

*A Historical
Sketch of Liberty
and Equality*

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and Equality*



AS IDEALS OF
ENGLISH POLITICAL PHILOSOPHY
FROM THE TIME OF HOBBS
TO THE TIME OF COLERIDGE

Frederic William Maitland



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The cuneiform inscription that serves as our logo and as the design motif for our endpapers is the earliest-known written appearance of the word “freedom” (*amagi*), or “liberty.” It is taken from a clay document written about 2300 B.C. in the Sumerian city-state of Lagash.

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NOTE ON THE TEXT

“A Historical Sketch of Liberty and Equality” was composed by Frederic William Maitland as a dissertation for a fellowship at Trinity College, Cambridge, in 1875, when the author was twenty-five years old. The essay was included in *The Collected Works of Frederic W. Maitland* published by Cambridge University Press in 1911. The Liberty Fund edition of Maitland’s essay appears as it was originally published, with no elaboration on the footnotes, aside from translation as noted below. In keeping with the nature of the essay—a dissertation—the footnotes assume considerable learning upon the part of the reader and refer to contemporaneous editions of the cited works. To ensure that the essay itself is accessible to the general reader in an era when knowledge of classical languages is no longer the rule, pertinent passages in French, German, or Greek have been translated into English, enclosed in brackets. The translations were executed by Dennis O’Keeffe, Dan Kirklin, and Chris Oleson, respectively. Also included in this volume is “The Body Politic,” a lecture that is typical of the author’s application of his methods to his own historical period.

*A Historical
Sketch of Liberty
and Equality*

Frederic William Maitland
(1850–1906)



FOREIGN HONORARY MEMBER IN
CLASS III, SECTION I, 1897

Frederic William Maitland was born in London 28 May 1850 and died at Las Palmas, Canaries, 19 December 1906. The grandson of Samuel R. Maitland, the historian of the “Dark Ages,” he was educated at Eton and Trinity College, Cambridge, where he came under the influence of Henry Sidgwick and won high distinction in philosophy. He entered Lincoln’s Inn in 1872 and was called to the bar in 1876. His interests, however, soon began to turn from the practice of law to its history, and in 1884 he was appointed Reader of English Law in the University of Cambridge, and in 1888 Downing Professor of the Laws of England, a chair which he held until his death. It is, however, characteristic of the English university system that

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the duties of his professorship consisted of general lectures to undergraduates on the elements of law rather than of the training of scholars in his special field, so that he formed no school of disciples who could develop or continue his work. His professorship, however, gave him considerable leisure for writing, and in spite of the ill health which soon drove him southward in the winter and finally cut him off in the fulness of his activity, he accomplished an astonishing amount of productive labor.

It is a curious fact that Maitland owed to a Russian historian, Paul Vinogradoff, his introduction to the original records of English legal history. The acquaintance ripened speedily into his first important publication, a roll of "Pleas of the Crown for the County of Gloucester" in 1884, followed in 1887 by "Bracton's Note-book." Then came "Select Pleas of the Crown" (1888); "Select Pleas in Manorial Courts" (1889); "Three Rolls of the King's Court, 1194-5" (1891); "Records of the Parliament of 1305" (1893); "The Mirror of Justices" (1895); "Select Passages from Bracton and Azo" (1895); and the "Year Books of Edward II," as far as 1310 (1903-06). Merely as an editor of records and as the prime mover in inaugurating the publications of the Selden Society, he would hold a high place among those who have advanced the cause of English history. He shrank from no editorial labor, such as the difficult problems of the Law-French of the Year Books, but his introductions also show the wide learning, the luminous view, and the brilliant style which characterize all his writings. Besides these editions and a number of scattered essays, most of which have been brought together into the three volumes of his "Collected Papers," his most important works are "Domesday Book and Beyond" (1897); "Township and Borough" (1898); "Roman Canon Law in the Church of England" (1898); a translation of Gierke's "Political Theories of

the Middle Ages" (1900); a brilliant lecture on "English Law and the Renaissance" (1901); a posthumous set of lectures on "The Constitutional History of England" (1908); and the classic "History of English Law before the Time of Edward I" (1895), published conjointly with Sir Frederick Pollock but chiefly the work of Maitland. His last weeks in Cambridge were given to the "Life and Letters of Leslie Stephen." A full bibliography of his writings is appended to A. L. Smith's *Fred-eric William Maitland* (Oxford, 1908), where many characteristic passages are quoted. A biography, with a number of letters illustrating his style and the charm of his personality, has been published by Herbert Fisher (Cambridge, 1910).

As an historian of English law Maitland has never been equalled. He was a finished jurist without the lawyer's reverence for form and authority; he combined the philosopher's power of analysis with the faculty of seeing everything in the concrete; and he had the delicate sense of evidence, the flashing insight, the vivid imagination, and the human sympathy of the great historian. To him the history of law was the history, not of forms, but of ideas; through it "the thoughts of men in the past must once more become thinkable to us." Yet law is not something abstract: its records "come from life," as he said of the Year Books, and must return to life. "English law is English history," he wrote; yet, first of English scholars, he saw it clearly against its Continental background. Unlike many jurists, however, he did not seek to reduce the manifold complexities of life to a few general principles and to clarify what had never been clear; he avoided too definite conclusions and rather let his mind play about a subject in all its variety and illuminate it from different angles. To a masterly gift of exposition and a talent for apt illustration he joined a marvellous style, pointed, witty,

epigrammatic, lighting up the dullest and most technical subject, and adorning everything it touched. Confining himself to the history of institutions and ideas, he did not enter the field of the narrative historian, so that the absence of a common standard renders comparisons difficult; but the quality of his mind justifies Lord Acton's judgment that he was "the ablest historian in England."

CHARLES H. HASKINS

*The Historical Spirit Incarnate:
Frederic William Maitland*



The hundredth anniversary of the birth of Frederic William Maitland fell in 1950. There is, however, a better reason than belated centennialism for pausing to consider what he stood for as a historian because what he stood for, unless I am much mistaken, needs to be emphasized today. Maitland has a message not only for professional students, teachers, and writers of history but for everybody who aspires to balance and sanity in his attitude toward the past. If a confession of historiographical faith on my part can be found in what I am going to say about him, this is something that will not greatly concern anyone but me. Yet it should perhaps be stated explicitly at the outset, rather than left to be inferred by you later, that Maitland has meant more to me than any other historian—not primarily for the subjects he dealt with, but for his methods, his insights, and his superb historical sense. He was a lawyer, and his specialty

Presidential address read at the annual dinner of the American Historical Association in New York on December 29, 1951.

was the history of English law, though he did original and important work in other branches of history. But it would be wrong to think of him as just a lawyer who happened to become interested in the history of his subject. He was, rather, what his intimate friend and collaborator Sir Frederick Pollock called him, “a man with a genius for history, who turned its light upon law because law, being his profession, came naturally into the field.” As a professor of legal history at Cambridge, he used medieval law as a tool to “open . . . the mind of medieval man and to reveal the nature and growth of his institutions,” as one of his students, George Macaulay Trevelyan, has told us. I doubt whether any medievalist has ever made a more earnest and sustained effort to get inside the medieval mind.

The only one of Maitland’s forebears who needs to be spoken of here is his grandfather, the Reverend Samuel Roffey Maitland, who was librarian to the archbishop of Canterbury at Lambeth Palace and wrote a number of books, mainly on medieval religious history. As a boy Frederic William visited from time to time at Maitland House, his grandfather’s home in Gloucestershire, and later he came to have a great admiration for his historical writings. There were, in fact, striking resemblances between grandfather and grandson considered as historians.

The elder Maitland was never content to stop short of the most reliable available original sources for his historical knowledge, and he was distinctly critical, exceptionally so for his day, in handling historical evidence. He was, therefore, skeptical in his attitude toward historical traditions. As a medievalist he had a strong feeling for the general cultural context in which the institutions of the Middle Ages were embedded, and he

was keenly sensitive to the differences between it and the cultural milieu of his own day—which is to say that he was historically-minded, and, being so, he was repelled by anachronism. He liked the medieval in the Middle Ages but not in modern times. Thus he had good things to say about medieval monasticism, but its merits in its own day were not, in his opinion, a valid reason for reviving the monastic system in nineteenth-century England, as had recently been proposed. Indeed, he did not believe that the *medieval* monastic system could be revived.

We have been hearing so much of late about subjectivity and objectivity in historianship, about the historian's "frame of reference" and "controlling assumptions," about history as faith *versus* history as science, that we may be in some danger of supposing that thought on such subjects is an exclusively twentieth-century form of cerebration. Samuel Roffey Maitland lived long before the term "historical relativism" had been coined, but in his historical outlook he was a thorough relativist. He understood quite clearly that the institutions of the past could be comprehended only when viewed in their context, and he knew equally well that a man of the nineteenth century, even if he was a historian, could not become absolutely and consistently medieval. Here is a remark of his that could serve as a text for a discourse on historical relativism at a meeting of historians today: "Do what he may, no man can strip himself of the circumstances, and concomitants, which it has pleased God to place around him." Frederic William Maitland's indebtedness to his grandfather's critical methods and historical point of view was undoubtedly very considerable. A private letter of his, written early in his career as a historian, tells us as much.

As a student at Cambridge, where his earliest interests—in music, mathematics, and athletics—had little enough obvious

relation to what was to be his lifework, Maitland before long came under the influence of the eminent philosopher, and professor of philosophy, Henry Sidgwick, with results of importance for his intellectual development. He read widely in various branches of philosophy, and to such good purpose that he came out at the head of the first class in the Moral and Mental Science Tripos of 1872. He acquired a reputation as a humorous and brilliant talker and an extremely effective public speaker, and already as an undergraduate he gave more than a hint of that flair for pointing an argument with an epigram that was to characterize his lecturing and writing in after years.

Maitland entered Lincoln's Inn in 1872 and was called to the bar in 1876. In the law chambers of Benjamin Bickley Rogers, who is still remembered in classical circles for the translations of the comedies of Aristophanes with which he beguiled his leisure hours, the young barrister specialized in conveyancing, and his familiarity with that highly technical branch of English law served him well in his later study of early English land deeds and charters. The testimony of Mr. Rogers is eloquent as to Maitland's extraordinary legal talents: "he had not been with me a week before I found that I had in my chambers such a lawyer as I had never met before. . . . his opinions, had he suddenly been made a judge, would have been an honour to the Bench."

Many lawyers have written history, and often, in sorrow be it added, quite untruthful history. The time-honored method of studying law, in English inns of court and American law schools, has not made for historical-mindedness. The lawyer is concerned with precedents, to be sure, but usually not with the context of his precedents. If, to quote some penetrating words that I have seen ascribed to my old friend Reed Powell, who

has devoted his years of discretion to the study of how judges think, "If you think that you can think about a thing, inextricably attached to something else, without thinking of the thing it is attached to, then you have a legal mind." The historical mind, on the other hand, sees past events in their contemporary contexts. In his inaugural lecture as Downing Professor of the Laws of England at Cambridge, delivered in October, 1888, and entitled "Why the History of English Law Is Not Written," Maitland, with characteristic insight, thus contrasted the legal mind and the historical mind:

. . . what is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the Middle Ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts. A lawyer finds on his table a case about rights of common which sends him to the Statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the decision, the more valuable for his purpose. That process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding.

Let me underscore one phrase in that quotation; we shall be coming back to it: *a knowledge of medieval law as it was in the Middle Ages.*

As a young man, and in fact throughout his life, Maitland took a lively interest in current affairs, though he did not find time to write much on them. For it was a settled conviction of his—in the opinion of some, this may be thought to date

him—that the highest function of a historian is to be a historian. Law reform, however, was one of his early and abiding interests. His approach to the subject was historical, as we should expect, and his attitude toward it decidedly radical. As a young conveyancer, he declared in an article published in 1879 that what was needed was “nothing less than a total abolition of all that is distinctive in real property law,” and it was his mature judgment, expressed toward the end of his life, that the historical spirit, far from being the handmaid of conservatism, was the natural ally of rational reform. He was spiritually akin to the great English law reformers of the early nineteenth century, and he could use equally vigorous language. He belonged in what Sir William Holdsworth called the “long series of judges, conveyancers, and legislators” whose efforts led to the drastic reforms in English property law in the 1920’s. He was ever a sworn foe of what he called “out-worn theories and obsolescent ideas,” though it should quickly be added that his historical sense prevented him from making the crude mistake of condemning theories or ideas in the past because they later became incumbrances and impediments. In connection with the law of real property he spoke of the need of clearing up what he called “that great medieval muddle which passes under the name of feudalism,” but he never expressed contempt for feudalism in the feudal ages. He did not endorse what he described as “the cheerful optimism which refuses to see that the process of civilization is often a cruel process,” but on the other hand he never beheld myopic visions of golden ages in the good old days.

Two of Maitland’s contemporaries, both of them close personal friends of his, did much to determine his lifework. One of these was Frederick Pollock, whose name is always linked with his. Pollock was a few years older than Maitland and pre-

ceded him by a few years in the educational procession—at Eton, Trinity College, Cambridge, and Lincoln’s Inn. Maitland has recorded that it was through Pollock that his interest in legal history was first aroused. The two friends collaborated in writing the treatise that has been a classic in English legal history for more than a half-century, *The History of English Law before the Time of Edward I*, always cited as “Pollock and Maitland.” The order in which the authors’ names appeared on the title page was in accordance with professional legal usage, the order, namely, of seniority at the bar, but a note by Pollock, added to the preface, recorded that Maitland’s share in the work, both as to research and as to composition, was by far the greater. One of my predecessors in this chair, who was also my old chief at Yale, George Burton Adams, pronounced “Pollock and Maitland” to be unequalled as a work of continuous institutional history—and Professor Adams was not addicted to uncritical eulogy.

The other friend whose influence on Maitland was very great was the Russian medievalist Paul Vinogradoff. Visiting England in search of materials for medieval history, Vinogradoff became greatly impressed by the immense stores of unexploited archive sources for English legal history in the Public Record Office in London. Meeting Maitland by chance in January, 1884, he communicated his enthusiasm to him, with results that were to be decisive in Maitland’s career and momentous for the history of English law. “I often think,” Maitland wrote to Vinogradoff some years later, “what an extraordinary piece of luck for me it was that you and I met upon a ‘Sunday tramp.’ That day determined the rest of my life.” The first fruit of Maitland’s enthusiastic explorations at the Public Record Office was an edition of an early thirteenth-century plea roll, which he pub-

lished before the end of 1884, with a masterly introduction and an appropriate dedication to Vinogradoff. He had now entered on his lifework as a legal historian.

In that same year, 1884, Maitland began to teach at Cambridge. Four years later he was elected Downing Professor of the Laws of England, and he held this chair for the rest of his life. As a lecturer he was pre-eminently original—illuminating, suggestive, and stimulating in what he had to say, which was carefully prepared, and impressive, humorous, and even at times dramatic in his manner of saying it. Students spoke of his power to create historical atmosphere and make dry bones live. In addition to formal lectures he used to give informal instruction in paleography and diplomatics to small groups of advanced students. My colleague Professor Shotwell, who knew Maitland in his later years and was familiar with the character and quality of his teaching, has spoken of this work of his as a kind of informal *Ecole des Chartes*.

In 1887 the Selden Society was founded for the purpose of advancing the knowledge of English law by publishing first-hand materials for the study of its history. Maitland was the prime mover in its establishment, became its literary director, and remained its inspiring genius until his death. Twenty-one volumes were issued by the society during his lifetime, of which eight were his own contributions, and all the others, some of them undertaken at his suggestion, underwent his editorial supervision. As a historical editor he was the opposite of perfunctory, and his introductions to his own volumes have been a boon to students because of his lucid presentation of his findings, his clear-visioned insights, his original and ingenious hypotheses, and his critical historical methods.

After all the argument and controversy that have been raging

in historical circles regarding the uses and objectives of historical study, the nature of historical knowledge, and that perennially alluring apple of discord, historical relativism, most of us still speak respectfully, if not enthusiastically, about historical truth—that is, when we speak of it at all. Some of us are old enough to have listened to the impressive and beautiful address on “Truth in History” read before this Association nearly forty years ago by its President, my old and honored teacher, William Archibald Dunning, and all of us could read it with profit.

Only a selfless dedication to historical truth could have sustained labors so laborious and pains so painful as those to which Maitland subjected himself. A single instance must suffice for illustration. He turned from a continuation of *The History of English Law*, which he had much at heart, to the preparation of a critical edition of early Year Books because he regarded this latter as an indispensable preliminary to the former. To an understanding of the Year Books, however, there was also an indispensable preliminary—a thorough knowledge of the language in which they were written, the Anglo-French language spoken in English law courts in the thirteenth and fourteenth centuries. And hence our historian turned grammarian, orthographer, and phoneticist. For the competence with which he performed this exacting and intensely laborious task we have the testimony of a distinguished contemporary French philologist, who recommended Maitland’s excursion into medieval law French, published in the introduction to the first volume of the Year Books which he edited for the Selden Society, to all students of Old French in any of its numerous varieties. Maitland’s achievement seems all the more remarkable in that he took no interest in philology for its own sake and that his work on the Year Books was done in the closing years of his life, under the

severe handicap of illness and enforced absences from England. He retained to the very end his capacity for the drudgery involved in scholarship. The pursuit of historical truth, as he understood that term, was Maitland's ruling passion, and it explains, I think, most of his traits as a historian.

Anyone who has read more than a very little of Maitland is sure to be impressed by his concreteness and mastery of detail. He had a healthy distrust of the glittering generality that disdains illustration for he knew that concrete events are the stuff of history. One of the chief virtues of Stubbs's *Constitutional History of England*, in his judgment, was a concreteness exceptional in books on that subject. "People can't understand old law," he once remarked, "unless you give a few concrete illustrations; at least I can't." And so his writing is alive with facts and the doings of men, even though the men are sometimes necessarily left anonymous. He never forgot that human institutions and ideas have no existence, no life of their own, apart from human beings.

This concreteness of Maitland's, his factualism, goes far, if it does not go all the way, to explain his historical interpretations and conceptions of causation. You will search his writings in vain for any reference to historical laws, universal determinism of any variety (providential, economic, racial, geographical, or other), controlling social forces, or *Zeitgeist*. He himself, when young, had eagerly pursued philosophy as an academic subject, to be sure, and he must have heard great argument about causation, but the bent of his genius was historical. Perhaps he was too essentially and wholeheartedly the historian to take kindly to historical philosophy. You can find some "necessary conditions" in Maitland, but he did not mispend time and energy in the futile attempt to establish "fundamental causes."