The “Invention” of Early Legal Ideas: Sir Henry Maine and the Perpetual Tutelage of Women*

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Every age has its own gestalt. Sometimes authors use ideas and relationships from earlier times and cultures as implicit contrasts to their own society, but using the past for allusions to the present is hazardous, because everyone has a limited view of the rate of change in the modern era. We now know that the person who in 1909 remarked, “The world changed less since Jesus Christ than in the last thirty years” (quoted in Durant and Durant 1968:12), was quite mistaken.

In addition to a foreshortened sense of history, false analogies, and too much importance attributed to one’s own times and values, other problems arise when authors use the past to illuminate the present. The most formidable obstacle is perhaps shallowness of insight into a former time. Asking “Do we really know what the past was,” what “actually happened,” or is history “a fable” not quite “agreed upon?” historians Will and Ariel Durant (*ibid.*, p. 11) caution us about the interpretative task of historical analysis: “History as usually written . . . is quite different from history as usually lived: the historian records the exceptional because it

*The “perpetual tutelage of women” is a phrase used by Maine (1977:90). Under the *XII Tables* and in classical Rome, a woman of any age who was *sui iuris* needed a guardian, called a “tutor.” In his will a man appointed a guardian for any woman under his *manus* or *potestas* (protection), who would become *sui iuris* at his death. No woman could be a guardian. See Jolowicz and Nicholas 1972:121.

is interesting—because it is exceptional” (ibid., p. 41). Anthropologists and historians use history differently because anthropologists are generally more concerned with uncovering, describing, and analyzing the normal processes of social life and of change, rather than the exceptional processes. And legal history differs from both in its attempt to reconstruct the laws and legal systems of a particular period and their uses in society.

The Durants were raising phenomenological questions concerning the study of history in the late 1960s, about the time the questioning of the “scientific objectivity” of ethnographic writing by social anthropologists intensified. Some anthropologists challenged the authority and “objectivity” of ethnographic reporting, while others raised it to a creative art form, pointing out that “writing” is central to what anthropologists do both in the field and thereafter (Clifford and Marcus 1986:vii–viii). Ethnographic writing is creative writing, not simply a reporting of *transparent representations and immediate experiences*. When ethnographic experiences are seen as “something made or fashioned,” ethnographies become part of the “worldly work of writing” (Clifford 1986:6).

The above is relevant to this chapter for four reasons. First, in an attempt to understand better how anthropologists of law had conceptualized power relationships and the control of resources, I began in 1981 to reread Sir Henry Maine’s *Ancient Law* (1977), published in 1861. Sir Henry Maine had profoundly influenced a number of social anthropologists, and even in the mid-twentieth century his formulations of social and legal evolution continued as a touchstone for new integrative theories (Fried 1967; Gluckman 1965:113; Nader 1965:25, 1978; Colson 1974; Moore 1978:63). I sought to understand Maine’s conceptualizations of social change by reviewing his ideas about the influence of changing gender relationships on law in early and classical Roman society, but on rereading Maine I continually felt uneasy. My previous understanding of his ideas was at odds with the multiple and complex view of patriarchal family life I had seen through field research in several different patrifocal cultures.

Second, in Marcus and Cushman’s article “Ethnographies as Texts,” I recognized a similarity between their analytical stance and mine, especially when they described “experimental ethnographies” (1982:25). Experimental ethnographies integrate the textual representation of native life and thought with the ethnographers’ reflections. If contemporary ethnographies are to be treated as creative texts that express the times and thoughts of their authors, the writings of earlier social thinkers

should be treated the same way. Ideas from literary criticism, such as deconstructionism, also suggest how we might read texts as "cultural artifacts of an age" (see Derrida 1976; Culler 1982).

Third, the current anthropological enthusiasm for self-scrutiny of field research, field-workers, and their written products (see Marcus and Cushman 1982) was just beginning to be extended to nineteenth-century writers. Lively debates in the 1960s and 1970s about Marx and "Marxisms" had raised certain issues. For example, Leacock's (1972) introduction to a new edition of Engels's *Origin of the Family, Private Property, and the State* (1884) called for Marxist anthropologists to rely less on "idealism" and to separate materialistically conceived structures and actions from the subjectively held views of members of the societies being studied. This meant that an enormous amount of reinterpretation needed to take place (Leacock 1972:65,66). But most non-Marxist anthropologists used nineteenth-century writers in a literal manner or simply ignored them. The attempt to see "representational forms," "fictional" aspects, and "cultural intrusions" in the work of influential nineteenth-century theorists—Bachofen, McLennan, Fustel de Coulanges, Maine, Spencer, Engels, Weber, and Durkheim—has not yet had a major impact on social anthropology. Kuper's work reevaluating the ethnographic evidence concerning the lineage (1982) and on contextualizing Sir Henry Maine in his times (1985) are major exceptions.

Fourth, the uses made of nineteenth-century theory were even more striking in the anthropology of law. Evolutionary frameworks were mostly passé, and ideas considered false were ignored. But other ideas were appropriated in "unreconstructed" theoretical formulations. With some anthropologists of law turning to analyze how power shapes cultural and historical relationships among groups, it seemed time to bring contemporary scholarship on classical times to the study of the texts of earlier anthropological theorists.

The effectiveness of this unity between classical scholars and social anthropologists in reviewing nineteenth-century thinkers has been demonstrated in the new introduction to Fustel de Coulanges's *Ancient City* (1980). Momigliano and Humphreys boldly state that Fustel de Coulanges was in favor of private property and that throughout his life he engaged in a polemic against socialism, which led him to posit private property as *the original* human institution. They are quite critical of his major theory, remarking: "The reader of *The Ancient City* must be on guard at every step about what Fustel states as given in his sources. For instance, the notion—essential for the validity of Fustel's theories and

presented by him as a fact—that the Greeks and Latins buried their dead in family tombs within their own estates is simply not supported by the evidence he produces (or by any evidence discovered subsequently)” (1980:xi).

My attempt to view the writings of the nineteenth-century writer Sir Henry Maine as “texts” is thus part of a new evaluative and interpretative stance occurring in anthropology. By contextualizing some of Maine’s published work within his historical period, I demonstrate that the same philosophical energies used by social anthropologists to analyze the ethnographic writings of contemporary times might be brought to bear on the great formative ideas of our discipline. The gain would be a more powerful understanding of past societies. This chapter will add to anthropological conceptualizations of changing power relationships and the control of persons and resources in early and classical Roman societies. Once we began to inquire into the ability of women to hold property in classical Roman times, we will have to change our anthropological ideas of Roman property and kin relationships. Thus, the study of gender relations adds greater depth to our understanding of all societal relations.

This chapter first analyzes Sir Henry Maine’s use of the *Institutes* of Gaius in writing *Ancient Law* in 1861. These fragments served as a touchstone for Maine’s general theory concerning the direction of legal change from legal fictions through equity to legislation. Then we shall reexamine women and property relationships in early and classical Roman society from the point of view of Gaius and other sources. And finally, we treat *Ancient Law* as a “cultural text” that reflects some of the great ideas and controversies of the nineteenth century. Like many others who trace secondary sources back to the original, I discovered that a literal reading of the data did not permit all the conclusions drawn by Maine. Maine’s ideas, like those of other eminent essayists, evolved during his lifetime. His views changed between the publication of *Ancient Law* in 1861 and the publication of *The Early History of Institutions* in 1875. But *Ancient Law* is the text of primary concern because it has most influenced social anthropologists and is the one most often cited. In it Maine was “liberal,” “evocative,” and sometimes mistaken in his extrapolations from Gaius’s text.

Writers and intellectuals in each age reinterpret past times, and some social and cultural groups even rewrite or invent their histories (Hobsbawm 1983:7). Thus, we can no longer take literally even what the historians of an age say about their own period. As Giddens states so

clearly, "The production of a society . . . is always and everywhere a skilled accomplishment of its members" (1976:126).

Maine's Ideas Presented and Critiqued

Sir Henry Maine stated that the process of change within the structure of elite Roman families resulted from lawyers' ability to influence judicial decision-making in civil litigation and from judges' use of the rules of equity. This supported his generalization that the law evolved from legal fictions, through equity to legislation. The time period Maine considered was from 451 B.C., the time of the *XII Tables* (what Maine called the "ancient codes" or "ancient law"), to the second century A.D., the period of Gaius's *Institutes*. My use of Gaius and other sources provides a view of Roman society that is an alternative to Maine's and that is supported by current legal and historical scholarship concerning Roman law (see Crook 1967; Honore 1962, 1981; Watson 1968, 1975).¹

"Ancient law," wrote Sir Henry Maine, "knows next to nothing of Individuals." It is concerned with Families, not with single human beings, but groups" (1977:152).² "The Roman distinction between the Law of Persons and the Law of Things . . . though extremely convenient, is entirely artificial" (ibid.). Maine continues: "The separation of the Law of Persons from that of Things has no meaning in the infancy of the law . . . it is more likely that joint-ownership, and not separate ownership, is the really archaic institution" (ibid., pp. 152–153). Maine sums up his theory when he states later, "On a few systems of law the family organization of the earliest society has left a plain and broad mark in the life-long authority of the Father or other ancestor over the person and property of his descendants, an authority which we may conveniently call by its later Roman name of *Patria Potestas*" (ibid., p. 80).

Thus Sir Henry Maine, who was to hold the first professorship in Roman law at Oxford University and who is considered the father of comparative legal studies,³ launched his theory of patriarchy. Many

¹Literary sources also discuss a woman's place in elite Roman family structures. See Cantarella 1987, Hallett 1984, and Lefkowitz and Fant 1982.

²Maine is referring to the time the *XII Tables* were compiled—under the Roman Republic, 451–450 B.C.

³Sir Fredrick Pollock, in the introduction to the tenth edition of *Ancient Law*, credits Maine with creating the natural history of law (1930:xvi). Maine "showed . . . that legal ideas and institutions have a real course of development as much as the *genera* and species

legal scholars did not take *Ancient Law* seriously in its day (Kuper 1985:24). In the same year a Swiss jurist, J. J. Bachofen, had published *Das Mutterrecht* (1861), a widely acclaimed book based on Greek and Roman sources. Bachofen's theory was that early societies were based on matrilineal inheritance and maternal authority. Thus, already there is a contested view of the interpretation of the original Greek sources. Maine's successor to the Oxford Chair of Jurisprudence had this to say of Maine's work in his inaugural speech in 1892: "It is not unusual nowadays to talk in a rather supercilious manner of the lack of erudition and accuracy, of the allusiveness and vagueness of Maine's writing. Those who indulge in such cheap criticism should rather try to realize what accounts for his having been a force in European thought, a potentate in a realm where parochial patronage and a mere aptitude for vulgarization are not recognized as titles to eminence" (Vinogradoff 1904:2). Some critics of Maine have viewed *Ancient Law* as a bold attempt to gain the coveted post of "legal member" in the viceroy's council in India. In fact, Maine was appointed to this position in 1862, one year after *Ancient Law* was published. He held the post for seven years (Kuper 1985:279).

Although Maine's formulations of legal change in *Ancient Law* had little impact on comparative law scholars and Roman historians (ibid., p. 24), these ideas were later taken up by social anthropologists (see Fried 1967; Gluckman 1965; Nader 1965, 1978; Colson 1974; Moore 1978). A critical issue in anthropological theory, for instance, has been the transformation from kin-group ownership of land to private control of estates. Maine's concept of social change has influenced the evolutionary thinking of Morgan (1877), Engels (1884), and more recently Morton Fried (1967).⁴

The appeal of Maine's formulations to continuing generations of social anthropologists lay in the usefulness of the dichotomies he proposed, which provided a model of change from preindustrial societies to complex, stratified states. In *Ancient Law*, Maine consistently discussed the movement from early Roman society to the classical Roman Empire as a change from a kinship-oriented society to one based on common ter-

of living creatures," but he "made it clear that these processes deserve and require distinct study and cannot be treated as mere incidents in the general history of the societies where they occur" (ibid.).

⁴Fried was as influenced by Hobhouse, Wheeler, and Ginsberg (1915) as by Maine. Fried suggested that political society evolved through the distributive role of leaders instead of by changing systems of landownership. His concern was with the systematic emergence of social stratification in previously egalitarian societies and how systems of stratification related to political and economic control.

ritoriality. According to Maine, under the ancient Roman codes property was held in kinship groups. In classical times it was held in private ownership. Roman law evolved from laws relating to commonly held land by kin groups to laws regarding individual people. In kinship-organized society, social relations and rights were based on status in a kinship group. As societies changed, kin-based organizations gave way to individual relationships based on contractual agreements.⁵

These assertions are not supported by scholars of Roman law however. There is a marked paucity of evidence when one tries to reconstruct a "gentile" stage of society in Italy (Watson 1974, 1975:67). Watson (1977:40) states that at the time of the *XII Tables* (Maine's "ancient codes"), "the *gentes* had for centuries ceased to have much real significance. Who can doubt that for hundreds of years the propertied Roman would have preferred close relatives to succeed rather than the distant—and, in fact, very shadowy—*gentiles*?" Second, the era of the *XII Tables* is dominated by private ownership and wills. Land could be acquired and held as private property, private property that was different from inherited property (Jolowicz and Nicholas 1972:139). Third, the *XII Tables* stipulated that privately owned lands should be inherited by someone in a *potestas* (protected) or *manus* (literally, under the hand) relationship (i.e., a son, wife, or daughter) who became "freed" (*sui iuris*) by the death of the patriarch. (A wife or a daughter who became freed was given a guardian, called a "tutor.") If no son, wife, or daughter survived, the nearest agnate should inherit. Only if he refused did the inheritance go to the *gentiles* (gens). This situation is not one of "common agnatic kin rights to land." Finally, the beginning of Roman contracts drawn up between individuals has been traced to the era shortly before the *XII Tables* (Watson 1985:4–11).

This difference of opinion between accumulated Roman law scholarship during the last hundred years and the "received wisdom" of social anthropology suggests that we should bring our ideas concerning property relationships in early and classical Roman society up to date. To do so, we need to review a critical juncture in Maine's theory—the opposition between *res Mancipi* and *res nec Mancipi*. Maine explained these Latin terms, but he never clearly glossed them.⁶ But for a clear under-

⁵For a summary of Maine's theory of the evolution of law as developed in *Ancient Law*, see Newman 1983:6–12. For an analysis of how Maine's research dovetailed with his political ambitions, see Kuper 1985. For Maine's influence on the work of other evolutionists, see Kuper 1982.

⁶In fact, Maine's original edition lacks citations, bibliography, and footnotes, as do the later editions. These terms, still in their Roman gloss and untranslated, were later

standing of women's status and rights to control property in ancient Roman society, we need to deconstruct the meaning of these terms in denoting property relationships, and we need to understand Roman marriage forms.

Fragments of manuscripts by a second-century A.D. Roman lawyer, Gaius, stimulated Maine's ideas.⁷ The fragments, discovered in 1816 by Barthold Niebuhr in the cathedral library at Verona, have provided the European world with information concerning early Roman law which, according to Maine, "had disappeared" from the "mature Roman jurisprudence" of the sixth century known in Justinian's Code (Maine 1977:90). Maine asserts (although it is not true) that "a considerable part of Gaius's volume" is taken up with descriptions of the numerous expedients, some of them displaying extraordinary ingenuity, which the Roman lawyers had devised for enabling women to defeat the ancient rules" (ibid.).⁸ According to Maine, "led by their theory of Natural Law, the jurisconsults had . . . assumed the equality of the sexes as a principle of their code of equity. The restrictions which they attacked were . . . restrictions on the disposition of property, for which the assent of the woman's guardians was still formally required. Control of her person was apparently quite obsolete" (ibid., pp. 90–91).

The above quotation from Maine obscures the existing situation.⁹

appropriated by Gluckman (1965:113) and also by Laura Nader (1965:25) for theory-building.

⁷Gaius became famous as a legal scholar only in the fifth and sixth centuries, but he may have been writing the *Institutes* as early as A.D. 161 (see Jolowicz and Nicholas 1972:386–387, n. 2). The *Institutes* is three books that formed the basis of the first year of legal education in Byzantine schools. Justinian and the compilers of his codes single him out by calling him "Gaius noster," an important honorific title (Honore 1962:xi). Because Gaius's manuscripts were subsequently lost, everything the legal world knew of Roman law came from the codes of Justinian, published between A.D. 529 and A.D. 530 (Harris 1875:2–3). When Niebuhr discovered them, they were immediately recognized by the great legal scholar (and Niebuhr's contemporary) Savigny as containing original work (Jolowicz and Nicholas 1972:389). The manuscript is a palimpsest and probably dates from the fifth century A.D. Some works of Saint Jerome had been written over the original text. It is difficult to read because of "the numerous mistakes made by the copyists and the free use of abbreviations" (ibid.). In some places two inscriptions had to be removed. Harris stated: "In consequence of the economy of parchment, about a tenth . . . is wholly lost or illegible" (1875:1).

⁸For a basic historical treatise on Roman law, see Jolowicz and Nicholas 1972.

⁹A fourth fragment of Gaius's *Institutes* was found in 1927, as well as a few fragments from a papyrus of about A.D. 250 and part of a magnificent parchment codex of the late fourth or early fifth century. Taken together, these help clarify the meanings in Gaius's manuscripts and "enable us to follow in detail the famous three-fold arrangement of the subject-matter of the law as it concerns 'persons,' 'things,' and 'actions'" (Jolowicz and Nicholas, 1972:389).

Women were both freer in some contexts, and more controlled in others, than Maine claimed they were. For instance, women were free to sell and buy all kinds of property that was not *res Mancipi*. This included sheep, goats, poultry, pottery, jewelry, clothes, furniture, houses, and land outside Italy (Gardner 1986:18). In terms of women's personal freedom, however, Crook has aptly said, when commenting on the alleged freedom and independence of Roman women, that this view is generalized from "the antics of Roman 'night-club' society" and tends to be much exaggerated (1967:103–104).

Maine's reading of Gaius assumed that women had already gained "control of their person" when in fact this was still at issue. Women were under either their father's, husband's, or guardian's protection. Women with living fathers could marry only in the first two marriage forms (for the marriage forms, see later in this chapter), and neither form allowed them free choice of a husband. Women whose fathers had died might engage in legal maneuvers to marry the male guardian (i.e., husband) of choice, but this limited his status and that of her male children. This marriage form created problems if the husband or male children born of such a union should later aspire to the high-priestly office.

If a woman was *sui iuris* (i.e., if her father had died and she had not yet married), then at the time of the *XII Tables* and for a long time afterward she needed a guardian (Jolowicz and Nicholas 1972:121). As Crook comments in his *Law and Life of Rome*, "women were never released" from guardianship, and "subjection of women's legal acts to some male authority was virtually universal in antiquity. . . . This life long guardianship was whittled away by legal devices, though as a formality it hung grimly on" (1967:114).

A detailed study of Roman law relating to women begins: "With few exceptions, all Roman women were for their entire lives subject to some degree of limitation on their capacity for independent legal action" (Gardner 1986:5). All action depended on male permission—women needed to obtain consent from fathers, husbands, or guardians. The few exceptions were six in number—the six vestal virgins. In *Ancient Law*, Maine misinterpreted the transfer of women's subordination from father to husband as a growth in freedom, saying: "Ancient law subordinates the woman to her blood relations, while a prime phenomenon of modern jurisprudence has been her subordination to her husband" (1977:91). Twenty years of female agitation in England led Maine to recant this position later, but most anthropological theories emanating from his views are based on the earlier work, not on the later work. In a lecture delivered at Birmingham on March 25, 1873, "The Early History of the

Property of Married Women, as Collected from Roman and Hindoo Law” (later published in nearly the same form in *The Early History of Institutions* [1875]), Maine stated that women should be equal to men: “It has been said that the degree in which the personal immunity and proprietary capacity of women are recognized in a particular state or community is a test of its degree of advance in civilization” (1873:21).

Ancient Law, however, makes it clear that Maine viewed the lawyers’ manipulation of the legal system to transfer control of an adult female from father to husband as a growth of women’s rights. Although some elite women were able to use lawyers to plead their property cases on grounds of equity, women of poorer ranks did not have access to lawyers. Furthermore, case-to-case argumentation is an indication that new legislation protecting female equality was not in place. Appellate cases argued under rules of equity instead of from existing legislation indicate that the subject was still controversial.

Three legal documents from the second century A.D., cited in Crook (1967:114), provide further proof that a Roman woman still needed permission from her guardian to engage in commercial transactions regarding land or money. The scholarship of Crook, Gardner, and Honore (discussed more fully below) provide deeper interpretations of law in the classical period of Roman society. Because the written law demonstrates only what people may or may not do, not what actually happened when cases were brought to trial, selected cases from Honore’s text (1981) are briefly discussed later in the chapter.

Maine’s Theory of *Res Mancipi* in Contrast to the Views of Gaius

Before turning to Roman law cases, it is necessary to establish the original meaning of the legal concepts of property and ownership denoted by *res Mancipi* and *res nec Mancipi* as used in Gaius’s fragments. Here interpretations by professors of Roman law are helpful in clarifying what Gaius meant, especially with regard to women’s ability to own and control property in Rome in the second century A.D. To fully understand the *context* in which female autonomy was limited in law and in practice, we need to know the three prevailing forms of marriage and their consequences for the woman in terms of her status, autonomy, and legal rights. Several law cases examined below, in combination with the legal rules provided in the text of Gaius, and interpreted by Roman law

scholars in the twentieth century provide an alternative view of the degree of women's emancipation in classical Roman society, the period considered by Maine.

To develop an image of Maine's views of the Roman law of property, we have to piece together different sections of his book. Maine did not present the material consecutively, because he felt there was a confusion in the Roman classifications of property, that Romans did not recognize the natural distinction between movable and immovable property. The "*Res Mancipi* of Roman Law included not only land, but slaves, horses and oxen" (Maine 1977:161). Maine also believed that "the classifications of Ancient Law are classifications implying superiority and inferiority" and that "*Res Mancipi* . . . did certainly at first enjoy a precedence over the *Res nec Mancipi*" (ibid.).

Reading further in Maine, we discover that *res Mancipi* is a type of property for which "mancipation" is required. Maine continues: "By their side there may have existed or grown up a class of objects, for which it was not worth while to insist upon the full ceremony of Mancipation. It would be enough if, in transferring these last from owner to owner, a part only of the ordinary formalities were proceeded with, namely the actual delivery, physical transfer" (ibid., p. 163). These commodities were *res nec Mancipi* of ancient jurisprudence—"things which did not require a Mancipation" (ibid.).

From Gaius's text we learn that the ritual for *res Mancipi* (the ceremony of emancipation) included five witnesses, the saying of a formula spoken by the person giving up rights to the property, and symbolic actions denoting weighing (Gaius, translated by Zulueta 1953:59). In a footnote by Gaius's translator, we learn that because until the fourth century B.C. the medium of exchange was uncoined bronze, weighing had been essential, and it continued still in the symbolic form of the ritual emancipation (Zulueta 1946:58–59).

Maine's belief in "natural law" led him to find confusions in the Roman classifications of property, because Romans classified some movable property with immovable property (Maine 1977:160–161). According to Maine, this confusion retarded the development of European law of property until well into the Middle Ages. In Maine's view the "history of Roman property law is the history of the assimilation of *Res Mancipi* to *Res nec Mancipi*" (ibid., p. 160)—that is, the two classifications of property merge into one, a property that does not entail a ritual to be alienated from its owner but that can be transferred by mere conveyance. Jointly held property, which included all aspects of the productive

resources (land in Italy, slaves, and beasts of burden) required a special ritual when sold. Maine's point is that this requirement disappeared because joint agnatic ownership gave way to individualized ownership.

But legal commentaries on the text of Gaius stress an interpretation that Maine glossed over. Most twentieth-century commentators have suggested that the distinction between *res Mancipi* and *res nec Mancipi* bore some resemblance (but not a complete similarity) to the earlier distinction in Roman law between *familia* and *pecunia*. Watson attempted to solve the puzzle about the different meanings ascribed to these words in several different Latin texts (1975:57). He suggests that *pecunia* means property and that *familia* means "a man's property considered as a unit." This view is supported by another scholar, who points to the *original* concern of Romans to control the movement of property *between* families as the meaning of these distinctions (Kaser 1980:46). In other words, it is to prevent a few families from gaining control of most of the land in Italy (*ibid.*). According to Roman tradition, the *XII Tables* came about as a compromise in "the class struggle" between plebeians and patricians (Watson 1975:177). Whether "tradition" is accurate or has been created as hindsight, it allows an explanation of the development of written law as a mechanism to limit property accumulation in the hands of an emerging elite.

The classifications of property—*res Mancipi* and *res nec Mancipi*—are important points of departure for Maine's theory of the evolution of legal forms. Although Maine introduced considerable complexity into his theory, and even separated European continental law from developments in property law in England, he maintained the cultural idea of the progressive evolution of legal forms. Of course, he recognized that English law was also constantly changing, but because of his evolutionary theory he distorted the underlying intent of the Roman distinction between *res Mancipi* and *res nec Mancipi*. This was necessary to show the progressive nature of law from ancient codes through earlier Roman law to the mature Roman law of Justinian's Code and its current manifestations in the Scottish law of inheritance (Maine 1977:161).

The Argument Summarized

Elite women were neither as dependent nor as independent as Maine suggested. By the "ancient rules" of the *XII Tables*, all women (except the vestal virgins) were dependent. In the time of Gaius, elite Roman

women were struggling to find ways, with the help of lawyers, to circumvent these rules, but the struggle remained individualized, on a case-by-case basis. The emancipation of women was not an accepted principle. Control of landed property in Italy pertained only to upper-class women, who *won* their cases. But even when they won, it was difficult to dispense with a guardian, who managed the property (Jolowicz and Nicholas 1972:116–117, 121).

This chapter, therefore, aims at solving two problems. The first is to provide a more convincing interpretation of the older texts and a better understanding of selected aspects of the writings of Gaius. The second relates to the emancipation of Roman women, especially with regard to their ability to control property. Thus, this chapter also contributes to the study of property relations.

Roman Marriage Forms

Maine discussed “the peculiar contrivance of archaic jurisprudence” which retained a female in bondage in her family for life (1977:90). His description of the *patria potestas* sounds like the archetype of the patrilineal, patriarchal family. The female is not able to communicate any rights of agnation to her descendants, although she is included in the agnatic bond. Maine’s enthusiasm for the manuscripts of Gaius lies in part in his attributing to them the disclosure of the legal concept “perpetual tutelage of women” at the time it “had fallen into complete discredit and was verging on extinction” (ibid., pp. 80, 90). The “ancient rules” of the *XII Tables* of Rome were still in effect when Gaius was a Roman lawyer. These gave fathers tremendous rights over sons, daughters, and wives. Codified in 451–450 B.C., they allowed a father to sell a son into bondage twice and forced all females (except for the vestal virgins of Rome) to remain for life under the control of a male guardian (Hallett 1984:22–23; Watson 1968).

In describing these ancient rules and contrasting them to those of his own time, Maine stated: “Ancient Law subordinates the woman to her blood-relations, while a prime phenomenon of modern jurisprudence has been her subordination to her husband” (1977:91). Yet, a reading of the *Institutes* of Gaius makes it clear that the legal status of women is much more complex. Why would Maine overstate the situation to such an extent, saying on the one hand that “control of [a woman’s] person was apparently quite obsolete” and on the other hand that Roman women

were free when control of them passed from their fathers to their husbands (ibid., pp. 90,91)?

One answer, suggested earlier, is that the book was written hastily in order to gain a coveted position in the Indian civil service. A second answer may be Maine's immersion in the ideas and assumptions of his own culture. In 1871, English women were very much under the control of their fathers and husbands.¹⁰ In an admittedly ambiguously titled final chapter, "The Emancipation of Roman Women," Gardner traces the restrictions on elite women in English society from 1857 to 1935 (1986:257–266). Then, referring to Dale (1894), another nineteenth-century writer, Gardner concludes: "It is no wonder that to a late-Victorian writer Roman women seemed unrestrained to the point of license" (1986:257–258).

A third explanation may be that in 1861 Maine was less interested in the rights of English women to hold property than he was in 1875. In the United States of the 1840s and in Great Britain by the 1860s, women were involved in a social movement that was to attain new legislation allowing married women to make contracts and purchase, sell, and hold property (Basch 1982; Holcombe 1983; Rabkin 1980). In fact, much of the impetus for women to gain voting rights in Great Britain and the United States grew out of the laws that restricted married women from controlling their inherited property (see Rabkin 1980:10; Holcombe 1983).

Turning to the writings of Gaius, we find that before marriage a Roman woman in the second century was under her father's *manus* (literally, hand, i.e., control, protection). She entered into marriage in three ways: by *usus*, *confarreatio*, and *coemptio*. *Usus* was a situation in which a woman cohabited with a man for a year without interruption, whereupon she passed unceremoniously into his family, came under his *manus*, and gained the rank of daughter (Gaius, translated by Zulueta 1946:35). Any woman who did not want to come under her husband's *manus* must stay away from his house three nights a year, thus interrupting *usus*. Gaius suggests that this marriage form (*usus*) had in his time been partly abolished by statutes and partly obliterated by disuse. Un-

¹⁰Before 1881, British women could hold property only in the form of a trust, so that male trustees and guardians had the true decision-making power concerning sale, investment, and so on. Thus, in Great Britain in that period there were certain parallels to times in classical Rome. Between 1881 and 1887 the Married Women's Property Act became law in Britain, giving female British citizens the right to hold property directly in their own names and to make decisions concerning sale, alienation, purchases, and the like.

doubtedly it began to disappear because in order to hold public office a male, and sometimes his parents, had to be married more formally (described below as the second marriage form).

The second marriage form, *confarreatio*, was entered into through a civil ceremony that took place in front of ten witnesses in which specified words were spoken formally and a "spelt" cake was offered to the god Jupiter Farreus. This was the most formal marriage mode, and men who wanted to hold higher positions as *flamens* (a priestly office) had to have been born of parents married in this manner or be himself so married (*ibid.*).

The third form of marriage, *coemptio*, was used when a woman's father had died. It allowed the woman to gain the guardian (i.e., husband) of her choice through a legal maneuver and took the form of a "mancipation." Mancipation was a symbolic sale performed in the presence of five Roman citizens and a sixth citizen who held the bronze scale. The person now giving up his *manus* over the other says, while holding a bronze ingot, "I declare that this slave (or son, or person in my guardianship) is mine by Quiritary right, and he is purchased by me with this bronze ingot and bronze scale." He then strokes the scale with the ingot and gives a symbolic price to the person he is mancipating. But this ceremony did not free a woman; it acted to transfer her from her father or guardian to her husband's authority. She passed into the *manus* of the man in whose presence this ceremony was performed (*ibid.*).

By the time of Gaius, this third form of marriage allowed a woman to be transferred to the guardianship of a stranger, who then transferred her to the guardian (i.e., husband) of her choice. Gaius is explicit: "A woman wishing to get rid of her existing guardian and to obtain another enters into the third marriage form with a stranger" (*ibid.*, p. 37). After that she could be mancipated to "the person of her own choice." This was also the legal device used in a period when women did not have the right to make wills. A *coemptio* marriage with a stranger allowed a woman to be "remancipated" and "manumitted" to the person of her choice, who then became her guardian. In that way he acquired rights over her property. This was not a will on parchment, like a Roman male could make, but it had legal status. In all the marriage forms it was the accepted view that a wife always acquired the position of a man's daughter and that any marriage form gave her a daughter's rights.

With a father alive, a woman could leave her father's guardianship only by marriage. And the first two marriage forms placed her under the control of her husband (*ibid.*, p. 45). Parents appointed guardians for

both male and female children, but at puberty the male child ceased to have a guardian, while the female needed to continue in guardianship all her life. If adopted, a daughter could not compel her father to perform a ceremony of mancipation to her husband for her.

A woman in any marriage form could compel a husband to allow her to leave him if she sent him notice of divorce (*ibid.*, p. 47). But divorce did not free a woman of male guardianship, only of guardianship by a particular male. The classical Roman lawyers (who, as we saw, found ways for unmarried women to marry the man of their choice after their father's death) held that a female must stay in guardianship. Only vestal virgins were free of guardianship, because of their religious office. Those for whom no guardians were appointed would have, under the laws of the *XII Tables*, their agnates as guardians (*ibid.*, p. 51).

Any person under a father's guardianship (*patria potestas*) could own no property; it belonged to the *familia* (Jolowicz and Nicholas 1972:121–125). When married according to the second or third marriage form (available when a father had died), a woman brought some property from her father's household, which in Gaius's time or shortly thereafter was called *dos* (Zulueta 1953:39). The husband was manager of the *dos*, and during the marriage he had the right to control it as a *patria potestas* and to enjoy its income, but his rights did not allow him to sell or mortgage it. At his death or at divorce, the *dos* had to be returned to the wife, but he was allowed to make certain deductions from it, such as for wifely misconduct.

In later Roman law the wife became the preferred creditor for her husband's general estate (*ibid.*, p. 40). This meant that the husband could spend and lose all his own property and then borrow all his wife's property, while the law gave her no remedies. Roman lawyers began developing wives' rights to change guardianship of their property by arguing through case law and not attempting to change the existing legislation.

Roman Women's Lawsuits Challenging the Structure of Property Relations

From Gaius's writing we find elite women in second-century Rome developing legal mechanisms to free women from the continual status of a minor. But even when individual women gained majority status they were not given the rights their brothers enjoyed. Recently translated

law cases from third-century Rome provide glimpses of the process of females gaining control over their inheritance (see Honore 1981). The cases rank as “true law reports” because “they report not merely the facts of cases and the course of judicial proceedings but the points of law at issue and the arguments addressed to them” (ibid., p. 15). According to Honore, twenty-six cases are reported in reasonable detail, dating from the reigns of the Roman emperor Severus, who ruled from A.D. 193 to A.D. 211 and the emperor Caracalla, who ruled from A.D. 211 through A.D. 217 (Crook 1967:337). Of all the cases, nineteen concern private law, thirteen involve inheritance, seven concern trusts (*fideicommissa*), and one is the division of an inheritance. This “confirms that upper-class Romans were more inclined to litigate about succession and inheritance than anything else” (Honore 1981:16). Four of the cases published by Honore (1981) involve women.

These cases demonstrate that even in the century after Gaius the position of women was not clearly established in legislation, so that it could be taken for granted, as Maine has asserted. Of course, the principle of the equality of adult women could have been established and then canceled, but scholarship on Roman law does not support a cyclical view of the evolution and decline in the laws governing property relations. Roman women did not find it easy to gain the freedom to change managers of property that they had purchased or inherited. It was a long struggle because each case had to be heard individually. The four cases (translated by Honore 1981) discussed below were taken on appeal to the highest legal resource, the emperor. Like the other evidence presented here, these four cases, heard on appeal, illustrate the existence of different opinions about the legal rights of adult women in managing resources.¹¹

Case 1: Cancellation of a Sale

By the terms of the sale under review in this first case, the seller could cancel if the balance due was not paid within a certain period. Before the due date the buyer died, leaving an underage daughter as heir. Her guardians did not pay the balance when it was due, although the seller pressed them to pay. In the end he sold to someone else. When the daughter became of age, she claimed restitution—that is, claimed to be

¹¹All law cases cited here are in Honore 1981: case 1, pp. 17–18; case 2, p. 18; case 3, pp. 18–19; case 4, pp. 19–20.

able to tender the price and obtain delivery of the property from the seller. Her claim was rejected by both the urban praetor and the urban prefect, judges who heard such lawsuits.

The case then went to Severus's council, which had a split vote on the issue. Paul, a member of the "literal-minded, strict-constructionist" group agreed with them on the grounds that the daughter was claiming restitution under a contract made by her deceased father and not by her (Honore 1981:17–18). But the emperor felt it was important that the installments came due when she was in tutelage. Paul argued against the emperor Severus, saying that restitution should be granted only on the grounds that the seller, by calling on the buyer to pay the price after the due date had passed, had renounced the right to cancel the sale. However, the emperor granted restitution "because he disliked the provisions for cancellation" and because the tutors had failed to pay on the due date and had been accused of defaulting (*ibid.*, p. 18).

This case demonstrates that a woman who had reached majority was granted restitution because her guardians had mishandled her property. The case was heard at three hierarchically ordered legal institutions before being resolved by the emperor.

Case 2: A Daughter's Right to an Inheritance

In a second case Paul, the literal-minded conservative, once again argued against the emperor and had his view rejected. In this instance a testator appointed his son heir to two-thirds of his estate, and his daughter to one-third. If the son died without children, he gave his daughter certain other property through a trust (*fideicommissum*). By a codicil, the testator gave his daughter specified other lands and told her to be content with these in lieu of the inheritance and of everything left her in the will. The son died, and the son's property was forfeited to the tax collector.

The issue was whether the daughter could accept the trust. Paul argued that the codicil clearly stated the daughter could take nothing but the specified lands, so she could not take the trust. But the emperor Severus decided, on the basis of a more humane interpretation, that she could, saying that the codicil deprived her only of what she was to receive under the will during her brother's lifetime, not what she was to take on his death. A second issue was whether the father intended his property to go to his daughter if his son died. The emperor decided that

the father did intend that, and thus awarded the trust to the adult female over the claims of the state tax collector. The trust was to be administered by her guardians.

*Case 3: The Testator's Intentions
Toward His Friend's Daughter*

The testator appointed as heir the daughter of Pactumeius Magnus and substituted her father for her because all women were still in male guardianship. Magnus, consul in A.D. 183, was killed by or at the insistence of Commodus, and Pactumeia, his daughter, was rumored to be dead. The testator then changed his will and named as heir Novius Rufus "because I could not have as heirs those whom I wished." Pactumeia, the daughter, turned up safe later.¹² The emperor Severus awarded the woman the inheritance on the grounds that this was what the testator intended, but he imposed on her the legacies prescribed by the testator in his second will in favor of Novius.

Case 4: A Testator's Intention

A testator who had a son and a daughter made his daughter heir, but in his will he instructed her not to make her own will unless she had children. She succeeded him, but died without children. The crucial issue became: could her brother claim the estate by way of a trust (*fideicommissum*)? Severus decided that the brother could. The only point of telling the daughter not to make a will until she had children was that her father wanted her brother to inherit the estate if she died without heirs. Hence, a trust in favor of her brother is implied.

This case demonstrates that a father could choose to give his property to one child only, in this case a daughter, instead of his son, and that such a wish would be respected in courts of law. This case went to the emperor on appeal because of the need to interpret the intent of the deceased in the will.

¹²A strict interpretation of Roman law in this case would be that "when a false reason" is given for instituting someone as heir that reason should be disregarded because it expresses the motive, "he could not have those he intended" (*ibid.*, p. 19). He intended Pactumeia to be his heir and she was awarded the inheritance. Note that until the time of Augustus, and often thereafter, "a Roman woman was called by the feminine form of her father's family name, from the cradle through however many marriages to the grave" (Hallett 1984:67 and n. 7).

Conclusions

Today in social anthropology many of our “accepted verities” are being rethought under the impetus of interdisciplinary scholarship. This chapter uses Roman law scholarship and analytic modes of analysis from “deconstructionism” to contextualize the writings of Sir Henry Maine and the sources he used in discussing change in Roman society. In returning to legal research on Rome, I provide a fresh view of the status of upper-class Roman women, their ability to control property, and the use of this data in Maine’s book, *Ancient Law*, which is still an important text for social anthropologists.

Yet, Roman law specialists are not the only ones who are critical of Sir Henry Maine. A social anthropologist recently remarked: “Although it is clear that early Roman law reflected a society deeply rooted in ownership of private property and practising contract and testamentary disposition,” Maine rejected his main source of information—Justinian’s Code of the sixth century—as “contaminated” (Kuper 1985:278). Had Maine extended his historical vision to the sixth century, as twentieth-century Roman legal scholars have, he would have recognized that Justinian’s Code was an authentic view of the degree to which concepts of private property had developed by the second century A.D.

In following Max Gluckman’s dictum to confine an anthropological study within certain narrow limits (Devons and Gluckman 1964:16–17), I have considered here only tenets of Roman law that related directly to Maine’s arguments. A close examination of some of the laws in Gaius’s *Institutes*, and explications by Roman law scholars other than Maine, have demonstrated that females were not free of paternal and male guardianship. They did not have control of their property or even of their own persons in the second century A.D., as Maine had asserted.

A woman with a living father could marry in one of two ways, both of which required paternal consent. If a father had died and a woman had not yet married, she might engage in the third marriage form: first she need assume a stranger for a guardian, who then passed her on in a simple ceremony to the guardian (i.e., husband) of her choice. Thus, only women without living fathers could marry whom they chose, and to do this they needed to engage in legal maneuvers that deprived them of the higher-status marriage ceremony. When parents married in less formal ways, both the husband and the male children were prevented from seeking the prestigious priestly offices. Every form of marriage deprived females of rights accorded their adult brothers. By the second

century A.D., however, the favored form of marriage, the second form, gave a wife more status because of its public nature and the religious ceremony. In classical Roman society, no woman could ever be a guardian, and the status of a wife was unequal to that of her husband or her adult brother.

A return to the Latin texts that inspired Sir Henry Maine helps us to determine the actual meaning of the terms *res Mancipi* and *res nec Mancipi*, which Maine used but never appropriately glossed. The interpretations offered by Roman legal scholars helps us place these legal concepts of property in their context—that is, in relation to Roman attitudes toward state formation and state control. Contrary to Maine, the terms did not denote kinship-held land versus privately held land, but expressed a principle in classical Roman law that protected productive farmland in Italy from being amassed by a few families. Watson's extensive search of Roman legal and literary sources led him to refute Maine conclusively on the topic of the kinship organization of Roman society into gens at the time of "the ancient codes" (1977:40; see earlier in this chapter).

The nineteenth-century social movement in Great Britain that worked for the rights of married women to hold, buy, and sell property explains the changing political climate in which Maine worked and which led him between 1861 and 1873 to change his views concerning what constituted full equality for women. That he knew of the agitation for the passage of "the married women's property act," and approved of it, is clear from a reference in a lecture Maine gave in Birmingham, England, in 1873 (Maine 1873:3).

Our inquiry into the "perpetual tutelage of women" in Roman society and women's ability to hold property has changed our anthropological ideas about Roman property relationships. In other words, a study of gender relationships is a study of societal relationships writ large. Recent scholarship in Roman law helps clarify legal ideas and principles relating to Roman property relationships. Anthropologists should never have let the ancient Romans speak to us for so long in the accents of nineteenth-century Europeans.

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