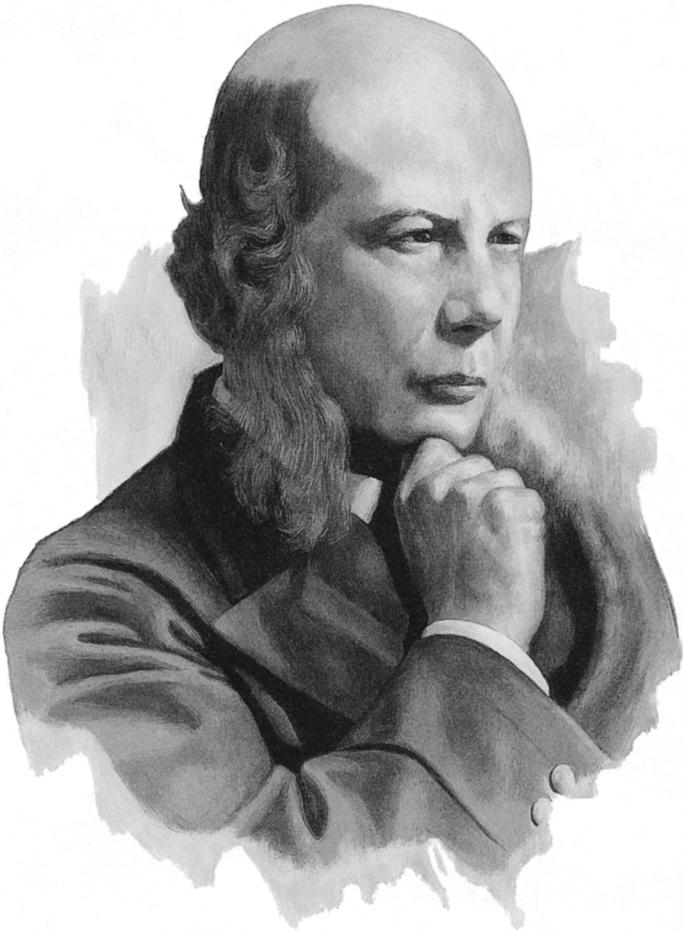


POPULAR GOVERNMENT



Henry Sumner Maine

POPULAR GOVERNMENT

HENRY SUMNER MAINE

With an Introduction by
George W. Carey



Liberty Fund

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INTRODUCTION

by George W. Carey

Sir Henry Maine's life spanned one of the most illustrious periods of English history, the Victorian Age. Not only was England the center of a vast empire and at its apex as a world power, the period is equally notable for its intellectual giants—Macaulay, Bagehot, Acton, Carlyle, Leslie Stephen, James Fitzjames Stephen, and J. S. Mill, to name but a few. And no one compiling a list of the great scholars and intellects of this extraordinary era could omit Henry Maine, whose contributions to the field of jurisprudence opened new horizons and approaches for the comparative study of civilizations and their development. Nor could one interested in the great affairs of the British Empire ignore his contributions to the administration of India.

Maine's life most certainly was not adventurous or particularly intriguing. Quite the contrary. One might say his life was a series of steady and purposive accomplish-

ments, wherein each stage seemed to follow logically on the preceding.

Henry Sumner Maine was born in 1822 near Leighton, Scotland. After the separation of his parents, his mother took him to reside with her at Henley-on-Thames. In 1829, through the efforts of his godfather—who was Bishop of Chester—he was admitted to Christ’s Hospital, where he soon distinguished himself as a very gifted student. In 1840 he was to enter Pembroke College, Cambridge, as an Exhibitioner of Christ’s Hospital.

His achievements at Cambridge were most remarkable. In addition to winning honors for his Greek and Latin compositions and English verses, he was elected a Foundation Scholar (1841), a Craven University Scholar (1843), and was awarded the Senior Classics Medal (1844), the highest university honor. In 1844 he accepted the position of Tutor of Trinity Hall, Cambridge Law College, serving in this capacity until 1847, when he was appointed Regius Professor of Civil Law.

In the early 1850s, Maine was to undertake the practice of law, but his health, always quite delicate from early youth, would not permit him to pursue a practicing legal career with vigor. More important in light of his subsequent career was his appointment in 1852 to the Inns of Court, the London legal center, where he lectured on the subject of Roman law and jurisprudence. From these lectures emerged *Ancient Law* (1861), his most famous and celebrated work. This book, coupled with his contributions, more or less regular, to the *Saturday Review*, established his reputation not only as a juridical scholar of the

first order but also as a knowledgeable individual with keen perceptions concerning contemporary social and political movements.

Soon after the appearance of *Ancient Law*, his career was to take a somewhat different direction. With some reluctance, this owing largely to his frail health, he accepted appointment as the Law Member of the Council of Governor-General of India. His duties principally involved reform and codification of Indian law and provided him with the opportunity to apply in practice principles which he had set forth in *Ancient Law*. He served in this capacity until 1869.

Upon his return to England, Maine was named Corpus Professor of Jurisprudence at Oxford, thus becoming the first professor of comparative jurisprudence in Oxford's history. Shortly thereafter (1871), he was named Knight Commander of the Star of India and appointed as a permanent and paid member to the Council of the Secretary of State for India. Despite his work with the Indian Council, his tenure at Oxford was a most productive one. He produced three books based largely on his Oxford lectures: *Village Communities in the East and West* (1871), *Lectures on the Early History of Institutions* (1875), and *Dissertations on Early Law and Custom* (1883).

In 1878, Maine was to return to Cambridge as Master of Trinity College, a position which allowed him to devote more attention to Indian Council affairs. However, he still contributed frequently to periodic journals. Certain of these articles which first appeared in the *Quarterly Review* form the corpus of his *Popular Government* (1885). His fi-

nal work, posthumously published, was *International Law*, based upon his lectures at Cambridge as Whewell Professor of International Law, a position to which he was appointed in 1887.

Maine died of cerebral hemorrhage in Cannes, France, on February 3, 1888.

While there can be no doubt that Henry Maine's activities did have an impact on his times, particularly with respect to the affairs of India, his more lasting contribution is to be found in his principal writings. The most celebrated of these, as previously mentioned, is *Ancient Law* because it stands as a pioneering effort in the study of the source and growth of law. "If by any means," he wrote in the opening passages of this work, "we can determine the early forms of jural conceptions, they will be invaluable to us. The rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself."¹ And, using principally Roman law as his reference point, he was able to trace the evolution of major aspects of the law (e.g., property, contract, criminal, wills, and succession) from the earliest times forward, simultaneously showing how modern legal conceptions and codes are the outgrowth of the slow and gradual development of ancient conceptions and fictions. Because of its approach, *Ancient Law* is frequently compared to Darwin's *Origin of Species*.

¹ Henry Sumner Maine, *Ancient Law* (New York: E. P. Dutton and Co., 1917), p. 2.

However notable for its approach, *Ancient Law* advanced certain propositions which are of importance for understanding Maine's later works and theory. Perhaps the best known of these is the general formulation that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."² He meant by this, to put the matter simply, that ancient law was concerned with the specification of relationships between what can be termed extended families, not individuals. In this order of things, individual members of the family were completely subject to the control of the family head. For example, as embodied in the Roman legal conception *Patria Potestas*, the head of the family possessed within his realm the power of life and death, the authority to arrange marriages and issue divorces, and, among others, the right to sell his children. Thus the status of the individual was completely defined in the context of this patriarchal authority.

The movement to contract, the mark of the more progressive societies, involved in its most important dimension the breakdown of *Patria Potestas* and the recognition of the capacity of individuals to assume powers, responsibilities, and authority which previously were only within the province of the family head. Thus, contractual relationships between emancipated individuals, a condition duly reflected in the legal codes of civilized states, is the central focus of modern jurisprudence. But, as Maine was careful to point out, modern jurisprudence in no small

² *Ibid.*, p. 100.

degree still employs those forms and concepts which were utilized, albeit in far less refined form, in the ancient laws.

Maine's observations concerning the character and evolution of the law of nature also deserve comment. From the earliest times forward, all societies, he noted, have possessed concepts of higher ideals to which positive law and its applications ought to conform. Yet, two major difficulties have arisen both in ancient and modern times regarding the relationship of "higher," or ideal, law and positive, or man-made, law. First, the higher law may become so dominant that little heed is paid to the settled prescriptions or rules of society. More exactly, various interpretations of the higher law may be superimposed on an *ad hoc* basis in the settlement of conflict, a situation hardly conducive to the permanency, stability, or consistency of the legal codes and their meaning. Societies which have been plagued by this difficulty (the foremost of which were the ancient Greek) present the modern observer with no coherent jurisprudence, rather a legacy which informs us only of the different priorities accorded the elements of the higher law at different times.

A second and seemingly more serious difficulty which he perceived was this: "Higher law" may operate in such a fashion as to stifle the progress of a civilization. This occurs when a people look over their shoulders, so to speak, and associate the higher law with the principles upon which the original laws were codified. And this, in large measure, was the situation that Maine confronted in India.

In Maine's estimation, the status accorded the law of nature in Roman times avoided both pitfalls. While, indeed,

there were conceptions of a higher law, these conceptions were seldom, if ever, allowed to supersede the strictures and commands of man-made law. The higher law was not perceived as standing in an antagonistic relationship to the positive law and could best be discovered or approximated through evolutionary refinement, a gradual process that would eventually yield or reveal the essence or underlying principles of seemingly diverse and disparate positive laws. In Maine's words, the notion prevailed that the law of nature "underlay existing law and must be looked for through it." The principal function of the natural law in this context was "remedial, not revolutionary or anarchical."³

These elements of his thinking should be borne in mind by those who want to place *Popular Government* in its proper perspective, the more so as critics over the years have sought to drive a wedge between it and *Ancient Law*. Some critics allege that in writing *Popular Government* he allowed his political beliefs and prejudices to divert him from the path of sound scholarship. Sir Ernest Barker writes, "the final upshot of the Historical Method, if we turn to *Popular Government*, seems to be a somewhat melancholy conservatism."⁴ Another critic puts the matter this way: "Maine's violation of the scientific method or of ordinary reasoning shows perhaps more than anything else the strength of his conservatism."⁵

³ *Ibid.*, p. 45.

⁴ Sir Ernest Barker, *Political Thought in England, 1848-1914* (New York: Oxford University Press, 1959), p. 145.

⁵ Benjamin Evans Lippincott, *Victorian Critics of Democracy* (Minneapolis: University of Minnesota Press, 1938), p. 199.

Nevertheless, *Popular Government* by any standard is only a rational extension and application of the findings so carefully, logically, and painstakingly developed in *Ancient Law*. In short, there is no gulf or cleavage between these works. In both he shows a keen awareness of the absurdities connected with natural law theories (principally Rousseau's) based upon a fictitious and prehistoric state of nature characterized by extreme individualism. Moreover, in both books he emphasizes that the utilitarianism of Bentham represents but a pitiful perversion of the ancient notions of natural law. To be sure, in *Popular Government* he is more immediately concerned with the acceptance and application of these false theories because of their central role in democratic ideology. Yet any perceptive reader of *Ancient Law* can certainly see the logic and validity of his approach and emphasis in *Popular Government*, as well as its timeliness, since the forces of democratism in Victorian England were in the ascendancy.

To regard *Popular Government*, then, as merely a partisan attack on democracy and popular governments in general would be a gross mistake. Maine's largely favorable appraisal of the American system clearly indicates that he believed popular government was not only possible but, where conditions were appropriate, desirable. And history offers abundant proof of his overriding thesis: Popular governments, unless they are founded upon and consonant with the evolutionary development of a people, will crumble from their own excesses. In this sense, to quote Peter Viereck, "*Popular Government* system-

atized the Burkean approach into a consistent philosophy"⁶ fully suited for modern conditions. But this Henry Maine was able to do only because, like Burke, he heeded the wisdom of the ages.

⁶ Peter Viereck, *Conservatism from John Adams to Churchill* (Princeton, N.J.: D. Van Nostrand and Co., 1956), p. 32.

POPULAR GOVERNMENT

PREFACE

The four Essays which follow are connected with studies to which, during much of my life, I have devoted such leisure as I have been able to command. Many years ago I made the attempt, in a work on *Ancient Law*, to apply the so-called Historical Method of inquiry to the private laws and institutions of Mankind. But, at the outset of this undertaking, I found the path obstructed by a number of *à priori* theories which, in all minds but a few, satisfied curiosity as to the Past and paralysed speculation as to the Future. They had for their basis the hypothesis of a Law and State of Nature antecedent to all positive institutions, and a hypothetical system of Rights and Duties appropriate to the natural condition. The gradual recovery of the natural condition was assumed to be the same thing as the progressive improvement of human institutions. Upon the examination, which was indispensable, of the true origin and real history of these theories, I found them to rest upon a very

slender philosophical foundation, but at the same time they might be shown to have been extremely powerful both for good and evil. One of the characteristics most definitely associated with Nature and her Law was simplicity, and thus the theories of which I am speaking brought about (though less in England than in other countries) many valuable reforms of private law, by simplifying it and clearing it from barbarous technicalities. They had, further, a large share in the parentage of International Law, and they thus helped to mitigate in some small degree the sanguinary quarrelsomeness which has accompanied the human race through the whole course of its history. But, on the other hand, they in my judgment unnerved the human intellect, and thus made it capable of the extravagances into which it fell at the close of the eighteenth century. And they certainly gave a false bias to all historical inquiry into the growth of society and the development of law.

It has always been my desire and hope to apply the Historical Method to the political institutions of men. But, here again, the inquiry into the history of these institutions, and the attempt to estimate their true value by the results of such an inquiry, are seriously embarrassed by a mass of ideas and beliefs which have grown up in our day on the subject of one particular form of government, that extreme form of popular government which is called Democracy. A portion of the notions which prevail in Europe concerning Popular Government are derived (and these are worthy of all respect) from observation of its practical working; a larger portion merely reproduce technical rules of the British or American constitutions in an altered or disguised form; but a multitude

of ideas on this subject, ideas which are steadily absorbing or displacing all others, appear to me, like the theories of jurisprudence of which I have spoken, to have been conceived *à priori*. They are, in fact, another set of deductions from the assumption of a State of Nature. Their true source has never been forgotten on the Continent of Europe, where they are well known to have sprung from the teaching of Jean-Jacques Rousseau, who believed that men emerged from the primitive natural condition by a process which made every form of government, except Democracy, illegitimate. In this country they are not often explicitly, or even consciously, referred to their real origin, which is, nevertheless, constantly betrayed by the language in which they are expressed. Democracy is commonly described as having an inherent superiority over every other form of government. It is supposed to advance with an irresistible and preordained movement. It is thought to be full of the promise of blessings to mankind; yet if it fails to bring with it these blessings, or even proves to be prolific of the heaviest calamities, it is not held to deserve condemnation. These are the familiar marks of a theory which claims to be independent of experience and observation on the plea that it bears the credentials of a golden age, non-historical and unverifiable.

During the half-century in which an *à priori* political theory has been making way among all the civilised societies of the West, a set of political facts have disclosed themselves by its side which appear to me to deserve much more consideration than they have received. Sixty or seventy years ago, it was inevitable that an inquirer into political science should mainly employ the deductive

method of investigation. Jeremy Bentham, who was careless of remote history, had little before him beyond the phenomena of the British Constitution, which he saw in the special light of his own philosophy and from the point of view of a reformer of private law. Besides these he had a few facts supplied by the short American Constitutional experience, and he had the brief and most unsuccessful experiments of the French in democratic government. But since 1815, and especially since 1830, Popular Government has been introduced into nearly all Continental Europe and into all Spanish America, North, Central, and South; and the working of these new institutions has furnished us with a number of facts of the highest interest. Meantime, the ancient British Constitution has been modifying itself with a rapidity which could not be foreseen in Bentham's day. I suspect that there were few observant Englishmen who, in presence of the agitation which filled the summer and autumn of 1884, were not astonished to discover the extent to which the Constitution of their country had altered, under cover of old language and old forms. And, all the while, the great strength of some of the securities which the American Federal Constitution has provided against the infirmities of popular government has been proving itself in a most remarkable way. Thus, in nearly all the civilised world, a large body of new facts has been formed by which I endeavour, in these Essays, to test the value of the opinions which are gaining currency in our day concerning Popular Government as it verges on Democracy.

It would argue ignorance or bad faith to deny the benefits for which, amid some calamities, mankind is indebted to Popular Government. Nevertheless, if there be even an