well to draw the ideas together in order to answer four essential questions.[2]

(1) What are the distinctive characteristics of the writer? Maine is not concerned with research and investigation - rather he takes the work of others and builds brilliant generalizations and systems upon their evidence. Not only did he synthesize factual material, he synthesized social science. "At one master stroke he forged a new and lasting bond between law, history and

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1. Talcott Parsons, The Structure of Social Action (Glencoe, Ill., 1949), p. 687.

2. These are much the same questions that Benjamin Lipincott Victorian Critics of Democracy (Minn., 1938), formulated and used in his analysis of various authors.

anthropology."[1] An extremely lucid writer, Maine attempts to reduce things to their simplest terms, and aims to discover in remote laws and institutions the fundamental ideas that lie behind seeming diversity.

(2) By virtue of these (characteristics) what place does he hold in the thought of his time? Maine with his definitive generalizations summarized the evidence and made the problems facing the social sciences explicit. If his answers or theories were not entirely correct at least they provided a basis for investigation and opposition. As Vinogradoff said, the whole generation of scholars following Maine had to deal with problems introduced by him or similar to his. The comparative-historical method of Maine was much used for a period, before undergoing extensive criticism and refinement. His works as a whole helped provide defenses for everything from acquisitive economics to anarchism (as will be shown later). His works were similar in scope to the works of others in anthropology and sociology, such as McLennan, Lewis Morgan, Westermarck, and Spencer, who tried to include most of human history in one work or one scheme.

This was the era of optimistic attempts at complete explanation of the total social picture. This era quickly came to an end. Under the influence of a type of positivistic thought, the investigation became of a minute and detailed character (especially in history) often lacking any generalizations of the sort previously mentioned.

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1. Sir Frederick Pollock, Oxford Lectures (London, 1890), pp. 158-9.

The writers of Maine's period, however, provided plenty of problems for the minute investigations that were to follow. The social science was overextended, and therefore - much as had happened in philosophy earlier, after Hegel - there came a quick turning away from the theoretical to the empirical aspects. Never again has theory flown so high.

(3) What are the influences that shaped the writer's thought? Most of the positive aspects have been mentioned already. In review they are: (a) the German school dealing with the Mark theory, especially Maurer; (b) the English school treating of the village community in England (But here the interest is primarily in the development of the political institution, especially the state out of the earlier communal, tribal, and Roman elements. Nasse attempted to illustrate the English form of the Mark.) (c) the historical school of Eichhorn and Savigny introducing the idea of growth and development of law: they form the first school of historical jurisprudence, which was also Maine's essential interest. Combined with the historical method was the comparative method for which the precedents were the comparative method of Maurer and the investigations of comparative philology and comparative mythology. (From comparative philology came the idea of the "Aryan Race".)

Modifying all the above was the interest in natural science, especially Darwinism; although Maine was never a unilinear evolutionist as some became. Following the historical jurisprudence of Savigny, naturally Maine was opposed to the analytical jurisprudence of Bentham and Austin. Maine was opposed to any first principles whether of "the greatest good" as in Bentham, or "the

general will" of Rousseau. The Enlightenment mentality had as its first principles social contract, the law of nature and the possibility of an ideal system. If we banish things metaphysical and theological, must we not also banish natural rights and take history as it is, accepting the groups of historical facts and explaining them by bringing them within the sphere of regularity?[1] "The course which I have followed . . . has been to trace the real as opposed to the imaginary history of the institutions of civilized mankind. When I began it, several years before 1861, the background was obscured and the root beyond a certain point obstructed by a priori theories based on the hypothesis of a law and state of nature."[2] "He (Maine) positively refused to accept the idea of a social compact as the basis for the rights and duties of man in society, pleading that everything we know about the early stages of human societies shows the latter to be organic bodies and not products of contractual combination."[3]

The above quotations show us two things: that Maine thought the progress of history - as a science - had been blocked by Enlightenment thought, and Maine as an historian opposed such thought. Secondly, the latter quotation shows us a distinction which the later socialistic use of the theory was to ignore. That is, that under early society, while the members might enjoy substantial equality they were not free, but rigidly bound to custom and to the group. Maine saw the rise of civilization in the freeing of the individual from complete group domination, and that is why the village community marks an important stage for settlement

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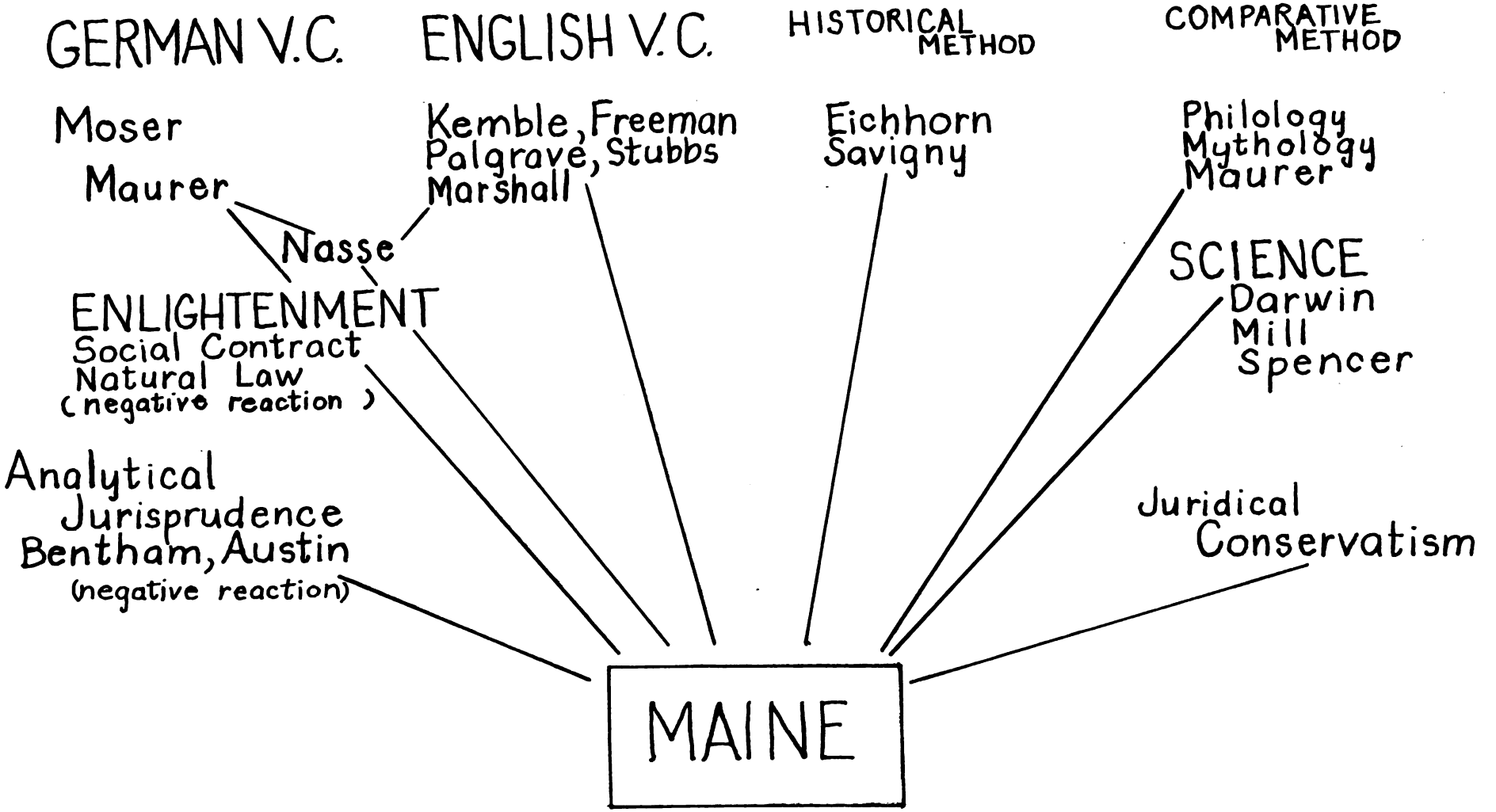
1. Ernest Barker, Political Thought in England from Herbert Spencer to the Present Day (N.Y., 1915), p. 162.
2. Maine, Custom, p. 192.
3. Vinagradoff, Papers, II, 176.

begins the process of freeing some individuals from the group.

(4) The fourth question is: What are the writer's basic assumptions and how do they affect the structure of his thought? Probably the most basic assumption lies in Maine's method. First, he assumes with the historical school of Savigny that law is as much a part of a nation as its language or religion; and therefore, tracing the development of law gives us great historical insight. Connected with this is the evolutionary concept of a development which he related to a universal scheme. The validity of the comparative method is another assumed element. What we might call assumptions about prehistoric societies were not considered so under the previously assumed methods. The essential assumption, then, lies in the determination of method and theory, and the epistemological conception of the nature of fact.

ORIGINS OF MAINE'S THEORETICAL POSITION



V. THE ESSENCE OF MAINE'S VILLAGE COMMUNITY THEORY

(A) Introduction

Originally this work was planned to consider first the theory itself, the essentials of the village community theory according to Maine; and then the changes and modifications which he introduced as he continued working with the problem, but this method of analysis is not possible in any real sense, as the theory is so intimately bound up with the empiric evidence. As Talcott Parsons has pointed out so well, among all social theorists the nature of the empiric evidence with which they deal, influences the development of their theory, although the generalizations and concepts which they create out of their evidence are not necessarily limited to the specific case studied.[1]

Therefore, in dealing with Maine's theory, we cannot just abstract a paragraph or two of material and say that that is the theory: rather we must analyze sufficiently the mass of material with which Maine dealt to show how the nature of the theory and method are structuring elements used in phenomena and cannot be completely separated from them. As Maine attempts to structure new materials he encounters new problems which should modify the structuring elements, although in some cases, as with most thought, he has a tendency to prefer structure to phenomena in case of a conflict.

In taking up the historical approach to Maine's village community theory we find three definite periods in which the nature of the theory and the use which he makes of it vary considerably.

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1. Talcott Parsons, The Structure of Social Action (Glencoe, Ill., 1949), pp. 6-7.

The periods can be briefly summarized before taking up the detailed analysis.

In the first period Ancient Law is the essential work. This is the time when Maine is first becoming interested in the problem of the village community. He relies largely on the statements and theories of others concerning it. The theory is incidental to his purpose of demonstrating ancient law.

In the second period the work that occupies our interest is Village Communities in the East and West (1871). Maine continues to rely on the work of early theorists, but he has had the benefit of new experiences and interests. From 1862 to 1869 he was an administrator in the British government in India, and he dealt with the various problems in jurisprudence that arose there as the old structure of Indian law rapidly modified itself to the western concepts introduced by Britain. Especially prominent was the conflict over land rights and land ownership. Maine was impressed with the widely different concept of land rights and ownership which the Indians held. Shortly after he returned to England his primary work on village communities appeared, which attempted to establish the relation of the Indian forms of the village community to the various Western forms. This was an important modification of the restricted mark theories.

Therefore the second period is characterized by Maine's use of first-hand evidence and by the comparisons made between India and the West. He saw the Indian village community and the Mark as the same in all essential details.

The third period is one in which the Lectures on the Early History of Institutions (1875) is undoubtedly the most important for our purpose. It was a period of interest in the analysis of cultural evidence especially as taken from the Law codes of Ireland. The village community now plays a lesser role; and, while the original theories of Maine concerning the village community are stated at the beginning, the evidence of the work verges on contradiction. The type of evidence introduced here is used by later scholars to introduce extensive modifications in the village community theory as Maine understood it.

The material which follows this introduction is largely a chronological development of Maine's theory. The only method by which we can understand his theory in all its ramifications is by a detailed analysis of the various works in which it appears. His theory, then, as seen in this work, is not just the brief statements which Maine has used to characterize his beliefs about the village community: the total extent of his works must be surveyed, and elements which bear upon the theory must be incorporated into the final analysis. The result should be both a chronological and a logical whole. If it is not logically consistent, we can assume that Maine's position has been modified in the course of the chronological development or that he verges on contradiction. Both of these elements can be detected in Maine's theory. The development of Maine's theory in this manner involves: questions of selection, relevancy and judgment; the extended use of highlighting quotations; and internal criticism, pointing out inconsistent or changing elements. The theory often cannot be dealt with in its entirety and often evidence must be introduced bearing

on certain elements alone. Those elements which appear consistently and are not unique or contradicted by further evidence can be assumed to be part of Maine's general theory of the village community.

Section B which follows and deals with the theory and its evidence, is divided into five parts:

(1) Primarily concerning property rights as seen in Ancient Law;

(2) Comparisons between Eastern and Western forms of village communities based on Maine's experiences in India;

(3) The forms of group inter-relations and group intra-relations;

(4) The house-community and other factors in relation to the village community;

(5) General summary.

(B) The Theory of the Village Community

(1) When the theory is first taken up by Maine in his Ancient Law, he has a chapter dealing with "The Early History of Property". This shows the nature of Maine's earlier interest in the village community theory: Maine was largely interested in developing a theory of the nature and perhaps origin of property in land. The village community theory in all his writings is largely centered around this problem and the other factors that enter in are to a great extent correlated to that interest. The whole status to contract theory, which shows the progressive freeing of the individual from a fixed system of obligation to an individually willed one, centers around the gradual ability of the individual to obtain exclusive rights in property and control it at will. The individual was to struggle against the power of the family and the wider kinship relations of the total village community.

Patriarchal families in groups form the village community. The relations and obligations, the rights and duties are between households, not individuals. The relations are largely customary and necessary because of a supposed community of blood. This blood relationship of the members of a community was the basis for the group feeling - the "we" versus "them" feeling. Strangers of other blood could be introduced into the group by adoption after which the fiction was accepted that they were of one blood. The customary law regulated relations only within the group and anarchy prevailed between them, much as between states today.

Thus we see that the patriarchal theory of Maine is one of the cornerstones of his village community theory. It is an element found in all the types of village communities which he takes up. We do not find his village community theory operating without it, and can therefore assume the patriarchal element to be bound up with the village community theory.

The absence of regulation between village communities in the early stages indicates that they were the largest functional group and keeps us from assuming tribal or state-like regulations as an important factor. Thus in his Indian evidence[1] he plays down the importance of the larger states and empires and of the code (Manu) of the dominant religious group, and shows the village communities existing in virtual isolation.

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1. Maine, Vill. Comm..

Maine negatively approached the village community by showing that earlier theory as to the origin of property was not to be accepted. The criteria of ownership of property are essentially three: "The owner has undisputed possession as against the claims of other individuals or groups of individuals. He is free to dispose of what is his own as he wills. And for the use of what is his, he makes no payment whatever."[1]

To show the position that he opposed, Maine quotes Blackstone:

> The earth and all things therein were the general property of mankind from the immediate gift of the Creator. Not that the communion of goods seems ever to have been applicable even in the earliest ages . . . For, by the law of nature and reason, he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; . . . the right of possession continued for the same time only that the act of possession lasted . . . when mankind increased in number, 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.[2]

Maine opposed this a priori stand because of "the very baselessness of the positions themselves".[3] Blackstone's statement shows us with a specific problem the nature of the a priori Enlightenment type of thought which Maine constantly opposes in almost every related subject, with the historical approach. It is indicative that Maine turns from Blackstone to a quotation from the historically minded Savigny, who "laid down that all Property is founded on

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1. Norman S. B. Gras, The History of Agriculture (New York, 1940, 2nd ed.), p. 252.

2. Henry Maine, Ancient Law (Hereafter, Maine, Ancient). (New York, 1888), pp. 244-45.

3. Maine, Ancient, p. 246.

Adverse Possession ripened by Prescription." The Prescription is a "period of time during which the Adverse Possession has uninterruptedly continued"[1] and which has been the important factor affecting men's minds and creating further property rights.

Maine's position is: It is only when the rights of property have gained a sanction from long practical inviolability, and when a 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. The sentiment in which this doctrine originated is absolutely irreconcilable with that infrequency and uncertainty of proprietary rights which distinguish the beginnings of civilization. Its true basis seems to be, . . . a presumption, arising out of long continuance of that institution (property), <u>that everything ought to have an owner</u>.[2]

It is in this opposition to the other stands on property that we see the adumbration of the village community theory.

> It will be observed, that the acts and motives which these theories suppose are the acts and motives of Individuals. It is each Individual who for himself subscribes the Social Compact. It is 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. It is the Individual who, in the picture drawn by Blackstone, "is in the occupation of a determined spot of ground for rest, for shade, or the like." The vice is one which necessarily afflicts all the theories descended from the Natural Law of the Romans, . . . but Ancient Law, . . . knows next to nothing of Individuals. It is concerned not with Individuals, but with Families, not with single human beings, but with groups. . . . The life of each citizen is not regarded as limited by birth and death; it is but a continuation of the existance of his forefathers, and it will be prolonged in the existance of his descendants.[3]

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1. <u>Ibid</u>., p. 247.
2. <u>Ibid</u>., p. 249.
3. <u>Ibid</u>., p. 249.

After continuing this theoretical build up showing how Roman law has affected most of our theories concerning the origins of property, and how Roman law does not by any means represent the earliest form, Maine turns to the Indian village community - "an organized patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights."[1]

The essential features of the village community in India according to Maine are: the assumption of common descent by the joint proprietors, and the fact that, upon extinction of a family, its share returns to the common stock; the consent of the whole brotherhood being necessary for such things as the adoption of an outsider. Maine also points out that: "The co-owners of an Indian village, though their property is blended, have their rights distinct, and this separation of rights is complete and continues indefinitely."[2]

This distinction stems from the legal right of the heirs to divide their property, which is not generally done, so that the property is operated collectively.

In addition to the Indian village community, Maine mentions several other types stating:

> The great interest of these phenomena (vc) in an inquiry like the present arises from the light they throw on the development of the distinct proprietary rights inside the groups by which property seems to have been originally held. We have the strongest reason for thinking that property once belonged not to individuals nor even to isolated families, but to larger societies composed on the patriarchal model; but the mode of transition from ancient to modern ownerships, obscure at best, would have been infinitely obscurer if several distinguishable forms of V. Communities had not been discovered and examined.[3]

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1. Ibid., p. 252.
2. Ibid., p. 252.
3. Ibid., p. 260.

(2) In Maine's primary work on the village community, Village Communities in the East and West, which followed Ancient Law in the year 1871, the village community theory is greatly expanded. The introductory part of the work is devoted to the historical comparative study of the Eastern and Western village communities.

We can, however, still detect in his first chapter the primary interest Maine has in the theory of property. This fact is brought out in his summary of the work of von Maurer:

> von Maurer has written largely on the Law of the Mark or Township, and on the Law of the Manor. The Township (I state the matter in my own way) was an organized, self-acting group of Teutonic families, exercising a common proprietorship over a definite tract of land, its Mark, cultivating its domain on a common system and sustaining itself by the produce. It is described by Tacitus in the 'Germany' as the 'vicus'; it is well known to have been the proprietary and even the political unit of the earliest English society . . . In our own country it became absorbed in larger territorial aggregations, and, as the movement of these larger aggregations constitute the material of political history, the political historians have generally treated the Mark as having greatly lost its interest . . . But is it true that it has lost its judicial as well as its political importance? It cannot reasonably be doubted that the Family was the great source of personal law; are there any reasons for supposing that the larger groups, in which Families are found to have been primitively combined for the purposes of ownership over land (My underlining), were to anything like the same extent the sources of proprietary law? . . . ordinary text-books of our law suggest no such conclusion; since they practically trace our land-law to the customs of the Manor, and assume the Manor to have been a complete novelty introduced into the world during the process which is called the feudalization of Europe. But the writings of von Maurer, and . . . Nasse of Bonn, afford strong reason for thinking that this account of our legal history should be reviewed. The Mark has through a great part of Germany stamped itself plainly on land-law, on agricultural custom and on territorial distribution of landed property. Nasse has called attention to the vestiges of it which are still discoverable in England.[1]

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1. Maine, Vill. Comm., pp. 10-11.

Seeing Maine's fundamental assumptions as stated above, how does the use of Indian evidence enter the picture? Remembering Maine's comparative-historical method, the following statement demonstrates its use, and the relation of Indian evidence to European. "When the Teutonic group has been reconstructed by the help of observed Indian phenomena . . . we may be able to correct and amplify the received theories of the origin and significance of English real-property law."[1]

Maine's purpose in taking up the Western village community or Mark theory was to give "such a summary of von Maurer's conclusions as may suffice to correct them with the results of official observation and administrative enquiry in India."[2]

The Mark community consisted of a "number of families standing in proprietary relation to a district divided into three parts. These three portions were the Mark of the Township or Village, the Common Mark or waste, and the Arable Mark or cultivated area. The Community inhabited the village, held the Common Mark in mixed ownership and cultivated the arable mark in lots appropriated to the several families."[3] On the Common Mark there is "strict ownership in common, both in theory and practice . . . the common domain was equitably enjoyed."[4] The Arable Mark was, according to theory, always originally part of the Common Mark. This cultivated land was almost invariably divided into three fields. However, the fields were not cultivated by labor in common. Each family has

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1. Ibid., pp. 18-19.
2. Ibid., pp. 77-78.
3. Ibid., pp. 77-78.
4. Ibid., p. 78.

lots within the three fields, which are worked by the family. The family was not free to work the soil in any manner, but was bound to a complicated and very extensive set of regulations which produced a uniformity of cultivation.

The evidence seems to show that the "original distribution of the arable area was always into exactly equal portions, corresponding to the number of free families in the township . . . the proprietary equality of the families composing the group was at first still further secured by the periodical redistribution of the several assignments."[1]

Maine finds two of the above points significant in tracing the rise of individual property out of collective areas. The first step was the arable land, which was divided among the various families, and the second came with the end of periodic re-distribution and confirming of the rights of each family to the land it possessed in perpetuity.

Maine does not restrict periodic re-distribution: "there appears to be no country inhabited by an 'Aryan race' in which traces do not remain of the ancient periodical re-distribution."[2]

In taking up the relation of the patriarchal theory to the mark, Maine quotes from Morier.[3] And here we see the connection between Maine and the characteristic German Romanticism which has been mentioned earlier. "' These two distinct aspects of the early Teutonic freeman as a "lord" (patriarch) and a "commoner", united in the same person - one within the pale of his homestead, the

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1. Ibid., p. 81.
2. Ibid., p. 82.
3. J. W. Probyn, ed., Systems of Land Tenure in Various Countries (London, 1881).

other when standing outside the pale in the economy of the Mark - . . . in them are reflected the two salient characteristics of the Teutonic race, the spirit of individuality, and the spirit of association.'"[1]

The evidence for the Mark as it existed in England depends on a variety of sources differing from those used in establishing the German mark. Compiling evidence from such sources as Nasse, the works of Marshall, and evidence presented by witnesses before the Select Committee of 1844, Maine has arrived at what he concludes to be the vestiges of the Teutonic village community which remained in England before the enclosures. They are briefly:

> The arable part of the domain was indicated (1) by simple intermixed fields, i.e. fields of nearly equal size mingled together and belonging to an extraordinary number of owners, . . . (2) by fields of nearly equal size arranged in three long strips and subject to various customs of tillage, the most universal being the fallow, observed by each of the strips in successive years; (3) by shifting severalities of arable land, which were not, however of frequent occurence; (4) by the existence of certain rights of pasture over the green baulks which prevented their removal.
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> The portion of the domain kept in grass was represented: (1) by shifting severalities of meadowland, . . . (2) by the removal of enclosures after hay harvest; (3) by the exercise, on the part of a community generally larger than the number of persons entitled to enclose, of a right to pasture sheep.
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> (Two other elements were:) the supervision of the communal officer who watched over the equitable enjoyment of the pastures . . . (and the fact that) some commons, now entirely waste, bear the traces of ancient tillage.[2]

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1. Maine, Vill. Comm., p. 82.

2. Ibid., pp. 98-99.

While the object here is not criticism of Maine's theories, but their statement, it should be mentioned that Maine in the quotation concerning the English village community has given as evidence that which he has assumed to be related to the village community. He may have proved the validity of the evidence, but he makes little attempt to demonstrate that the evidence proves his village community theory. Others have used the same general information to prove other theories. Maine has not established the exclusiveness of his evidence - that it proves only one thing and not another also.

When dealing with the European material, Maine does little but summarize the theory of von Maurer, Morier and others. As to English works, he relies heavily on Nasse and other sources that have been mentioned. It is when we come to India that Maine, while still adhering to the older theories in general, begins to introduce modifications, clarifications, and changes in emphasis. The first change is in the very application of the village community theory, in its entirety, to India. Maine no longer had to depend entirely on the researches of others for his Indian evidence. He spent many years there connected with the government and collected detailed records and observations to use. His introduction of the comparative element, as well as the historical, to the method he used, allowed him to employ his contemporary Indian evidence in the expansion and modification of the theories about the no longer existent European Mark.

Turning to India, Maine finds that it is not "a hazardous proposition that the Indian and the ancient European systems of

enjoyment and tillage by men in grouped in village communities are in all essential particulars identical".[1] Maine's purpose in dwelling upon the Indian evidence was not to build up the village community theory but to show the "differences in detail between them (European and Indian village communities), . . . the discussion of these differences and of their apparent causes (is) not uninteresting . . . to the student of jurisprudence."[2]

One point about the nature of the village community which Maine makes is that many writers on the Mark have "a tendency to speak of the relations of the free chiefs of Teutonic households to one another as determined by what, for want of a more appropriate term, must be called spontaneous legislation".[3] This fact can "well be traced to the national, political and democratic bias of such authors,"[4] who found things in the past as they should be in the future. Maine, with his conservative mind interested in tracing the development from status to contract, shows that while "the council of elders, which is the only Indian counterpart of the collective assembly of Teutonic villagers, occasionally legislates; and, if very strict language be employed, legislation is the only term properly expressing the invention of customary rules to meet cases which are really new . . . (however) it is always the fact or the fiction that this council merely - declares customary law."[5]

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1. Ibid., p. 103.
2. Ibid., p. 103.
3. Ibid., p. 116.
4. Ibid., p. 116.
5. Ibid., p. 116.

The argument presented by Maine for the dominance of customary law over spontaneous legislation is only one side of his argument for his general theory of development from status to contract. The customary law is an element of the whole fixed system of relations called status, into which the individual is born and which demands the fulfillment of obligations not determined by his free will.

Maine also showed what happened in the village community with the introduction of concepts of individual rights and contracts. "The sense of personal right growing everywhere into greater strength, and the ambition which points to wider spheres of action than can be found within the community, are both destructive of the authority of internal rules. Even more fatal is the increasing feeling of the sacredness of personal obligation arising out of contract."[1]

The idea of contract or agreement does not enter into the minds of those within the village community and regulated by it. "Authority, Custom, or Chance are in fact the great sources of law in primitive communities as we know them, not contract."[2]

In looking at India, Maine found that the communities had sufficient occupations and trades established to enable them to continue collective life without assistance from external sources. Those engaged in occupations such as shoemaking, harness-making, or dancing, stand in customary relation to the rest of the community. The individual becomes a servant of the community, allotted land or

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1. Ibid., pp. 112-13.
2. Ibid., pp. 110-11.

grain although a customary price is charged for wares. Maine, looking to Europe, says: "It is the assignment of a definite lot in the cultivated area to particular trades, which allows us to suspect that the early Teutonic groups were similarly self-sufficing. There are several English parishes in which certain pieces of land in the common field have from time immemorial been known by the name of a particular trade; and there is often a popular belief - that nobody, not following the trade, can legally be owner of the lot associated with it."[1]

When the village community theorists provide historical continuity for the village community up to the present, it is not merely for the sake of completeness. There is an intimate connection between the theory and the history of its changes up to the present. This is due to the fact that much of the theory is based on reversing the historical process; that is, starting with contemporary or historically documented evidence, we push back further and further into the past into a period of less and less evidence, where we depend more and more upon logical inference and analogy. Thus, one charge leveled against village community theorists is that they placed conditions for which we have records dating only from 1000 or 1100 back into periods long before that. Maine with his strong evolutionary tinge looked back to find status, the opposite of the contract society which existed all around him. Others saw in more or less contemporary land divisions a stable element existing through shifting social systems; and with this idea in one hand, and their theories concerning society in the other, they commence the long march back through history. But increasingly

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1. Ibid., p. 126.

some scholars felt that the territory behind them was not well secured by research on elements of history lying closer to established knowledge, and as a result there followed a withdrawal to more empirically based positions.

If we are to accept the village community theory it must have historical continuity. Almost everywhere in Europe the feudal system and the manor have existed until a relatively recent period. If the village community existed before the manor, what was the nature of the changes leading to the manor? Maine takes up this problem which faces all village community theorists.

"I will say that a group of tenants, autocratically organized and governed, has succeeded to a group of households of which the organization and government were democratic."[1] In other words he believes the origin of the manor to be in the village community: "we may accept the belief of the best authorities over a great part of England that there has been a true succession of one group to the other".[2]

The first step, in the process creating the change to the manor, and the most important is that "the waste or common-land of the community has become the lord's waste".[3] This is all very well, but Maine does not explain how the waste came to be his. Maine goes on to say that the lord acquired rights in other parts of the village community, without showing how he did so. Maine assumes the Manorial Court to have grown out of the assembly of the township.

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1. Ibid., pp. 133-34.
2. Ibid., p. 135.
3. Ibid., p. 135.

Maine develops a general principle that

> wherever that collective ownership of land which was a universal phenomenon in primitive societies has dissolved, or gone far to dissolve, into individual property, the individual rights thus formed have been but slightly affected by the process of feudalisation. If there are reasons for thinking that some free village societies fell during the process into the predial condition of villenage . . . a compensating process began at some unknown date, under which the base tenent made a steady approach to the level of freeholder. Even rights which savoured of the collective stage of property were maintained intact, provided that they were ascertained.[1]

To explain the rise of the lord, Maine turns to the school of von Maurer and its delineation of the change from Mark to Manor. This change is largely the result of intertribal warfare in which the military leaders gain political power and larger holdings of land from the conquered mark and even from their own. "Everything in fact which disturbed the peaceful order of the village system led to the aggrandisement of the leading family and its chief."[2]

In time the chief became powerful enough to sever his land from the common land and thus free himself from obligatory rules of cultivation. Warfare tended to establish one township in suzerainty over another. Thus we see that there were causes at work "leading to the establishment of superiorities or suzerainties of one township over another, which tended to place the benefits of an unequal proprietary system and the enjoyment of these suzerainties in the hands of particular families, and consequently of their chiefs for the time being. Here you have all the elements of the system we are compelled to call feudal."[3]

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1. Ibid., p. 141.
2. Ibid., p. 145.
3. Ibid., p. 146.

Maine shows the further effects of the conquest of the Roman provinces, which led to large grants to various chieftains which were settled on, either by persons under him or vanquished provincials. These conclusions of German scholars Maine claims agree with the accounts of English scholars for the parallel phenomena occurring in England before the Norman conquest.

Going on Maine's evidence alone, it would still be hard to imagine a period among the tribes when various of these factors, descriptive of the village community concept, were not operating. What does he offer here to show us a somewhat static period allowing for village community development? Again we find no necessary connection between his evidence and the village community concept.

We have seen that the study of the village community theory can well be broken down into elements, and it is the inter-relation and weight of the various elements that determine the nature of the theory developed.

(3) In his Lectures on the Early History of Institutions, we find not a study of the village community, but of factors in early society which are important directly or indirectly to the village community theory. The above work, however, marks a definite change in Maine's approach to the problems of the village community. Previously the center of interest had been in the theory of property: the center of interest now is the inter-relationships of groups and of individuals to groups.

What we have called the third period in Maine's writing is found in this work, Early History of Institutions. It probably does not mark as great a change in his thinking as did Maine's

personal experiences in India as reflected in Village Communities in the East and West. But in the Early History of Institutions we find him turning to new material; especially the ancient Brehon law.

In Early History of Institutions, Maine again asserts that "collective ownership of the soil by groups of men either in fact united by blood relationship, or assuming . . . They are so united, once universally (characterised) . . . Those communities . . . between whose civilisation and our own there is any distinct connection."[1] As he assumes such a statement to be largely proved in his earlier works, he spends little time in establishing it further. In fact the very nature of the evidence seemingly disrupts the village community theory. The existence of a legal code such as found in the Senchus Mor and the Book of Aicill speaks against a free self-governing village community. Most of the Early History of Institutions deals with kinship, chieftainship, and the tribe. If you establish the existence of strong chiefs in the earliest stages of land settlement, it would seem that you seriously weaken the village community theory. The concepts of the democratic, self-determining nature of government, the equality in use of land and the common ownership of land in the village community, are all endangered by showing strong chieftainship. Yet Maine quotes,"'Every chief', says the Brehon law; 'rules over his land, whether it be small or large.'"[2]

What Maine is apparently trying to do in the Early History of Institutions is to free us from the concept of society which we

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1. Maine, Hist. of Inst., p. 1.
2. Ibid., pp. 29-30.

have gained from Roman Law, and which caused "Caesar's failure to note the natural divisions of the Celtic tribesman, the families and septs or sub-tribes."[1] With the Celtic, it is somewhat as with "the vast Indian population (which) is an aggregate of natural groups, and not the mixed multitude (found) . . . at home (England)."[2] What is the relation of this line of investigation into the "natural groups" to the theory of the village community? One problem which the theory must answer and almost part of it, is the relation of the village community to the larger groups of tribe and state, etc. The study of these groups can provide us with further information on the nature of the interpersonal relationship and status (equality, or the lack of it) of the members of the group and government; and the nature of land-holding, all problems involved in the village community theory.

Maine has taken out one element of the theory - that the basis of the village community is kinship - and generalized it, finding "kinship as the basis of society."[3] This subject occupies a whole lecture. "The tribes and all subdivisions of them are conceived by the men who compose them as descended from a single male ancestor."[4] The family may be a group of descendants of a still living man or of one recently dead. "Kinship, as the tie binding communities together, tends to be regarded as the same thing with subjection to common authority . . . the confusion . . . of kinship with subjection to patriarchal power is observable . . . in the larger groups

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1. Ibid., p. 30.
2. Ibid., pp. 30-1.
3. Ibid., p. 64.
4. Ibid., p. 66.

into which the Family expands. In some cases the tribe can hardly be otherwise described than as a group of men subject to some one chieftain."[1]

For a partial explanation of the subjection of various groups of kindred to a patriarchal type of power, Maine turns to Morgan. Morgan has pointed out the system of classification of some tribes where "every man is related to an extraordinary number of men called his brothers, . . . his sons, . . . his uncles . . . (This system) simplifies the conception of kinship and conjoint responsibility, first in the Patriarchal Family and ultimately in the Clan or Tribe."[2]

Having developed the concept of kinship, Maine proceeds to a new generalization, and it is in his generalization that we find the essence of his theory. He says: "From the moment when a tribal community settles down finally upon a definite space of land, the Land begins to be the basis of society in place of Kinship. The change is extremely gradual, . . . it has been going on through the whole course of history . . . for all groups of men larger than the Family, the Land on which they live tends to become the bond of union between them, at the expense of Kinship."[3]

Perhaps it would now be well to point up a few of the contradictions that seem to be appearing. If we accept the tribal form with strong chieftainship on the patriarchal model, as Maine has shown us to have existed before permanent settlement on the land, then, when permanent settlement came would not these chiefs have

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1. Ibid., p. 68.
2. Ibid., p. 70.
3. Ibid., pp. 72-3.

greater rights in the land or certain portions of it (which Maine's earlier theory denies) and would they not also have control over the patriarchal households to an extent (Maine's earlier theory denies this. He shows each household completely controlling internal affairs and controlling external affairs by the assembly of patriarchal household heads.)? Are we to assume that the chiefs of these kinship tribes declined in power (According to Maine the chief was powerful: "In some cases the tribe can hardly be otherwise described than a group of men subject to some one chieftain."[1])? Are we to allow the village community to be the early form of land settlement and then centuries later find power bestowed on territorial lords? Is it not easier to imagine an uninterrupted power of the chief who upon settlement gained extra rights in the land above the communal and thus in time turned himself into the communal lord.

The application of external criticism to Maine's works is not the aim of this author; rather it is internal criticism by comparative use of his works. Maine is too much of a jurist to be caught in outright contradiction, but I think it can be established by such comparisons as given above that the tenor of Maine's belief about the nature of early land settlement was changing progressively in his works either consciously or unconsciously. Maine has been accused by other authors of coming dangerously near contradicting himself.

Another problem facing village community theorists is the origin of the state. Maine answers this simply by saying that the

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1. Ibid., p. 68.

"Federal Monarchy was an exact counterpart of a Feudal Manor, . . . both of them were in their origin bodies of assumed kinsmen settled on land . . . The history of the larger groups ends in the modern notions of country and sovereignty; the history of the smaller in the modern notions of landed property."[1]

Maine in the Early History of Institutions changes from his earlier position which looked on the village community as especially Aryan to say: "The naturally organized, self-existing Village Community can no longer be claimed as an institution specially characteristic of the Aryan races."[2] He makes the change in the face of evidence proffered by men like Laveleye.

The relation of the village community to the household community is indicated by Maine and forms part of his theory. The household community or joint family precedes the village community and shows more communal aspects because of the stronger kinship ties.[3]

> In the true village community, the common dwellings and common table which belong alike to the Joint Family and to the House-Community, are no longer to be found. The village itself is an assemblage of houses, contained indeed within narrow limits, but composed of separate dwellings, each jealously guarded from the intrusion of a neighbor. The village lands are no longer the collective property of the community; the arable lands have been divided between the various households; the pasture lands have been partially divided; only the waste remains in common.[4]

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1. Ibid., p. 77.
2. Ibid., p. 77.
3. Ibid., p. 112.
4. Ibid., p. 81. I have found no such statement as this earlier in Maine showing that the true village community no longer holds any land but the waste in common, and that it was the preceding forms of the joint-family or Household Community that had held common lands. Of course we cannot be sure which he means here - whether the ownership is full or in the nature of usufruct, and whether or not there is periodic re-distribution.

Land plays an increasingly important part in determining relations and kinship a less important part, in the community: factors like the periodic re-distribution of arable land, found in Russia, drop out as they have in India, for now the "Indian village community is a body of men held together by the land which they occupy: the idea of common blood and descent has all but died out."[1] They are not far from private property in the full English sense.

Using Sullivan's writings which have already been mentioned, and various texts of the ancient Irish law, Maine builds up a picture of early Irish society.

> The temporary occupation of the common tribeland tends to become permanent, either through the tacit sufferance or the active consent of the tribesmen. Particular families . . . elude the periodic re-division . . . others obtain allotments . . . as the reward for service or the appange of office; . . . The establishment of Property in severality is . . . retarded by the abundance of land and by the very law under which, . . . the tribal society has crystalised, since each family which has appropriated a portion of tribeland tends always to expand into an extensive assembly of tribesmen having equal rights . . . the severance of land from the common territory appears to have been most complete in the case of Chiefs, many of whom have large private estates held under ordinary tenure in addition to the demesne specially attached to their signory.[2]

To Maine, study of the Brehon law leads to "a stronger impression than ever of a wide separation between the Aryan race and the races of other stocks, but it suggests that many, perhaps most, of the differences in kind alleged to exist between Aryan sub-races are really differences merely in degree of development."[3]

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1. Ibid., p. 82.
2. Ibid., pp. 94-5.
3. Ibid., p. 96.

The preceding quotation highlights two elements which can be considered essential parts of Maine's village community theory as they run through his works from Ancient Law and Village Communities in the East and West to The Early History of Institutions. First there is a type of village community specifically stemming from an original common stock of "Aryan" institutions. Secondly, while the development of "Aryan" societies proceeds at different rates and is modified by circumstance, the essential Aryan character is not lost.

While Maine admits that the Brehon law shows considerable evidence of private property, especially in land, he claims that this came about "through the natural disintegration of collective ownership or through the severance of particular estates from the general tribal domain."[1] Yet he does not show us proof of the earlier completely collective state of land ownership. Rather he proceeds to the study of the transition of the Patriarch to the chief. The relation of the chief to the origin of property is shown in "that Property in Land, as known to communities of the "Aryan" race; has had a two fold origin. It has arisen partly from the disentanglement of the individual rights of the kindred or tribesman from the collective rights of the Family or Tribe, and partly from the growth and transmutation of the sovereighty of the tribal chief."[2] These factors appear in feudalism as holdings by socage and by military tenure.

In the Early History of Institutions, there is a long and detailed account of the power of chiefs, their origin, their

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1. Ibid., p. 98.
2. Ibid., p. 120.

relation to the land, and the rise of feudal nobility: but this section does not deal directly with the village community. It is largely a relation of factors causing inequality many of which Maine shows us to have operated from ancient times. One is led to wonder just what elements of the village community theory Maine is maintaining at this point.

Undoubtedly one element is communal land-holding by the tribe, but he indicates that chiefly holdings of a private nature have long existed and does not prove that the chiefs have not always had land-holdings of another character than the rest of the community, or, that their holdings were superior to those of others in the community, or that they were not larger. He quotes no evidence for periodic re-allotment of the arable, except for evidence from the seventeenth century relating to re-allotment after a death. We see no political equality of the members. Maine shows a transition from Patriarch to chief[1] which allows little room, it would seem, for the association of autonomous governing themselves, as is found so characteristically in the village community theory; for increase in the chiefs' power causes a decline in the patriarchs'.[2]

Under the Irish system the chief "was before all things rich in flocks and herds. He was a military leader, and a great part of his wealth must have been spoils of war, but in his civil capacity he multiplied his kine[3] through his growing power of appropriating the waste for pasture, and through a system of dispersing his herds among the tribesmen."[4]

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1. Ibid., p. 117.
2. Ibid., p. 118.
3. Kine - cattle and other pasturing animals.
4. Ibid., p. 142.

Thus military status, as well as wealth in cattle, has apparently been operating from the earliest times before land settlement, to establish inequality among tribal members. Upon land settlement the need for cattle to operate the land by those below the chiefs tends to reduce them to the necessity of using the chiefs' cattle; and a system of further subordination to the chiefs' power develops.

The right to dispose of land, especially by the will, is shown to exist,[1] although in many cases it may be limited by other bodies such as co-villagers or church.

In the distribution of land Maine shows us the change from ancient methods to modern (yet he does not provide examples for the earliest village communities in his Irish material) "in the archaic forms of the Joint Family, and of the institution that grew out of it, the Village Community, these distributions (of land) are per capita; no one person who is entitled takes more than another, . . . and no respect is paid to the particular way in which a given individual has descended from the common ancestor. Under a more advanced system . . . (of) distribution; careful attention is paid to the lines into which the descendents of the ancestor of the joint-family have separated, and separate rights are reserved for them. Finally, each man's share of the property, now periodically divided, is distributed among his direct descendents at his death. At this point property in its modern form has been established."[2]

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1. Ibid., p. 194. This factor is an element distinguishing private property.

2. Ibid., p. 195.

After looking at the Early History of Institutions, what elements of the village community theory can we say Maine would really represent?

First, the tribe settled on the land and the land became "tribe-land". The tribe assumed itself to be a body of kin-folk related by blood. This blood relationship carried with it certain mutual obligations and rights. These obligations and rights existed not between individuals but between families. The families were represented and controlled by their patriarchal heads. Each family had rights in the tribal land perhaps equal or in proportion to the number of adult men in the family - that is, men who could work the land. There were, however, chiefs who had private property in land in their domains at a very early period if not from the first, and who exacted certain obligations from the tribesmen, which we know at a later date implied superior rights in the tribal land. There was probably in earliest times periodic re-distribution of land in the interest of adjusting the size of the holdings to the number of men. The ownership of cattle as a means of providing meat, milk, skins, etc., and especially for working the land, was in the early period of small population more important than land. The chiefs possessed the largest numbers of cattle, and used them to further establish a superiority, reputedly based on purer blood, but also furthered by their military following or comitatus groups.

Upon settlement, the kinship ties gave way in time to territorial relationships, which further strengthened the chiefs' power and weakened the dependents'; as kinship responsibilities were weakened for the chiefs. The period of the greatest equality in the land

thus came with the first settlement while kinship ties, tending to produce an amount of equality, still operated strongly among the larger groups.

We may well deal briefly with the house-community; as, according to Maine's patriarchal theory, they are intermediate between the Family and the Village Community, and help to prove the existence of the village community.

(4) In Early Law and Custom Maine takes a slightly different approach to the village community theory because of new evidence brought to his attention partly by the work of Valthasar Bogišić. This new evidence concerns the East European house-community. This Slavonic house-community Maine finds to be the same as the Joint Family of the Hindus, with "a real, thoroughly ascertained common ancestor, a genuine consanguinity or common fund of property, a common dwelling . . . The House Community then is an extension of the Family: an association of several and even of many related families, living together substantially in a common dwelling . . . following a common occupation, and governed by a common chief."[1] The natural family tends to expand into the household-community and the house-community gives off natural families. "The House-Communities,. . . are as far as possible from being patriarchal despotisms, and they illustrate very clearly that dimimution of paternal power which, . . . shows itself when families, instead of dissolving at the death of an ancestor, hold together and take the first steps toward becoming a nation."

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1. Maine, Custom, pp. 40-41.

2. Ibid., pp. 244-245.

Maine continues, showing the relationship between the East European and Russian forms of communalism. "The natural development of the House Community would be into the Village Community . . . It has almost universally assumed this form in the Russian territories . . . There is a growth in numbers in the village community over the old house-community, (and) the land, instead of being cultivated absolutely in common, is divided between the component families, the lots shifting among them periodically, or perhaps vesting in them as their property, subject to a power in the collective body of villagers to veto its sale. The tie of brotherhood has also become greatly weakened."[1]

Depending somewhat on Alfred Lyall's Formation of Clans and Castes, Maine proceeds to develop his kinship theories in relation to early society. "The communities which were destined to civilisation seem to have experienced an attraction which drew them toward one exemplar, the pure clan, generally exogamous among the Aryans, . . . always believing in the purity of paternal descent, as always looking back to some god or hero as the first of the race."[2]

The allod in some form or other is probably as old as the institution of individual landed property, and we may regard it as equivalent to or directly descended from the share which each man took in the appropriated portion of the domain of the group to which he belonged - tribe, joint-family, village community or nascent city . . . this share was not at first a definite area, but what we should now call a fraction or aliquot part of the divisible

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1. Ibid., pp. 261-62. This material is taken largely from Bogišić.

2. Ibid., pp. 281-82.

land. The shares of the domain which each family or household could claim shifted among the households under a system of distribution in turns or by lot, and each share very slowly became appropriated to particular families."[1]

This again goes to demonstrate his belief in the gradual development of private ownership of land long after settlement, and that periodic re-distribution was a survival from the days of communal ownership.

(5) This theory of "survivals" is one which was current throughout the latter part of the nineteenth century and forms the typical proof for the social evolutionists, who from one element posit an antecedent stage of development; such as: sexual promiscuity before marriage in a tribe would to them indicate an antecedent state of pure promiscuity.[2] The village community theorists tend to use this type reasoning: if part of the land is now owned in common, it must have once been all owned in that manner; periodic re-distribution indicates that there was once common ownership. However, Maine does not go along with the social Darwinists of the parallelist type. He was much more of a Diffusionist believing that different sequences and stages were possible; that there was not necessarily an exact order of stages and that cultures could be modified by diffusion of cultural elements.

"The important lesson is that in sociological investigation it is never possible to discover more than the way in which the type has been formed. If an institution is once successful, it

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1. Ibid., pp. 338-39.
2. E. A. Westermarch gave this concept of survivals one of its most critical attacks in his works.

extends itself through the imitative faculty, which is stronger in barbarous than in civilized man. It follows from this that no universal theory, attempting to account for all social forms by supposing an evolution from within, can possibly be true. . . Barbarous men will copy any successful or fashionable social type - a Tribe, a Sept, a Gens, a Village Community."[1]

Maine's concept of the village community varied, in emphasis if not in form, considerably from the previous concepts held by the German and English scholars. The essence is kinship expressed in land forms which reflect the varying degrees of kinship in a general way (That is, the extended family has entirely communal land; the village community has only separated part of the land on a permanent or semi-permanent basis, and finally as kinship gives way further to territorial obligations the land falls more under individual ownership).

This is all regulated by custom in the beginning, which finally gives way to the more individualized relations in dynamic societies - that is, the change takes place in emphasis from status to contract. This is somewhat the aspect that is accepted by later theorists such as Tonnes and Redfield.[2] Vinogradoff capably shows us what the primary problems of Maine were and the conclusions which he reached.[3]

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1. Ibid., p. 285.

2. Robert Redfield, Folk Culture of Yucatan (Chicago, 1941) p. 210. This is much the sort of distinction which the Redfield school make between Folk Culture and modern urban, or Western culture.

3. Paul Vinogradoff, Villainage in England (Oxford, 1892), p. 28.

The German mark theory with which Maine was familiar did not have the emphasis on the customary kinship society. That remained for him to bring out. Maine did not support the "spontaneous legislations of democratic councils"(folk-mots, etc.). Maine reached generalizations about the nature of society which were almost ideal types. A type is developed for primitive society just as one is developed for the other end of the continuum, modern society. There is a logical, consistent pattern of relationship and action for each type. Maine, however, does not make the fundamental methodological and theoretical distinction between what are essentially abstract ideal types and concrete phenomena, which would allow for the development of a theoretical system which did not have to match exactly any concrete system but which could be used as a method of analysis of the concrete. Maine never had an abstract system: his comparative system involved not comparison with the abstract, ideal type but comparisons between concrete phenomena existing in particular places and times. Thus, we see that he was essentially an historian with historical limitation of time and space instead of a sociologist dealing in space and time free concepts, which can be manifested in varying degrees in concrete situations. However, we have seen the strong sociological leanings in the complex of theories centered around the village community theory (centered there for the purpose of this analysis).

It is these sociological leanings that mark an essential distinction between Maine and the trend of both the German and English schools dealing with the whole problem of village community and manor. Both schools are historically dominated. We have seen

the German interest in tracing Teutonic forms leading to the Manor, and the German folk-law and constitution as a unique product. The English school is interested in developing the basis of English government. Maine has generalized the concepts pertaining to the village community to apply to the total Indo-European language group - that is, he has moved from the sphere of the unique to that of the general - and there has attempted to develop principles such as kinship versus territorial relations, patriarchal power, status to contract, etc. These aspects are movements away from the specialized historical studies, in the direction of rudimentary sociological principles. As we have shown already, he thought history should show inflexible law and regularity as did the natural sciences. Thus, Maine would seem to lie more in the sociological field; not so much because of the direct influence of sociology, but because of the combination of his historical natural science, and legal interests.

Let us summarize the essential elements which appear to be a consistent part of Maine's theory of the village community, not merely related to particular evidence.

(1) The village community exists as a stage within the "Aryan Race".

(2) The groups comprising the "Aryan Race" have moved varying distances from the village community. The latter stands in the line of development from nomadic life to modern civilization.

(3) It marks the beginning of the shift from kinship to territorial social structure.

(4) Kinship is the basis for earliest society which probably arose in relation to extended patriarchal power.

(5) In the early village community the land is communal land; and the community is a blood group.

(6) But there develops a semi-permanent division of the arable land (perhaps from the first), with a share for each patriarchal family, which represents a more closely related blood group than the community.

(7) This family portion of the arable is subject originally to a periodic redistribution and agricultural control by the community, which emphasizes the communal ownership of the land and the fact that individual families possess only the usufruct of it.

(8) The individual counts for nothing as an individual (and for this reason the village community cannot be considered democratic in the sense that some authors claimed it to be), and the patriarchal family is the smallest unit with which the community as a whole deals.

(9) As the village community begins to decline it maintains its ownership of waste, forest and pasture land; but the family gains permanent control over the arable, and in time even individual ownership begins to play a role.

All the above points have a bearing on the establishment of one general problem: that is, showing the relationship between the organization of society and forms of property - holding and associated rights. More generally stated, it approaches the Marxian problem of the relation between economic factors and other aspects of society, but in Maine's analysis economic factors are not solely determining, in fact the original kinship structure of society fixed the nature of economic production. Maine reminds us

of the true conservative whose "time-sense construes the past as inexorably leading to and indisputably validating the existing state of society".[1] History is the development from early "status" society to our modern and final "contract" society.

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1. Robert K. Merton, Social Theory and Social Structure (Glencoe, Ill., 1949), pp. 252-3.

VI. THE FOLLOWERS OF MAINE

In this section on the direct influence of Maine, I have chosen only to consider those who largely accept the village community as it stood. In the period after Maine the men who accepted the theory as it was given then were to a great extent men primarily interested in the use of the village community theory to prove later happenings in history or to justify possible future courses of action. Thus we find socialists and communists favorable to the theory, as it provides justification for communal ownership. The men interested in historical investigation and research I have dealt with largely in the following section on reaction and modification, as the trend of investigation brought about re-interpretation of evidence and the formation of new theories, which were undoubtedly influenced by Maine although in some cases it was only a reaction to his ideas.

This section is the carrying out of the division projected in the beginning parts of this work, between the social milieu and the forerunners of Maine.

Admittedly, almost all social research results from particular interests of the particular social milieu. This causes certain theories to be accepted; but the evidence accumulated as the result of investigation and the attempts at verification of the theories will often, in time, modify the theories so that they no longer meet the social milieu. Those most interested in action may continue to use the outmoded theory: those interested mainly in a scientific approach are careful to modify the interpretations, generalizations, and theories to meet the totality of facts and the highest developments

in method. Thus the village community theory has a dual aspect: it is the product of a social environment, and it is used by various members of the society to defend or change the conditions in the society; and the theory is also the product of the development of the sciences of history, sociology and anthropology. From the latter viewpoint it is subject to continual modification in the face of refinements in method and the accretion of facts in any of these sciences.

In this work direct influence means the influence coming from Maine, which led those following Maine to accept the village community theory fundamentally as it stood. Representative men have been chosen, that is, men who were led to accept the theory for a variety of reasons.

For purposes of clarification let us now redefine some of the terms used in Maine's village community theory, so we shall know explicitly what the followers accepted. Maine's definition of a Mark as an organized, self-acting group of Teutonic families, having a common proprietorship over a definite tract of land, the mark, cultivating the domain on a common system, and sustaining itself by the produce, is a general statement of what was accepted as the village community. This village community theory[1] was accompanied often by such of Maine's associated theories as the patriarchal and status to contract. These we have sufficiently described.

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1. We call it the village community theory when this type of settlement, demonstrated by the mark, is thought to be universal or to exist especially among such a group as the entire "Aryan Race".

What is amazing is the wide range of philosophic and political points of view held by the men who accepted the village community theory and found it useful in the demonstration of varying views.

As we know, Maine was the Conservative, saying that change is, and has to be, gradual, and the change from status to contract is the change that has been responsible for civilization. A somewhat similar position may be found in Herbert Spencer's writings. Spencer uses the terms status and contract - borrowed from Maine - as types for investigation, connecting status with what he called the military stage of development, and contract with his industrial stage. This was because of his need for the demonstration of a mechanical type of social organization implied in contract. He conceives of the tendency of evolution toward individualization and of forces toward equilibrium.[1] Thus Maine's theories tend to lend support to Spencer's system.

When we turn to Laveleye, we not only find an acceptance of the village community the the patriarchal theories; but an extension of their scope. Where Maine's statements had been limited largely to the so-called "Aryan Race", Laveleye shows the universality of the communal aspects of early life.

> A study of the course followed by the development of property from the infancy of society has led to two opposite lines of inference and thought - represented by Sir Henry Maine and M. de Laveleye - with regard to its present forms in most civilized countries; but the historical researches of both these eminent writers coincide in establishing that the separate ownership of land is of modern growth, and that originally the soil belonged in common to communities of Kinsmen.

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1. Ernest Barker, Political Thought in England from Herbert Spencer to the Present Day (New York, 1915), p. 93.

2. Emil de Laveleye, Primitive Property (London, 1878), p. vi. (Hereafter, E. Laveleye, Property).

We know more where Laveleye stands when we find out that "the object of the book is not to advocate a return to the primitive agrarian community; but to establish historically the natural right of property as proclaimed by philosophers, as well as to show that ownership has assumed various forms, and is consequently susceptible to progressive reform. Mr. Mill regards the point as of the greatest importance."[1] We see that we are dealing with someone primarily interested in establishing a philosophic theory in the interest of reform, a reform of a socialized nature.

In the introduction to Laveleye's work a good point is made concerning Maine and Laveleye; that is, that the theory of early communal property is not invalidated by Bachofen, Spencer, Lubback, Mc Lennan and Morgan when they assert antecedent states of human association before the earliest stages of inchoate civilization which Laveleye and Maine have in mind. Maine was always careful to state that his works did not deal with the origin of things. This is probably the distinction made by Laveleye in following Maine.

The difference in interpretation between Maine and Laveleye lies in the fact that, the trend has not only been towards individual property, but towards inequality of property. Maine sees in this progress and civilization: Laveleye "formidable dangers to society."[2]

As to the nature of the form of settlement thought to have existed by Laveleye, it was this: "Primitive societies, at the moment of passing from the pastoral system to the agricultural system, are composed, as has just been shown, of groups of men united

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1. Ibid., p. xliv.

2. Laveleye, Property, p. xxi.

by the bonds of common descent. All are proprietors of an undivided share in the common territory; all are equal and free; they are their own administrators, their own judges and the electors of their own chiefs . . . No authority is exercised except by delegation; no dissension taken except after discussion, by a majority of votes. No functionary has any particular power by virtue of birth or divine right."[1]

In another place he states that "when this institution is found among all nations, in all climates, we can see in it a necessary phase of social development and a kind of universal law presiding over the forms of landed property."[2] In taking up specific evidence, he attempts to show us that "in the dessa of Java and in the Russian Mir we can grasp, in living form, civilization in its earliest stages, when the agricultural system takes the place of the nomadic and pastoral system. The Hindoo Village has already abandoned community, but it still retains numerous traces of it. We must now show that European nations have started from the same point and passed through the same phases of development."[3] This passage shows a similarity to Maine's fundamental assumptions in method, which are probably taken from Maine in part, as the village community theory does not go far without the comparative historical method and the concepts of evolution and states of development.

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1. Ibid., p. 221.
2. Ibid., p. 2.
3. Ibid., pp. 60-61.

Throughout Primitive Property, we find direct use of Maine's material, which indicates that Laveleye probably read at least Ancient Law, Village Communities in the East and West and The Early History of Institutions. In addition, as has been shown, there is a reflection of the theory and method characteristic of Maine, but carried to a more universal scope and a greater degree of absoluteness (Maine would never refer to identical stages of development through which all mankind passed).

Maksim Kovalevsky (1851-1916) was a liberal dismissed from the University of Moscow in 1887 for his views. He was a Spencerian evolutionist and an advocate of Maine's comparative-historical method. He found that increasing density of population was the principal factor in economic evolution although not the only one.[1]

Writing to demonstrate what he thought to be the ancient law of Russia contrasted with its modern customs,[2] he (Kovalevsky) stands in continuance from Maine. This is indicated by the title of the work and by the fact that the work is dedicated to Sir Henry Maine. Kovalevsky has had the opportunity of reading such criticism of Maine's theory as Seebohm[3] and Fustil de Coulanges, but he hardly agrees with them. We can see his position in the following quotation:

> The almost universal admiration which his (Maine's) essay on Village Communities in the East and West has elicited, rests on no other ground than that of its having first brought to light the truth which is now all but established, that village communities represent a distinct period which ought to be

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1. "Kovalevsky", Encyclopaedia of the Social Sciences (New York, 1944), pp. 595-6, v. 7.
2. Maxim Kovalevsky, Modern Customs and Ancient Law of Russia. (London, 1891).
3. Seebohm is dealt with in the next section.

> placed between the patriarchal and the feudal periods, and that all endeavors to explain their existence among this or that people by the peculiarities of national character ought to be henceforth declared useless and worthless. This idea, confirmed, as it is, by a general survey of the survivals left by the system of village communities among the Celts, Germans, and later nations, a survey with which M. de Laveleye has inseparably connected his name, has literally revolutionized the historical researches of more than one country in Europe.[1]

The above quotation establishes Kovalevsky's direct continuity of theory from Maine and that he is a theoretical follower who generalized and made more rigid Maine's theory.

The statements contained in the above quotation also show us that the author is a Russian who rejects the slavophile interpretation of the village community in Slavic countries as something peculiar to the Slavic soul. He accepts the beliefs of Laveleye, who also rejects the idea above. This viewpoint, however, is nothing more than the expansion of Maine's ideas. The village community theory originated basically in national and religious feeling, especially German and Teutonic, but also Slavic and Russian. Maine made the theory apply to the widely scattered "Aryan races" (so-called) and did not exclude its application to other peoples. In that state it was no longer useful to nationalistic thought, but still had some use in terms of the white conservative Aryan dominations. Now Laveleye introduces the universal scope to the theory and further decreases its use as a bolster to the white Aryan social thinking, but he establishes its great usefulness to that universal non-racial, non-nationalistic struggle between economic groups; the proletariat versus the bourgeoisie.

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1. Ibid., p. 72.

We see that Kovalevsky accepts the patriarchal ideas of Maine as far as Russia is concerned at least: "all these features of the patriarchal family so ably illustrated in the works of Sir Henry Maine reappear in the modern constitution of the Russian family."[1]

In the preface to Engels' work it is stated that, "Kovalevsky's argument turns on the proposition that the patriarchal household is a typical stage of society, intermediate between the matriarchal and the monogamic family."[2] This statement serves not only as an indication of Kovalevsky's theory, but this excerpt also shows one the use that is to be made of Kovalevsky in Engels' work. The continuity in use and development of the theory leads us, therefore, from Maine to Laveleye to Kovalevsky and now, to Marx and Engels.

Marx and Engels both make reference to the village community. In the Capital of Marx, the reference is briefly to the Indian village community. It is in Engels' work that we most clearly see their position on the village community theory.

First, it is stated that Maine "thought he had made a stupendous discovery by saying that our whole progress over former epochs consisted in arriving from status to congract, from inherited to voluntary, by contracted conditions. So far as this is correct, it had already been mentioned in the Communist Manifesto. But in order to make contracts people must have full freedom over their

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1. Ibid., pp. 32-33.
2. Frederick Engels, The Origin of the Family, Private Property, and the State (Chicago, 1910). This book is admitted by Engels to be in large part the joint work of both Marx and Engels, so we treat their positions jointly.

persons, actions and possessions."[1] Thus, he denies Maine's complete originality in his status to contract theory.

Now it seems appropriate to make a fairly extended quotation showing Kovalevsky's position according to Engels, and Engels' use of that position.[2]

> Since Kovalevsky has demonstrated that the patriarchal household community existed nearly everywhere, perhaps even everywhere, as the connecting link between the matriarchal communistic and the modern isolated family, the question is no longer "collective property or private property?" as discussed between Maurer and Waitz, but what was the form of that dollective property. . . The question whether their economic unit was the gens, or the household or an intermediate communistic group, or whether all three of these groups existed at the same time as a result of different local conditions (in Germany), may remain undecided for a long while yet. Kovalevsky maintains that the conditions found by Tacitus were not founded on the Mark or Village Community, but on the household community which developed much later into the village community by the growth of population.[3]

> Their (the Germans') personal efficiency and bravery, their love of liberty, and their democratic instinct which regarded all public affairs as its own affair, in short, all those properties which the Romans had lost and which were alone capable of forming new states and raising new nationalities out of the muck of the Roman world - what were they but characteristic marks of the barbarians in the upper stage, fruits of the gentile constitution? . . . If they could safely transmit a trace of the genuine gentile order, the mark communes, to the feudal states of at least three of the most important countries - Germany, north of France, and England - and thus give a local coherence and a means of resistance to the oppressed class, the peasants, even under the hardest medieval serfdom; means which neither the slaves of antiquity nor the modern proletarian found ready at hand - to whom did they owe this, unless it was again their barbarism, their exclusively barbarian mode of settling in gentes?[4]

The above quotation should clearly demonstrate the acceptance and use of the village community theory in the materialistic communistic interpretation of history. What is assumed concerning

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1. Ibid., p. 96.

2. The continuity from Maine here is direct. Engels draws upon Kovalevsky, who is in large part based on Maine.

3. Ibid., pp. 169-70.

4. Ibid., pp. 188-89.

the village community is in fundamental agreement with Maine; even the introduction of the household community as an earlier form in some areas is acceptable to Maine, as has been shown in his writings concerning Bogišić's information on Slavic communal forms: Maine admits of the development of the household into the village community. Maine is primarily concerned with the origin of society and kinship relations, the communal nature of early property and the changes which they underwent. However, he gives a different picture from Engels' of the role which the village community has played in the development of civilization.

While the evolutionary theory had been consistently used to justify the conservative position, by showing that those on the top of the social and economic ladder had arrived by the process of natural selection, the evolutionary theory, just as the village community theory, could be turned to new justifications. This was done by P. Kropotkin who wrote, among other things, Mutual Aid, a Factor in Evolution. In the demonstration of the idea expressed in the title, the village community theory plays an important part.

> A whole science devoted to the embryology of institutions has been developed in the hands of Bachofen, Mac Lennan, Morgan, Edward B. Tylor, Maine, Post, Kovalevsky, Lubbock and many others. And that science has established beyond any doubt that mankind did not begin life in the shape of small, isolated families[1] (further on Kropotkin states:) they (Teutons, Celts, Scandinavians, Slavonians) came out of the ordeal (the rise of the patriarchal family) with a new organization - the village community - which kept them together for the next fifteen centuries or more. The concept of a common territory, appropriated or protected by common efforts, was elaborated, and it took the place of the vanishing conceptions of common descent . . .

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1. P. Kropotkin, Mutual Aid, a Factor in Evolution (New York, 1916), p. 65.

> it recognized the independence of the family . . . the village community disclaimed all rights of interference in what was going on inside the family enclosure; . . . it (the village community) became the primary cell of future organization, and with many nations the village community has retained this character until now . . . the village community was not a feature of the Slavonians nor even of the ancient Teutons.[1]

Kropotkin states that in the above he is following such men as Kovalevsky and Vinogradoff, both of whom have been strongly influenced by Maine. As for the direct influence of Maine on Kropotkin we need only quote.

> The village community in India - . . . is well known through the epoch-making works of Sir Henry Maine; . . . in short, (and here he goes beyond Maine) we do not know one single human race or one single nation which has not had its period of village community . . . it was anterior to serfdom, and even servile submission was powerless to break it. It was a universal phase of evolution, a natural outcome of clan organization, with all those stems, at least, which have played, or still play, some part in history.
>
> (Kropotkin considered the village community in much the same light as Maine) As a rule, it was a union between families considered of common descent and owning a certain territory in common[2] . . . As to private property in land, the Village Community did not, and could not recognize anything of the kind.[3] (Only the influence of Roman Law and the Christian Church brought about the concept of private property in land.)
>
> Every change in judicial, military, educational, or economical manners had to be decided at the folkmotes of the village, the tribe or the confederation.[4] And the progress - economical, intellectual and moral - which man accomplished under this new popular form of organization (the Village Community), was so great that the States, when they were called later into existence; simply took possession, in the interest of the minorities, of all the judicial economic functions which the village community already had exercised in the interest of all.[5]

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1. Ibid., p. 95.
2. Ibid., p. 96.
3. Ibid., p. 98.
4. Ibid., p. 99.
5. Ibid., p. 117.

Viewing the position of Kropotkin, then, we see that, in regard to the village community itself, it is very similar in its essential aspects to Maine. His interpretation of its place and influence in history is quite different, however. We can assume that he received some of his ideas from Maine (He apparently had read Village Communities in the East and West and International Law, both by Maine) or from some of Maine's followers, Vinogradoff or Kovalevsky. As Kropotkin was an anarchist, his position in regard to the village community is quite logical. He wished to show that state action was ineffective and that mutual aid was of great importance in the struggle for existence.

VII. REACTION TO AND MODIFICATION OF THE VILLAGE COMMUNITY THEORY

The reaction to and modification of the village community theory began in Maine's lifetime; and within two decades after his death, few, if any, scientists held a theory which could be called the same as Sir Henry Maine's hypothesis.

There was a general attack against the three factors which had helped to form Maine's theory, and much of the thought of his time. First, the unilateral evolutionary interpretation of social phenomena gave way to cyclical concepts of evolution or even a disregard of progressive evolution. Secondly, the tendency to generalize over broad areas, which came perhaps from the Enlightenment, and was especially characteristic of sciences newly come into their own (with naive faith in their ability to solve all problems), began to give way to distrust of broad and generalized systems, and subside gradually in favor of the rising use of intensive investigation and the accumulation of facts. Thirdly, the comparative historical method was severely limited and evidence was no longer moved in time or place to fill in missing elements of an historical continuity: at most it was useful only as an heuristic aid.

The village community theory was always backed by circumstantial evidence such as analogy and survival, and not by contemporary historical documents.

One of the first men to point this out was the critical and careful scholar Fustel de Coulanges.[1] He was probably strongly

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1. Fustel de Coulanges, The Origin of Property in Land (London, 1892).

biased in favor of private property, but he went through much of the so-called evidence for the village community theory, checking both the original source and the interpretation of the evidence. The result was that the theory, while not refuted, could not be said to be indubitably proved either. This provided a challenge which was soon taken up by other men in the field.

The attack on the Teutonic doctrine first came in 1875 made by the eminent French scholar when he published the first volume of a Histoire des Institutions de l'ancienne France. In essence he said: "There is not a single word in the documents to indicate that they (Germans) practiced for a day a system of communal ownership or periodical redistribution."[1] His ideas came under such criticism that he made an intensive re-investigation of the evidence, especially the writings of von Maurer, and in de Coulanges' work, The Origin of Property in Land, are made a number of points. In fact he and Seebohm arrived independently at much the same result. They find the manor to be of the earliest origin, and the development they found not to be from a free village community to a condition of serfdom but from a servile status to increasing freedom. F. de Coulanges challenged the communal mark theory and the whole theory of German primitive life supposedly resting on the authority of Caesar and Tacitus. "He showed how little evidence there was for the supposed existence of popular courts of justice; he traced the growth of the class of coloni or semi-servile peasants under the later Roman empire . . . and, finally, he denied altogether

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1. W. J. Ashley, "Early Teutonic Society", (Hereafter, W. J. Ashley, Teutonic) International Quarterly, VIII (1904), p. 243.

the existence of that free, self-governing village community with common ownership of village lands which Maurer had made familiar as the Mark.[1]

In his work Coulanges made a number of points: (1) The Mark theory derives no support from the language of Caesar or Tacitus. (2) Mark in early German law means primarily boundary and indirectly the property enclosed. (3) Early German law is based on the assumption of private property and never on common ownership, and traces of earlier conditions point only rights of family and no larger unit. (4) The only direct proof of periodic re-distribution of village lands is derived from an evident blunder by a copyist. (5) The term common as applied to waste in early German law means common to or shared by two or more individual owners. (6) The commons, allemende and such terms appearing frequently in documents of the ninth and succeeding centuries, point to customary rights of use enjoyed by tenants over land belonging to a lord, and there is no evidence that tenants were once the land's joint owners. (7) There is no evidence in the early Middle Ages of Mark assemblies. (8) Judging from the earliest German codes great estates cultivated by slaves or semi-servile tenants were the rule, even at the beginning of the Middle Ages.[2] "As to the supposed analogies with the mark in the practices of other peoples, all that can be said at this stage is that most of them prove only a joint-cultivation and not a joint-ownership."[3]

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1. Fustel de Coulanges, The Origin of Property in Land (London, 1892), p. x.
2. Ibid., introduction, passim.
3. Ibid., p. xx. This introduction was written by W. J. Ashley, who was probably not only arguing against Maurer, but also and especially against Laveleye.

After the Mark idea was attacked, comparative evidence from India was urged, "from the time of Maine it had been India that had furnished the most convincing parallels."[1] Maine had said that the oldest discoverable forms of property in land in India were forms of collective property and that all existing rights of private ownership arose from the breakup or depression of the original communities. However, at this time Baden-Powell stated: "the joint villages of India and all landlords' villages have arisen by sub-division among heirs in some similar way, and the joint owners do not themselves till the soil. They have beneath them tenants of inferior rank or caste who relieve them of this obligation. On the other hand, when villagers themselves cultivate the soil, their properties are in severality and there is no common ownership."[2]

The works of Sanskrit scholars were leading to new interpretations of Indian past forms of property and settlement, and this fact is even pointed out by Fustel de Coulanges. In addition, as has been pointed out, the works of Baden-Powell[3] throw new light on the village community problem as they show that the earliest forms of communities were not village communities in Maine's sense and that the communal villages are a later development.

Hopkins writing in 1898 says: "Since the days of Sir Henry Maine, the glory of the Hindu village community has well-nigh departed." He shows the early power of the King with the ability

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1. W. J. Ashley, Teutonic, p. 257.
2. Ibid., p. 257.
3. B. H. Baden-Powell, The Village Community in India (1899), or The Indian Village Community (1896).

originally to transfer land in absolute ownership to individuals; of individual land-holding with division of land by inheritors, and the effects of winning land by conquest.[1]

Returning to European problems concerning the theory we find Vinogradoff saying, "I can claim Maine as one of my most influential teachers . . . the whole of my generation of students of law and history have had to deal directly or indirectly with the ideas propagated by him or similar to his."[2]

We can see this influence of Maine on Vinogradoff when we look at the latter's ideas concerning the village community. We must class Vinogradoff among those who modified the theory. He steers between the two extremes: "I venture to submit that there are other combinations to be reckoned with than the two of free democracy and of an association of idle conquerors living on the work of natives."[3]

Vinogradoff goes on to state that: "Insofar as agriculture is historically developed out of pastoral husbandry, there seems to be hardly anything more certain in the domain of archaic law than the theory that the soil was originally owned by groups and not by individuals,[4] and that the individual appropriation is the result of a slow process of development."[5] The delimitation of land may be lasting if labor and capital bring about "a thorough-going

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1. E. Washburn Hopkins, "Land Tenure in Ancient India", Political Science Quarterly, XIII (1898), p. 669.

2. Vinogradoff, Papers, II, p. 174.

3. Paul Vinogradoff, The Growth of the Manor (London, 1905), p. 25.

4. Whether this is land ownership or political control is a question as Maitland has pointed out.

5. Ibid., p. 18.

change, extending with it indirect results long over the removal of the harvest."[1] Thus, while Vinogradoff does hold for a sort of original communal ownership in land, as does Maine, he recognizes that the type of use may be changed.

A further modification is the stressing of original aristocratic elements.

> The fact that land was considered primarily to be the common property of clans, septs or gwelys, does not preclude in the least that other commodities were distributed without any regard to the allotment of shares, and that very marked ranks and privileges were built upon this foundation as well as upon special forms of land ownership.
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> Communalism . . . was connected with the necessity of considering the feelings of tribal warriors which were the most important element of that society . . . The free armed tribesman was undoubtedly endowed with a rough average of rights, though the recognition of his social status had nothing to do with modern democratic theories.[2]

This follows along with the tenor of Maine's village community theory, but does not account for the difference in the status of leaders which comitatus groups created.

The nature of the village community is further illustrated when Vinogradoff states that, in addition to the free, there were slaves and strangers (or aboriginal inhabitants in a position much like serfs). While both freemen and serfs (strangers) contribute to the chiefs, the body of freemen are not supported by the serfs. Largely it was the kings and chiefs who could make good use of slaves and serfs; and "the owners of slaves and serfs naturally get ascendancy among the free."[3] (The unequal ownership of slaves

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1. Ibid., p. 18.
2. Ibid., p. 24.
3. Ibid., p. 28.

and serfs naturally leads us to expect unequal ownership of land so that the slaves and serfs can be employed. Their master could work more land than the individual freeman.)

Vinogradoff's main demonstration of the village community is typical of the historical method as used by Maine, from the documented to the non-documented. "Rights of common usage, communal apportionment of shares in the arable, communal arrangement of ways and times of cultivation - these are the chief features of open field husbandry, and all point to one course - the Village Community. It is not a manorial arrangement although it may be adapted to the manor."[1] In addition the existence of free tenants - other than lately freed ones - who are members of the village community - points to a manor, imposed on a free community, not a community of servile origin.

We see in this last statement not only a supporting of a position close to Maine but an answer to the Romanist theories of Seebohm.

We can understand the relationship between Maine and Vinogradoff when we read Vinogradoff's statements on historical research in his Villainage in England. Village life in medieval England was not the present individual and state-dominated type, nor yet the tribal blood relationship system, nor the village community with an "equal partnership among the free members . . . All these systems are but stages of development, after all, and the most important problem concerning them is the problem of their origins

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1. Paul Vinogradoff, Villainage in England (Oxford, 1892), p. 400.

and mutual relations. The main road towards solution (is the) . . . strictly historical investigation . . . The later and well recorded period ought to be made to supply additional information as to the earlier and imperfectly described ones."[1]

Seebohm believed that the equality in the size of land-holding units did not come from the free village community, as Germanic law regulating free land does not prevent it being divided, instead it must come from Roman influence - the Roman villa. "Roman villas and their labourers passed from one lord to another (Germanic) . . . social development is a movement from serfdom to freedom, and the village community of its early stages is connected not with freedom, but with serfdom."[2]

Holdsworth too points out the relationship between Maine and Vinogradoff (also Maine to Savigny). "Maine made a series of comprehensive surveys of many fields of jurisprudence: Vinogradoff carried on his work by the manner in which he actually mapped and charted the ground which Maine had only surveyed. Maine formed the connecting link between Savigny's school of historical jurisprudence, and the modern historical school, of which Vinogradoff was one of the most eminent representatives."[3]

It is Vinogradoff who asks such questions as: "Can it really be true that the great bulk of freemen was originally in territorial subjection, or rather that there never was such a thing as a great number of freemen of Germanic blood, and that the German conquest

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1. Ibid., pp. 397-98.
2. P. Vinogradoff, Villainage in England (Oxford, 1892), p. 34. (Hereafter, P. Vinogradoff, Villainage).
3. William S. Holdsworth, The Historians of Anglo-American Law (New York, 1928), p. 85. (Hereafter, W. Holdsworth, Historians)

introduced only a cluster of privileged people which merged into the habits and rights of Roman possessors?"[1]

Seebohm's approach stems probably more from the French type of thinking about the origins of European civilization. Due undoubtedly to a certain amount of national animosity, the French thought took the stand of strong Roman influence, and little of the Germanic, while the German view was based on German dominance in large parts of Europe and on the free and equal nature of early German institutions and people.

Evidently, the, Seebohm's position was not in complete opposition to Maine and Vinogradoff. "In conformity with Maine, he (Seebohm) underlined this communal bond of the medieval village, but he traced the origin of the communal bond, not to tribal freedom, but to manorial servitude."[2]

Gomme shows us the differences in the positions of Maine and Seebohm clearly. He attributes the popularity of the term village community to the writings of Maine and Seebohm. "The contrast between the village community as represented by each . . . the institution which the term connotes has become somewhat indefinite . . . A group of men cultivating their land in common and having rights and duties in common is the typical form; but students are divided as to whether this institution is of historical origin and growth, or of primitive origin and growth . . . To accept the primitive position we must . . . disentangle ourselves from the notion that the form in which the village community is found in

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1. Ibid., p. 32.

2. Vinogradoff, Papers, I, p. 274.

Britain could have only arisen from the influence of civilizing powers, a position forced upon us by Mr. Seebohm; . . . get rid of the idea that as an institution it is a special heritage of the Aryan race, a position forced upon us by Sir Henry Maine . . . establish . . . its wide extension . . . therefore to be reckoned with as one of the phases through which practically all mankind who have reached a certain stage of development must have passed."[1] The above quotation not only clarifies in part the positions of Seebohm and Maine but shows the viewpoint of an even more thorough-going believer in the village community than Maine.

Seebohm wrote an article[2] criticising the position of Vinogradoff "Villainage in England". According to Seebohm, Vinogradoff shows two things: (1) "the freedom of the class of Saxon gafolgelders or libere tenentes, swept, except in the Danish district, into the Domesday class of villani", (2) "of the independence of the open field system from the manorial system imposed on it . . . I have expressed my conviction that the first of them will not be found to date back to the original Saxon settlements, whilst the second appears to me to belong to the open field system which dates back long before them (That is, to Roman times). He (Vinogradoff) may even yet find sounder explanations of legal and other survivals of ancient freedom than in the theory of originally free Saxon settlements of the type of the supposed German Mark."[3]

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1. George L. Gomme, The Village Community (London, 1890), p. 2.
2. F. Seebohm, "Villainage in England", English Historical Revue VII (1892), pp. 444-65.
3. Ibid., p. 465.

This last quotation is especially useful in pursuing the objectives we have in mind in this section, of tracing relationships and differences in the development of the village community theory from Maine.[1] Seebohm and Vinogradoff are certainly two of the chief village community theorists carrying on after Maine; and they hold quite different positions; Vinogradoff following much more in the line of Maine. Seebohm has shown - above - Vinogradoff's position and his own in relation to it. We see that Seebohm differs on at least three essential points: (1) the origin of the village community, (2) the servile as opposed to the free, self-acting character assumed by Maine and (3) the patriarchal element is not too important to Seebohm because of the type of origin he postulates.

Seebohm also did much work with tribal material,[2] and he held a variety of positions during his lifetime, but he is most noted for his Romanist position which we have attempted to demonstrate.

At this point the work of Andrews[3] concerning the English manor falls into consideration. The relationship between Maine and Andrews is best described in an article appearing in the Saturday Review. It is found that Andrews' conclusions "'simply modifies the old theory of the village community by introducing a closer bond of

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1. We shall not deal with German scholars who take up this subject after Maine as the influence bearing on them is largely through the works of Laveleye translated into German. Secondly, German scholars to a great extent stand in continuance from previous German work. Finally, such inter-relations are adequately dealt with by A. Dopsch and others.

2. F. Seebohm, The Tribal System in Wales (London, 1904).

3. Charles M. Andrews, The Old English Manor (Baltimore, 1892).

kinship and the element of chieftanship, and by reducing the free tribesmen to a moral, social and political condition more in accord with the habits of people just emerging from . . . barbarism' . . . And who has insisted on the bond of kinship, real or fictitious, as a vital element, more than Maine. On the whole, the one-sidedness of Maurer and Kemble and their following is really a matter of tone and coloring much more than demonstrable errors in fact."[1]

Vinogradoff was a strong influence on the direction Maitland took in his investigation into early English records for an historical understanding of law.[2] Maitland became interested in the village community and attempted to clarify the term so that the nature of the argument over it would be more understandable. Especially he found confusion over what was imperium and what was dominium:[3] what was land-holding by the group and what was really only the prior rights of the group such as are found in various political rights, such as taxation, today. Vinogradoff states:

> Although Maitland's teaching thus ran counter to some of the views held by Maurer and the Germanists on the one hand, Maine and the comparative jurists on the other, he was in no way at one with the exaggerated reaction produced by these views. Neither wholesale Romanism . . . nor the device of treating Old English society as a ring of slaveholders . . . his treatment of the problem reckoned with the heterogeneous character of . . . society and the degradation of an originally free class.[4]

Maitland's works, such as Domesday Book and Beyond largely deal with historical periods and the documents thereof, and he only indirectly dealt with the village community theory.

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1. Anonymous, "Villainage in England", Saturday Review, lxxiv (1884), p. 288.
2. W. Holdsworth, Historians, p. 134.
3. Frederic Maitland, Domesday Book and Beyond (Cambridge, 1907) pp. 340-56.
4. P. Vinogradoff, Papers, I, p. 260.

By the beginning of the twentieth century, the village community theory in the ideal form we have selected - Maine's, and, in fact, even as a general theory - begins to disappear into a welter of different sciences and special studies, and the influences of Maine can only be indirect in relation to this whole body of investigation. Maine was the extremely able generalizer, but now the hope of a quick yield of universals from science was gone. The special sciences, with answers to specific problems in history, economics, sociology, jurisprudence, anthropology, etc., came to the fore. All carried on intensive investigation in restricted areas, with the possibility that is found in all sciences of universal and general statements after the evidence is accumulated, weighed and structured.

There appeared four main lines of inquiry especially related to what was left of the village community problem: (1) the anthropological, which investigated the usage regarding the occupation of land in present day simple societies; (2) investigation of the legal conception of private property, especially among the early Franks and Germans, (3) tribalism and tribal rules of descent and inheritance, (4) geographical identification and classification of land and land charters, especially in the eighth and ninth centuries.[1]

Men like Lewinski have begun building up new theories of the origin of property in land. Based largely upon an interpretation of Russian evidence, he shows us that nomadic people have no private property in land, but cultivation and settled life arise due to

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1. W. J. Ashley, Teutonic, p. 261.

population pressure. With this comes private property. Further growth in population leads to land scarcity and a re-division in land.

> The formation of private property and its breakdown have been caused by the growth of population . . . Periodic divisions are only posible when the preparatory labor is relatively small so that it can be remunerated after a few years of cultivation. This general rule explains why, when agriculture becomes more intensive, the village community breaks down . . . Under equal conditions of density of population and of natural surroundings - supposing always the existence of the economic principle (most value, least labor) and the principle of numerical strength - the same forms of property necessarily originate. Every change in one of these elements necessarily produces a corresponding change in the economic structure. So the evolution of property is not determined by accident, by the whims of legislators, but by causal laws.[1]

We see the strong economic viewpoint dominating the above quotation, and this view really stands greatly in opposition to Maine. Maine radically opposed the utilitarians of his day, who cast custom aside as mere friction in the social machine. Maine saw change occurring very slowly and modified by the law, custom and usage of the people.

Work which incorporates such a tremendous mass of detailed empirical studies concerning origins in Europe, and is therefore well grounded in the concrete, yet rises to the level of generalizations, is Dopsch's The Economic and Social Foundations of European Civilization.[2] He stands in contimuity from earlier work in economic and legal history which has dealt with the village community, among other things, but the title alone indicates that the nature of the investigation has shifted. The effects of Roman

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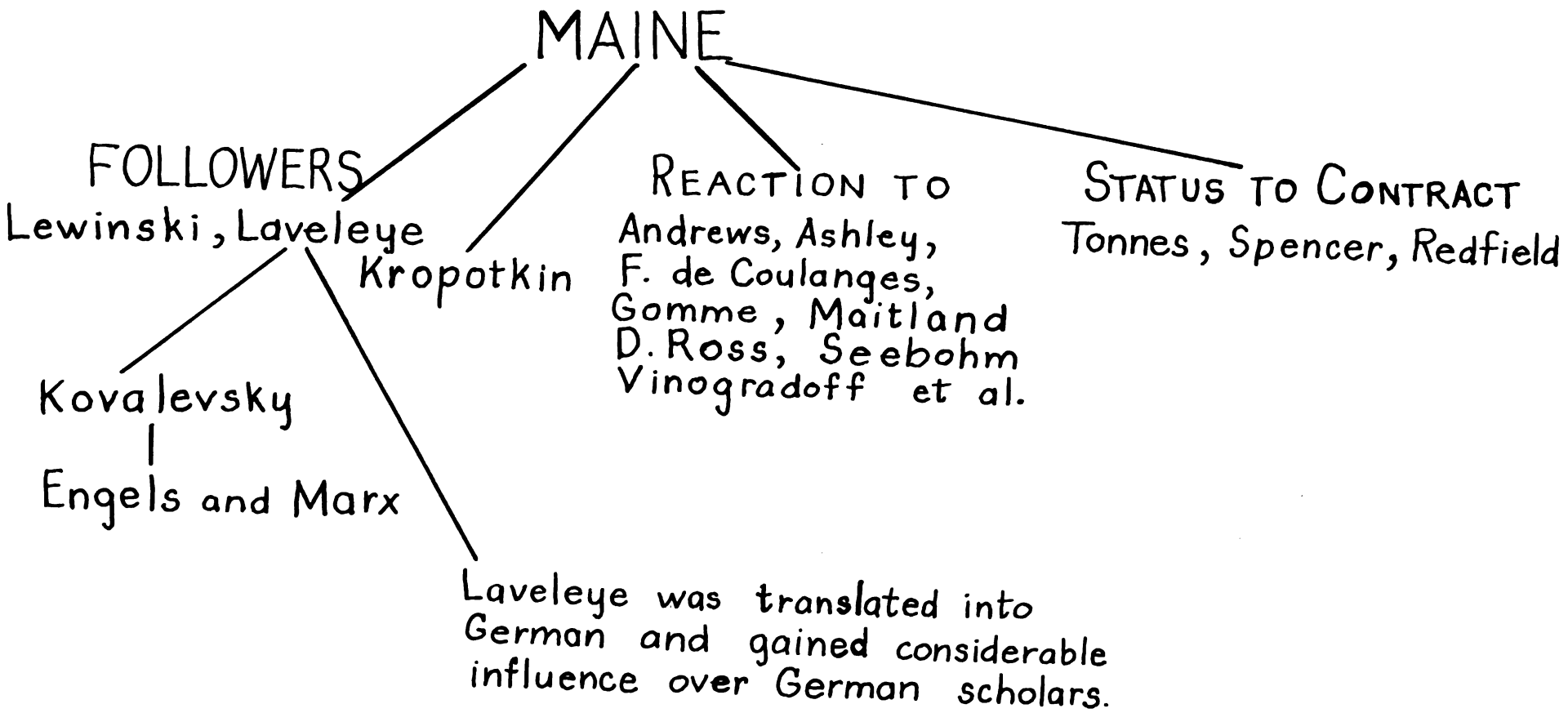
1. Jan St. Lewinski, The Origin of Property (London, 1913), pp. 60-71.

2. Alfons Dopsch, The Economic and Social Foundations of European Civilization (New York, 1937).

civilization, early German tribal life, ecclesiastical influences, feudalism and a multitude of other factors are integrated to form a complete picture, with the weight of the evidence showing the continuation of Roman culture and institutional forms throughout European history, including private property in land.



THE INFLUENCE OF MAINE

VIII. RETROSPECT AND CONCLUSION

In conclusion, what can be shown to be the broad outlines of the subject? (1) Maine accepted influences coming from others, and he accepts these influences for specific reasons. If we recognize his basic purpose as stated in the beginning of some of his works we see that ideas coming from Savigny's school of historical jurisprudence are useful to him, as his problems are legal - in the broadest aspect. Here we find the emphasis on continuity and development. From natural science comes an interest in law (scientific sense) regularity and development, which Maine wishes to show operating in history. If we are to have development it must be from something to something - status to contract. Maurer and the German school offer an essential element for the status to contract theory, the Mark and its relation to history. Certain English historians offer a broadened range for the Mark. The comparative method, taken in part from comparative philology and mythology, offers a means of developing generalizations by the application of the method, in combination with the historical method, to the "Aryan Race". Thus, the Indian, Slavic and Celtic evidence can be used in the formation of historical generalizations about the West.

Elements which were essentially anti-historical in nature had to be rejected: Austin, Bentham, and Enlightenment ideas of social contract and the law of nature. Also opposed by Maine were the social evolutionists of the strictly parallel school.

Maine's theory was especially useful and acceptable to those with courses of action in mind. To mention only a few, Laveleye, Engels and Kropotkin used it in the demonstration of their interpretation of history.

Maine's theory was rejected by such men as Fustel de Coulanges, with his strong belief in early individualized property in land; but Maine's theory was never rejected in all aspects, and was never replaced by another theory attempting such universality. We might say really that the theory broke down: certain elements within the theory were applied individually in various cases, but not as a structured group of related concepts. Further, the use of "survivals" in history, and of the comparative method, underwent severe restriction, as did the concept of the early communal arable.

Scientists undertook smaller problems. Thus, we find Vinogradoff, one of the men closer to Maine, dealing with problems involving primarily England, and holding a highly modified position concerning the village community. The influence of such factors as the tribe, of Rome, and of serfdom are all weighed. Maine's generalizations have now become the subject for intensive investigation. The tendency has been to restrict generalizations to specific cultural groups and it has also been to find less and less indication of an early communal arable. The strong influence of family and kin in early society, as indicated by Maine, has not been denied; but supplemented, rather, by other forms of association.

In concluding, what further observations can be made? We have seen the various influences working upon Maine; his contribution

and the influences which he had upon others; this has been briefly summarized (partly in outline form). Looking directly at Maine's work, however, what can we say?

We find Maine to be full of the past and of the future. The view we have taken of Maine has been historical: he has been traced through a period of time. We find in his works the same type of development that we find in historical periods, that is, the original concept is held for a long period of time during which new elements are constantly introduced without a modification of the concept: eventually, the weight of new unabsorbed factors destroys or radically changes the concept in what appears afterwards to be a sudden and spontaneous revolution. To give an historical example, the French revolution took place in a short period of time; but the factors leading up to it had gradually accumulated: they had found no room in the old system and finally, when enough factors conjoined, the change took place.

In Maine's work on the village community, we can see the addition, by Maine primarily, of more and more elements which seemingly went to strengthen the theory; but which, in the period after Maine's death, brought the whole system into a rapid decline.

Probably one of the seemingly successful elements introduced by Maine was the extension of the concepts concerning the Mark to India and the "Aryan Race". Yet there was danger in the fact that the more universal the theory is, the more difficult it is to prove.

In order to broaden the theory to apply to the "Aryan Race" Maine had to make use of the comparative historical method. A

seeming advance, but containing great danger, the method was soon recognized as unsound; and its reputation therefore tended, in time, to weaken the village community theory.

The use of the Celtic evidence by Maine which we have shown earlier to contain strong indication of private property in land, led to the introduction of elements relating to tribes, chieftainship, kingship, state, private property and comitatus to which elements Maine does not give his fullest attention; but which are the very elements concerning associations, power, economics and law that are later exploited in the radical modification or denial of the village community theory. Yet Maine continues throughout to state his village community theory as if it were unmodified. We find that Maine has a tendency to bring some elements in line with his theory by such devices as the use of what may be called "survivals", that is, if the situation we know about does not entirely agree with his theory, he finds an element within it which indicates that at an earlier time the situation did agree with his theory. A standard procedure is to find land held in common at an earlier period when there is only periodic re-distribution now.

This leads us into an unresolved conflict between his evolutionary beliefs involving a sort of parallelism and his stated belief in the influence of diffusion.

A further example showing his introduction of elements which in last instance operate against his position is found in one of his later works, Popular Government.

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1. Henry Maine, Popular Government (New York, 1886).

This work deals largely with democracy in a rather pessimistic manner. When demonstrating the reasons for the lack of awareness of the coming Revolution on the part of the French nobles, he shows the uninterrupted continuity of rule from Roman times: "There was little more than a succession of German to Roman privileged classes. German captains shared the great estates, and assumed the rank of the half-official, half-hereditary nobility who abounded in the province (France). A German King, who was in reality only a Roman general bearing a barbarous title, reigned over much of Gaul and much of Central Europe."[1]

This is essentially the position of Dopsch in his Social and Economic Foundations of European Civilization; yet Maine goes no further than the quotation above, and how are we to fit this into the picture of the village community he has given us?

Perhaps Maine reconciles the two: perhaps it is a change in position concerning the village community. It can be said, however, that the idea of continuity is in agreement with Maine's fundamental ideas. We see in this quotation showing his belief in continuity that he is again in conflict with Enlightenment concepts. The Enlighteners, as Dopsch has pointed out, found a fundamental break between the Roman and the German period: they held to the catastrophe theory. Maine is the historian, lawyer and believer in the fact that men change slowly; therefore it would seem that continuity, diffusion and gradual change are factors, for Maine, around which sociological systems must be built. The evidence, method and theory which Maine introduced brought the greatest

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1. Ibid., p. 3.

fame to the village community theory; and in time helped to discredit it.

All of Maine's work was not washed away in the flood of reaction. Great intellectual structures are not built by one man or one generation nor are they destroyed by such, either; and the factors of continuity, diffusion and change operate in the scientific world just as Maine would have anticipated. Ideas which enter history do not die, but only change.

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