THE HAMLYN LECTURES

Thirty-First Series

SOCIAL HISTORY AND LAW REFORM

O. R. McGregor

STEVENS

SOCIAL HISTORY AND LAW REFORM

by

O. R. McGREGOR

The topic of the 1979 series of Hamlyn Lectures, given by O. R. McGregor, was the way in which law operates in society. To illustrate this constantly shifting and subtle relationship, the author analyses the complex links between legal, social and historical research on the one hand and the movement for law reform on the other.

In the first part of the book some of the consequences that have flowed from the historiography of English legal institutions are considered, followed by an examination of the ways in which some Victorian law reformers tried to adapt the law to social change. O. R. McGregor then applies his conclusions to two branches of the civil law—the breakdown of marriage and debt—which are of extensive and direct concern to many.

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Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

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The Thirty-First Series of Hamlyn Lectures was delivered in February 1980 by Professor Lord McGregor of Durris at the University of Kent at Canterbury.

AUBREY L. DIAMOND,
Chairman of the Trustees.

September 1980

INTRODUCTION

I am very sensible of the honour which Miss Hamlyn's trustees have conferred upon a layman by their invitation to deliver these lectures. I do not know whether to be more alarmed by the formidable list of distinguished lawyers who have preceded me or by the fact that the only other layman whose name appears on it is Lady Wootton, our most renowned exponent of social science. A lecturer under this Trust is required to help those whom the Chancery Division of the High Court still thought of in 1948 as "the Common People of the United Kingdom" to "realise the privileges which in law and custom they enjoy in comparison with other European Peoples." A brief of this nature more easily moves English lawyers to adopt the language of Mr. Podsnap and to reiterate Lord Hailsham's belief that "our courts are better, our judges are better, and our lawyers are better than those of other nations, however good they may be,"[1] than to accept Lord Gardiner's judgment that "the courts exist for the people and not the people for the courts."[2]

In the first part of these lectures, I shall reflect on the present relations of law and the other social sciences, consider some consequences that have flowed from the historiography of English legal institutions and then go on to trace the ways in which some Victorian law reformers went about the business of adapting the law to social change. In the second part, I shall apply the conclusions of the first to recent developments in two branches of the civil law which are of extensive and direct concern to the common people, with the object of assessing how well they are being served.

[1] H.L. Official Report, Vol. 313, cols. 676, 677, quoted Barbara Wootton, *Crime and Penal Policy* (1978), p.81.
[2] *Ibid.*, Vol. 306, col. 200.

CHAPTER 1

SOCIO-LEGAL RESEARCH: THEORISTS AND FACT GATHERERS

The last two decades have seen a marked revival of interest in studies of the administration of justice and of the social and economic results of law in action. Practical expressions of this intellectual activity materialised surprisingly quickly. The Joseph Rowntree Memorial Trust set up a Legal Research Unit at Bedford College in 1965, the Nuffield Foundation followed suit in 1971 with its own Legal Research Unit, and the Law Faculty of the University of Birmingham established an Institute of Judicial Administration in 1969. In 1972, the Social Science Research Council, in partnership with the Rowntree trustees, provided funds for a Centre for Socio-Legal Studies in Oxford.[1] The Council also constituted a Law and Social Sciences Committee charged with administering grants for postgraduate students and stimulating interdisciplinary research throughout the institutions of higher education. It is fitting at this time to recall that Sir Otto Kahn-Freund, the leading exponent of the utility of collaboration between lawyers and social scientists, took the lead in setting up the Oxford Centre and the S.S.R.C. Committee. An expanding literature has emerged from these developments and is extending the pioneering work of Wolfgang Friedmann, first published in 1959 as *Law in a Changing Society*. There are now series of legal texts written to give the law a social and economic context. True to the principles of its founders, the Modern Law Review has been making a feature of articles with a socio-legal content, and other journals are projected. Sufficient enthusiasm for sociological investigation has spread among a fringe of younger teachers of law to sustain a

[1] The partnership was short-lived. The trustees wished their contribution to be used for activities which could not be undertaken with public funds. However, the S.S.R.C. insisted that the Rowntree grant should be paid directly to the Council in such a way that its only effect would have been to reduce the Council's liability. As a result, the trustees severed their connection with the Oxford Centre.

British Journal of Law and Society, founded in 1974. Behind all these enterprises lies a conviction that collaboration between lawyers and other social scientists will promote greater mutual understanding and appreciation of the relevance of each other's field of study to problems with which they are both concerned. Unhappily, this conviction has been much more in evidence among lawyers than among social scientists.[2]

Several waves of influences have shaped these developments as well as wakening a desire among laymen for knowledge about the role of law in society. The first has been the seemingly irreversible proliferation of crime and violence, and the obvious failure of existing methods to cope with this has forced consideration of how, to whom and for how long scarce cell space should be allocated. Moreover, the influence of psychiatry on the law and the penal system has been such that, as Lady Wootton observed more than 20 years ago, "the concept of illness expands continually at the expense of moral failure,"[3] with the consequence that what used to be clear notions of legal and moral responsibility have become blurred not only in discussions but in statutes as well. One result of this development has been that issues of law, order and morality are now high on the agenda of public and political discussion.

The second wave has been a reconstruction of the familial code which has involved a willingness to take account of the happiness of individuals at the expense of the legal integrity of the institution of monogamous marriage. The momentous innovations of the Adoption and Legitimacy Acts 1926 broke the age-long insistence upon the inalienable rights of parents over children, as well as introducing into England the *legitimatio per subsequens matrimonium* of Roman law which had been rejected when the Barons debated the Statute of Merton in 1263. Wives have secured a large measure of equality with their husbands, and the bonds of marriage, which used to be described as the essential safeguards of monogamy, have been weakened to the point at which between

[2] An example is the excellent introduction to *The Legal Structure* (1974) by M. D. A. Freeman.

[3] "Sickness or Sin," *The Twentieth Century*, May 1956, p. 43.

one-fifth and one-quarter of the married population are likely to seek licences to marry again from the divorce court. Most petitioners will obtain these by post without having to attend a court hearing.

In the third place, recent decades have witnessed the removal of customary and legal constraints upon certain forms of previously disapproved of or illegal sexual behaviour and upon their portrayal in print or by the visual arts or for commercial purposes. Men and women have also acquired new rights over their own bodies and new freedoms to choose how and with whom to exercise their reproductive powers. These freedoms constitute a watershed in social development. In 1854, John Stuart Mill recorded in his private diary the belief

> "that what any persons may freely do with respect to sexual relations should be deemed to be an unimportant and purely private matter, which concerns no one but themselves. If children are the result, then indeed commences a set of important duties towards the children, which society should enforce upon the parents much more strictly than it now does. But to have held any human being responsible to other people and to the world for the fact itself, apart from this consequence, will one day be thought one of the superstitions and barbarisms of the infancy of the human race."[4]

In Mill's sense, we have been growing up fast these 30 years. Our emergence from infancy and barbarism has sparked off the first sustained, academic and public debate on the relation of law and morality since the publication in 1873 of Fitzjames Stephen's *Liberty, Equality, Fraternity*, which attacked Mill's *On Liberty*.

The final destruction of the formal Victorian sexual code has been accompanied and hastened by public discussion and parliamentary debate upon reports and proposals for changes in the law which have come in the last 25 years from a stream of official and

[4] Hugh S. R. Elliot (Ed.), *The Letters of John Stuart Mill*, Vol. II (1910), p.382.

parliamentary enquiries into such provocative subjects as divorce,[5] homosexuality,[6] prostitution,[6] human artificial insemination,[7] censorship in the theatre,[8] the succession possibilities of bastards,[9] adoption,[10] the working of the Abortion Act 1967,[11] one-parent families,[12] violence in the family,[13] marriage guidance[14] and obscenity and related topics.[15] Many of these reports were paralleled and their recommendations approved by similar, though unofficial, investigations, especially by the churches, and notably by the established church.[16] Indeed, from this point of view, the Church of England has a strong claim to be regarded as one of the principal architects of the permissive society.

The fourth influence which has promoted a concern for the law among laymen has been a spreading awareness during the last 15 years of the limitations of the legal aid scheme, set up in 1950. At the end of the 1960s in two pamphlets, *Rough Justice* and *Justice for All*, both Conservative and Labour lawyers gave currency to a

[5] Royal (Morton) Commission on Marriage and Divorce, Report, Cmd. 9678 (1956).

[6] Committee (Wolfenden) on Homosexual Offences and Prostitution, Report, Cmnd. 247 (1957).

[7] Committee (Feversham) on Human Artificial Insemination, Report, Cmnd. 1105 (1960).

[8] Joint Select Committee on Censorship of the Theatre, Report, (1966–67; H.C. 503 or H.L. 255).

[9] Committee (Russell) on the Law of Succession in Relation to Illegitimate Persons, Report, Cmnd. 3051 (1966).

[10] Committee (Houghton/Stockdale) on the Adoption of Children, Report, Cmnd. 5107 (1972).

[11] Committee (Lane) on the Working of the Abortion Act 1967, Report, Cmnd. 5579 (1974).

[12] Committee (Finer) on One-Parent Families, Report, Cmnd. 5629 (1974).

[13] Select Committee on Violence in the Family, First Report (1976–77; H.C. 329).

[14] Consultative Document from Working Party on Marriage Guidance, Home Office, 1979.

[15] Committee (Williams) on Obscenity and Film Censorship, Report, Cmnd. 7772 (1979).

[16] Examples are: *The Family in Contemporary Society* (1958), *Fatherless by Law?* (1966), and *Putting Asunder: A Divorce Law for Contemporary Society* (1966).

concept of unmet legal need, though urging different methods of reducing it. The Lord Chancellor's Advisory Committee on Legal Aid accepted their diagnoses and concluded that research should be encouraged "which we hope will be financed by one of the Foundations, into the reasons why those who need and are entitled to legal advice and legal assistance do not get it."[17] The Nuffield Foundation responded quickly to this appeal, but the findings of the research which it prompted were a less important outcome of the initiative than the creation of the Legal Action Group in 1972, which the Foundation supported throughout its early growth. The Group has been a significant contributor to a burgeoning movement for citizens' rights. By emphasizing legal rights in respect of social welfare, it has directed attention within and beyond the legal profession to the crucial function of tribunals for citizens in dispute with the state over entitlement to benefits in many fields of social policy. The importance of this branch of the law has been more quickly and widely recognised by laymen than by lawyers. But by 1974, the stage had been reached when Mr. Justice Finer could state in a judgment that "much of the law of national insurance and supplementary benefits is of the greatest importance in the daily work of the (Family) Division . . . and demands as much study from practitioners as any other branch of the family law, of which it is essentially a part."[18] The legal profession is shedding the outlook and habits of a world in which its main task was to protect rights of property and to preserve freedom of contract, and it is slowly adapting to the requirements of an industrial welfare society.

Fifth, among the other influences which have generated lay concern with the law and the administration of justice is the Industrial Relations Act 1971 and its aftermath. Widespread anxieties about the policies of trade unions and, especially the numbers and conduct of strikes, have made the legal position of trade unions a central issue of present political controversy and have already led

[17] *Report on the better provision of Legal Advice and Assistance* Cmnd. 4249 (1970), p.11.

[18] *Reiterbund* v. *Reiterbund* (1974) 2 All E.R. 461.

to verbal skirmishes concerning the circumstances, if any, in which citizens may or ought to disobey the law.

Sixth, there has been the establishment of such new agencies as the Commissions for Racial Equality and Equal Opportunities which are charged with the enforcement of laws directed against social and economic discrimination. Perhaps more pervasive in their effects has been the development during the last quarter of a century of a variety of means which enable citizens to complain about the performance of concentrations of power. These range in type from the local ombudsmen to the BBC's complaints panel, from the Consumers' Councils of public utilities to the Council on Tribunals when it deals with complaints about the proceedings of administrative tribunals and public inquiries, and they include such bodies as the Press Council and the Advertising Standards Authority. The interest of central and local government in the protection of consumers is firmly established in the Office of Fair Trading, set up in 1973, and in the Trading Standards Authorities. There is now a network of complaints procedures, public and private, which has grown up unsystematically as a series of *ad hoc* responses to pressures from citizens in search of cures for grievances. Many of these bodies enforce their rules by hortatory procedures. Their aim is to set standards rather than to secure convictions, to persuade not to coerce.

I regard the spectrum of quasi-judicial institutions as being in practice of greater potential significance to the daily life of the general public than are the civil courts. These remedies for complaints are enlarging the content of democratic citizenship by conferring new rights and protections which cannot easily or cheaply be pursued through the courts. Indeed, access to them is free, and they are beginning to enlarge the administration of justice by helping to demonstrate that the rule of law is not exclusively, or necessarily importantly, a matter for legislation or for lawyers or for courts and tribunals or for legal sanctions. In this way law will become part of ordinary life and an instrument for positive social betterment, rather than a negative means of regulating pathological or marginal situations.

Finally, the setting up of the Law Commission in 1965, recently described by both Professor Michael Zander[19] and Lord Hailsham[20] as the single most important event of this century in the field of law reform, has resulted in broad discussions and major reforms of, for example, family and criminal law and consumer protection as well as in a programme of consolidation of statutes. This permanent but advisory body reviews legal problems which it chooses to put into its programme, though this in turn has to be approved by the Lord Chancellor who may also make references of subjects. In addition, any member of the public may make a proposal but few have made use of this right.[21] The Commission procedure is to publish a working paper which expounds the existing law that has been selected for reform, examines the criticisms that have been directed at it and sets out the field of choice of reforms. Then follows the widest possible consultation with interested parties which "may take a long time but it can, and usually does, mean a swift passage through Parliament of a non-controversial Bill. . . ."[22] Lord Scarman is justified in his claim that this brilliant technique "represents a major advance in legislative method. It is perhaps the greatest contribution to the public life of the nation made by the Commission."[23] The Working Paper and the subsequent consultations have therefore constituted a forum in which the lay public have been drawn into debates on law reform. Another pioneering technique was involved in the Commission's decision, after seven years' experience, "to give careful thought to ways and means of making greater use of the social sciences both in determining law reform priorities and in the preparation of proposals . . . " In the Seventh Annual Report in 1972 the Commission said that "We hope to evolve a standard procedure for harnessing social sciences to law reform which will become as much a

[19] "Promoting Change in the Legal System" (1979) 42 M.L.R. 502.
[20] H.L. Official Report, February 12, 1980, Col. 150.
[21] Lord Scarman, The Jawaharlal Nehru Memorial Lectures, "Law Reform —The British Experience," Lecture 111, p.4.
[22] *Op. cit.*, Lecture 11, pp.3–4.
[23] *Ibid.* p. 4.

part of our method as the Working Paper procedure itself."[24] That resolve has remained an aspiration save for the national random sample survey among married couples in order to discover their opinions about matrimonial property and the pattern of ownership of such property,[25] conducted on behalf of the Commission by the Office of Population Censuses and Surveys. This was the first occasion when large-scale social research was directly designed by a law reform body for the purposes of law reform. It has also been the last so far.

The truth is that there is very little social research on which a law reform body can draw and, besides, some academics hold that such work would be a betrayal of their discipline. Indeed, the advocates of sociology of law are in conflict with enthusiasts for socio-legal studies over the proper aims of research. Professor Campbell and Mr. Wiles are proponents of the sociology of law, which they define as an inquiry into "the relationship between law and all aspects of social order, and between law and other social institutions which play a part in ordering society." They account for the backwardness of this subject by asserting that

> "English pragmatism and the self-confidence of an industrial society at the height of its power and expansion combined to limit interest in more fundamental problems and instead largely focused such attention as was paid to the social nature of law on questions of practical and immediate efficacy."[26]

This is a puzzling judgment on a period which must be taken to run from mid-Victorian to Edwardian days. It seems to neglect, for example, the work of Maine, Maitland, Dicey and Hobhouse.[27] Moreover, lesser figures wrote brilliantly on the sociology of law as defined by Campbell and Wiles. One instance will suffice. In the year when Sir George Colley was killed on Majuba Hill in the pursuit of national expansion, George Brodrick published *English*

[24] The Law Commission, Seventh Annual Report, 1972, p. 1.
[25] J. E. Todd and L. M. Jones, *Matrimonial Property* (H.M.S.O., 1972).
[26] Colin Campbell and Paul Wiles, *Law and Society* (1979), p. ix.
[27] In particular, *Morals in Evolution* (1st ed. 1906).

Land and English Landlords, a study which sociologists of law should include among their minor classics. At moderate length, it provided both a social history of landownership and an analysis of the effects of primogeniture and entail upon the functions of the family in the territorial class. In addition, it showed how the structure of politics and the organisation of agriculture were related through the law and custom which regulated the tenure of land. However, the Warden of Merton also supplied proposals for the reform of the English land system because he was writing in ardent support of the mid-Victorian campaign to secure free trade in land.

Professor Campbell becomes impatient with such practical and reforming interests and with those who are "concerned with utilitarian priorities rather than with an advancement of theoretical understanding." In his view, self-confident English pragmatism leads to "lack of *any* explicit theoretical framework" and to

> "research activity (which) remains undirected, unconnected and is often open to abuse in so far as faddish concerns may be pursued uncensored. (Professor Campbell does not explain by whom such concerns should be censored.) The predictable consequence is for problem areas to be defined by political exigencies or possibilities—or the needs or demands of policy makers."[28]

In Britain, the history of sociology has been so bound up with social inquiries originating in the faddish concerns of people who wished to change society—and sometimes succeeded—by re-defining political possibilities and re-shaping the needs and demands of policy makers, that it is not easy or sensible to attempt to separate utilitarian priorities from theoretical understanding. Nevertheless, many who search for theoretical insights do despise as mere fact gatherers those who respond to what reformers and, on occasion, administrators, see as pressing social and legal problems. On the other hand, the fact gatherers—among whom I

[28] Colin Campbell, "The Expansion of Sociology of Law" (1974) 2 *Sociologia Del Diretto* 259; italics in original.

count myself—think that facts come in handy, and that what the sociology of law lacks most is not general theory but large-scale fact gathering, both historical and contemporaneous, conducted in the light of middle-range hypotheses. Fact gatherers do not care if the initiative stems from the hope of constructing an over-arching theory or from a desire to do good or from political exigencies. The approach of Campbell and Wiles seems on a level with that of the many Victorian ladies who were terrified lest they might betray an affinity with the lower classes by being caught with a duster in their own hands when they ought to have been devoting themselves exclusively to sending the servants about their business. The insistence of Campbell and Wiles that other people's selection of topics to study, and of data to illuminate them, necessarily involves a theoretical position, falls rather short of being a revelation. Moreover, their assertion that "the approach of socio-legal studies is untenable *per se*[29] is too brash. One of the main emphases of socio-legal endeavour has been to deploy all the relevant social sciences in collaborative studies of law in action. In the article from which this quotation has been taken, Campbell and Wiles write as if sociology is the only worthwhile social science and must be defended against bold, bad men who question its primacy. On this view, the other specialisms have little to contribute to an analysis of the working of legal institutions. I believe that all are necessary, as are theoretical and empirical work in partnership. Nothing is advanced by turning what are no more than personal preferences into methodological imperatives. The porridge of jurisprudence, sociological theory and the currently fashionable Marxism, which is too often served up as sociology of law, reminds me of a favourite observation of R. H. Tawney to the effect that methodological discussions resemble those Chinese dramas the spectator of which, after listening for five hours to a series of curtain-raisers, discovers that the performance is over at the moment when he hoped that it was about to begin.

[29] "The Study of Law in Society in Britain" (1976) 10 *Law and Society Review*, p. 574.

CHAPTER 2

THE NEED FOR A SOCIAL HISTORY OF LEGAL INSTITUTIONS

It was Lord Gardiner who persuaded Harold Wilson to include law reform in the Labour Party's election manifesto in 1964[1] and then, as Prime Minister, to give it priority in his Government's legislative programme. A Law Commission had been the central organ of the machinery of law reform set out in *Law Reform Now*, published in 1963 by the Society of Labour Lawyers under the editorship of Gerald Gardiner and Andrew Martin.[2] On the first page the editors remark that they

> "attach little or no significance to the fact that the public at large takes the law for granted, and that the need for reforming the law on a large scale has never become the subject of one of those great public debates which have been such a remarkable and encouraging feature of the British political scene in this century. The lack of a general public interest in the legal system as a whole is understandable. People do not campaign for changing that which is to them unknown . . . "

However, these editors did not seek to explain why the legal system as a whole is unknown to the general public; nevertheless this question must be faced if the present is to be understood. I believe that one approach to an explanation lies in the lack of an adequate history of English legal institutions since industrialisation created a new society. "It is at once," writes E. H. Carr, "the justification and explanation of history that the past throws light on the future, and the future throws light on the past"; or, as Sir Lewis Namier observed in the same vein, historians "imagine the past and remem-

[1] Lord Chorley and Gerald Dworkin, "The Law Commissions Act 1965" (1965) 28 M.L.R. 675–688, examines the background.

[2] This was a second and greatly revised edition of Glanville Williams (Ed.), *The Reform of the Law* (1951).

ber the future."[3] On this view, history is the most practical of subjects for, without it, we cannot find our way around the present, develop a feeling for the directions of change or prepare ourselves for the future. Each generation writes history afresh because its angle of vision is different. As contemporaneous interests change and knowledge expands, new presuppositions and new specialisms emerge; economic and social history in one generation, for example, and demographic history in the next. In turn, the main themes of these specialisms are woven into the fabric of the general histories and are thus disseminated to become a fundamental way in which citizens perceive that they are members of one community. The consciousness of a shared past is the beginning of civic self-awareness. Thus, general history acquires new emphases and wider subject matter. The recent branches of history have grown up to satisfy the interests of an industrial society. However, the historiography of legal history has followed an exceptional course. Already by the 1890s, in the hands of a master like Maitland, legal institutions had been shaped into the mountain backbone of medieval society from which the social and economic streams flowed down on either side, and legal history became one with social history. Alas, no Maitland has worked on the period since the late eighteenth century. Of course, there are technical histories of English law and there is Holdsworth, but none qualifies as a history which relates legal change and the social structure of industrialism. I do not for a moment belittle Mr. Alan Harding's *A Social History of English Law,* published 13 years ago. His aim was "to relate the development of law as a whole, and forwards, to the development of English society, not to trace backwards a bundle of legal doctrines . . . such a discussion of the relationship of law to society is what students of both history and law need and rarely get."[4] Impressive as Mr. Harding's study is, his short account of the phase which follows the industrial revolution is rather an incomplete sketch for a history than the history itself. No

[3] What is History? (1961), p. 117.
[4] p. 9.

specialism in the way of histories of legal institutions has yet grown up, and there has been little for the general histories to assimilate. One crucial consequence has been that the England of the history books from which most people derive their perception of their country, appears as a society without civil law. Britain invented police and has a criminal law and penal institutions but it lacks civil courts and a legal profession, and has no machinery for the administration of civil justice. This generalisation can be tested very easily.

The three volumes of the standard *Oxford History of England* which cover the period from 1815 to 1945 together run to some 1,800 pages. Excluding their fragmentary references to crime and punishment, they devote to the civil law, to the administration of justice and to the legal profession no more than six pages. In the final volume dealing with the period 1914–1945, Mr. A. J. P. Taylor provides a bibliography of 37 pages in which I have been unable to find a single item relating specifically to legal institutions. The same comment holds true of the 1979 edition of Professor Lloyd's, *Empire to Welfare State; English History 1906–1976*, in the short Oxford history of the modern world; a series which makes, according to its general editor, "a deliberate effort to incorporate recent research and recent thinking which has begun to change the conventional shape of historical writing."[5] A similar lack of interest characterises the writings both of social historians and of sociologists who give their accounts of modern social structure a historical perspective. Incredible though it may seem, the best short survey for laymen and, come to that, for lawyers, too, of the reconstruction of the legal system during the nineteenth century is still the essay which Lord Justice Bowen wrote in the mid-1880's on "The Administration of the Law" for Thomas Humphrey

[5] Among books dealing at length with shorter periods, only the study of the mid-Victorian generation by D.L. Burn, *The Age of Equipoise* (1964) gives substantial attention, pp. 132–231, to what he calls "Legal Disciplines." Even so, Professor Burn's chief concerns are with the controversy arising from Dicey's confused treatment of Benthamism, and with crime and punishment.

Ward's Jubilee volumes of 1887, *The Reign of Queen Victoria.*[6] American historians ape the habits of their British colleagues. Professor Havighurst's *Britain in Transition in the Twentieth Century*, which brings the story up to 1978 in more than 600 pages, shows the American student and general reader, for whom it was primarily written,[7] a society without civil law and even without crime. Thus, the law has almost no part in most of the history that is read and taught about the two centuries which follow the industrial revolution, and history contributes very little in the way of perspective upon the legal component of present anxieties.

A deliberate attempt to reduce the resulting ignorance was made by Professors Brian Abel-Smith and Robert Stevens in their "Sociological study of the English Legal System, 1750–1965," published in 1967 under the title, *Lawyers and the Courts*. This was a pioneering and scholarly work of the first importance; a "history which", as they stated, "leads up to and emphasises present problems, in the hope that it would draw attention to their importance and would spur a series of empirical investigations."[8] Together with the early investigations of Professor Michael Zander, this book undoubtedly inspired the criticisms of the legal aid scheme expressed in *Rough Justice* and *Justice for All*, to which I have already referred, and played a large part in creating a new, questioning attitude towards legal services. But it was not a popular book among practitioners who did not welcome a cogent analysis of the areas of their social failures. Indeed, the profession reacted rather in the manner of Dr. Grantly's assessment of Mrs Proudie's conduct of her husband's episcopate. Nevertheless, looking back, *Lawyers and the Courts* was a major turning point and it helped to promote a slow return to the more highly developed social awareness which characterised many mid-Victorian lawyers.

I have suggested some reasons for the present revival of interest in the administration of justice and in the social results of law in

[6] *A Century of Law Reform* (1901) is also useful. It contains 12 lectures delivered in 1900 at the request of the Council of Legal Education.

[7] (University of Chicago Press, 1979), p.xiv.

[8] pp. vi and vii.

action as well as for the halting progress which such studies have made so far. I now turn to justify my use of the phrase "revival of interest" and to illustrate the very large gaps in nineteenth century legal history by recalling the story of the National Association for the Promotion of Social Science, an almost forgotten chapter in the social history of law reform in mid-Victorian years. This will demonstrate how recent was the alienation of lawyers from anything which smacked of social science. Indeed, this alienation did not become a marked feature of the profession until the period between the two world wars. But I must first sketch in the background of this story.

CHAPTER 3

THE CONTRIBUTION TO LAW REFORM OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE

The animating conviction of the executive class of industrialism in Victorian days was, in the words of James Kay-Shuttleworth, a great Victorian public servant and one of their representative members, that "the condition of the great mass of the people (is) one of the surest tests of the wisdom and efficiency of government, and the indispensable basis of the stability of institutions . . . "[1] That conviction had been expressed in a multiplicity of investigative and reforming agencies: in the agricultural surveys organised by Sir John Sinclair and in the family budgets of the poor collected by Sir Frederick Eden and the Rev. David Davies at the end of the eighteenth century; in the local statistical and philosophical societies which flourished up and down the country in the 1830s and 1840s; and in the stream of blue books from commissions and committees which saved Marx from the untheoretical tedium of undertaking his own empirical inquiries. The executive class was so successful that 1848, the year of revolutions in Europe, issued in England in nothing more unsettling than the middle class radicalism of the Financial Reform Association, formed a year later to examine the incidence of taxation and to explore the economic costs of inefficient public administration. Administrative Reform Associations and the Northcote-Trevelyan Report on recruitment to the Civil Service followed, with the experience of the Crimean War to drive home their conclusions. The National Association for the Promotion of Social Science had the same derivation. It was one of the forces which, in Dicey's heyday of

[1] Quoted Frank Smith, *The Life and Work of Sir James Kay-Shuttleworth* (1925), p. 28.

laissez-faire, compelled the re-definition and expansion of the functions of government and the re-fashioning of public administration which prefaced the extension of the franchise in 1867 and after. The Association played a significant part in shaping the major legislative measures of reconstruction in the 1870s which took place in the poor law, public health, trade unions, prisons and much else besides, including the Judicature Acts which "laid the foundations of the structure of civil judicature and procedure which ... remains today substantially as it was created"[2] by the Acts of 1873–1875.

The Association held its first meeting in 1857. For the next 30 years it was a main agency for the discussion and investigation of social and legal problems which was directed to securing and strengthening the stability of institutions. There are 30 volumes of its *Transactions*, containing the papers read at the annual meetings, in fat, repellent-looking bindings and smallish print. The volumes run from seven to nine hundred pages each. In addition, there are 18 volumes of *Sessional Proceedings* carrying the papers read during the year at regular but smaller meetings in London, as well as a few further publications. All these constitute a monumental, indispensable but largely neglected source for the study of the history of both social policy and law reform. An outline of the circumstances in which the Association was founded can easily be drawn, although such records as survive[3] do not permit many details to be filled in.

A Society for Promoting the Amendment of the Law had been founded in 1844 by James Stewart, a barrister who had written extensively on land law, edited three editions of Blackstone's *Commentaries* and had at that time been a Member of Parliament

[2] I. H. Jacob, "Civil Procedure since 1800" in *Then and Now, 1799–1974* (1974), p. 177.

[3] Chiefly the Brougham Papers at University College, London, and the papers of Thomas Barwick Lloyd Baker at Hardwicke Court, Gloucestershire.

for 12 years. The idea had been wholly his[4] but he had been assisted at the outset by William Ewart, another Member of Parliament, active in the reform of criminal law and a leader of the campaign for reform following the third Report in 1837 of the Royal Commission on the Criminal Law. Stewart's other assistant was Mathew Davenport Hill, a member of the large family of tenacious and successful reformers which included Rowland Hill. Mathew Davenport was appointed Recorder of Birmingham in 1839, and his collected charges delivered to Grand Juries in that city under the title, *Suggestions for the Repression of Crime*, became a classic of Victorian criminal jurisprudence. The original minutes of the Society show that the founders early received the active support of Lord Brougham who frequently took the chair at meetings and himself received much help in return. In 1845, he introduced nine law reform Bills all of which had been prepared by committees of the Society. Of these nine, seven became statutes,[5] the best known being that which admitted parties to a suit to the witness box. The principle of that reform derived from Bentham; Lord Denman took the first step and the implementation was achieved by Brougham against the opposition of all the then 15 judges and the great bulk of the legal profession. Moreover, it was said[6] that the Society and Brougham had been instrumental between 1844 and 1857 in securing the enactment of no fewer than 40 statutes to say nothing of the portions of some 50 other Bills, introduced by Brougham, and incorporated into other Acts. The general meetings of the Society were fully reported in its journal and showed how unrestricted were members' interests in law reform. Some members of the Society joined a National Reformatory Union founded in 1855 on the initiative of Barwick Lloyd

[4] National Association for the Promotion of Social Science, *Transactions* (1868), p. 128.

[5] J. E. Eardley-Wilmot, *Lord Brougham's Acts and Bills.*

[6] *Ibid.*

Baker, a Gloucestershire squire, who became one of the leading penal reformers of his time.[7] The Society and the Union shared as Secretary George Hastings, son of Sir Charles Hastings, a well known doctor and founder of the British Medical Association. The young Hastings was a barrister of high reforming zeal and on close and deferential terms with Brougham. In the autumn of 1856, Hastings wrote to Barwick Baker enclosing "a draft plan for an Association intended to unite with the Law Amendment Society and the National Reformatory Union and to take up the subject of Preventive Education.[8]

In July 1857, 43 notables, several ladies among them, attended a private meeting at Lord Brougham's house. A resolution was passed "affirming the necessity for a closer union among the supporters of the various efforts now being made for social advancement, and establishing THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE,"[9] with which the Law Amendment Society was formally amalgamated in 1864. All the gentlemen present constituted themselves as a Committee to implement the resolution and to organise the first meeting to be held in Birmingham that autumn at the request of the mayor and leading inhabitants.[9] Brougham was appointed President. The Association had many committees, each with a large number of members. The lists of names printed in the annual *Transactions* reads like a roll call of the mid-Victorian intellectual and administrative establishment, with more than a sprinkling of leading political figures.

As far as organisation and procedure were concerned, the Social Science Association was modelled on the 20 years older British

[7] There is a brief memoir in Herbert Philips and Edmund Verney (Eds.), *War with Crime, Being a Selection of Reprinted Papers* . . . by T. Barwick Ll. Baker (1889).

[8] The Barwick Baker MSS., Box 17, Reformatory Conference, 1856.

[9] N.A.P.S.S., *Transactions* (1857), p. xxvi.

Association for the Advancement of Science. In fact, it would never have existed had not the British Association regarded social science as beneath proper scientific notice. Hastings recalled how, at the British Association meeting in 1856, "some of us who were then active in its statistical section proposed . . . that they should include in its programme . . . the subjects of jurisprudence, political economy, education, and other subjects closely connected with statistical research. The proposal was not approved."[10] The Committee which organised the Birmingham meeting divided the discussions and papers among five departments. Jurisprudence and amendment of the law was presided over by Lord John Russell, Education by Sir John Pakington, Punishment and Reformation by Mathew Davenport Hill, Public Health by Lord Stanley and Social Economy by Sir Benjamin Brodie. This division was maintained throughout the life of the Association save that a section on Art was added in 1876. The first meeting was regarded "with much satisfaction" by the Law Amendment Journal which wrote that

> "the Law Amendment Society resolved to give it all the support in its power. It was among the members of this Society that the new Association took its rise; the original idea of such a scheme having been started at the opening of our last session a year ago, suggested by the mutual advantages that had followed our connection with the National Reformatory Union. The meeting at Birmingham has been attended with marked success, at which your Council heartily rejoice, as likely to further the great object which our Society has in view. The Department of Jurisprudence was principally supported by our members, and by deputations from the Chambers of Commerce in connection with us, the proceedings were judiciously and ably conducted, and the resolutions arrived at, especially with regard to bankruptcy and transfer of land

[10] N.A.P.S.S., *Transactions* (1878), p. 151.

> questions, which occupied a large share of its attention, will, we doubt not, lead to important practical results."[11]

I shall not weary you with a catalogue of the law reforms which the Association promoted or in which it took a hand. From a Bill on Married Women's Property, framed in 1857[12] in terms almost the same as those of the 1882 Act, to the principles of trade union law and employers' liability which were canvassed in meetings and debated many years before they became law, the Association's role was creative and indispensable. It provided a focus for the expression of points of view still insufficiently organised to be effectively and independently articulated; it possessed the power and influence to represent them to a lethargic and often insensitive Parliament; and it stimulated the establishment of more specialised organisa-

[11] *Law Amendment Journal*, 15th Session, November 26, 1857, p. iv. The close connection between the Law Amendment Society and the National Reformatory Union led to some unintentionally inaccurate accounts of the formation of the Social Science Association. Rosamund and Florence Davenport Hill in *A Memoir of Mathew Davenport Hill* (1878), p. 307, assert that:

> "The National Reformatory Union assembled for its first provincial meeting (on the model of the British Association for the Advancement of Science) at Bristol (in 1856) .... Before the time for the next provincial meeting arrived, the Union developed into the National Association for the Promotion of Social Science."

Similarly, Frances Power Cobbe in *Social Science Congresses and Women's Part in Them* (Macmillan's, December 1861), p. 85, stated:

> "The first beginning of the Social Science congresses may be traced to a small meeting of persons interested in the reformatory movement, at Hardwicke Court, in Gloucestershire, the seat of Mr Barwick Baker, in the autumn of 1855. Before separating on this occasion, the members of the meeting formed themselves into a society, under the name of the National Reformatory Union.... The extended interest excited by the proceedings... suggested naturally that a still wider field of interest should be opened. At the next assemblage at Birmingham, in October 1857, the National Reformatory Union merged in the Association for the Promotion of Social Science under the auspices of Lord Brougham."

[12] Originally drafted by the Law Amendment Society in 1856, brought into the House of Commons by Sir Erskine Perry in 1857 and then revived by the N.A.P.S.S. in the late 1860s and introduced again by J. G. Shaw-Lefevre, Russel Gurney and John Stuart Mill.

tions. This may be illustrated by a very brief account of the way in which the businessmen who had set up the Financial and Administrative Reform Associations, to which I have already referred, responded to the frustrations they suffered from the economic costs and inefficiencies arising from the inadequacies of commercial law and the shortcomings of its administration. Many of them were members of the Chambers of Commerce which were proliferating in the 1850s with the purpose, *inter alia*, of "protecting the mercantile and trading interests of their members" and of "representing and expressing the sentiments of their members on commercial affairs."[13] The Social Science Association held a mercantile legislation conference in 1857 and set up a committee in 1858, with members drawn from the Association and from Chambers of Commerce. At the outset, the Committee concentrated on the law of bankruptcy, the registration of partnerships and the incorporation of Chambers of Commerce. The value of the Association's early work in this area was thus described by a member of the Bradford Chamber of Commerce in 1863:

> "The discussions between delegates of the various Chambers which took place at the Mercantile Law Conference . . . under the presidency of Lord Brougham in 1857, and subsequently at various meetings of (the Social Science Association) . . . were uniformly felt to have been beneficial . . . not merely by diffusing information and by correcting local narrowness of view, but also by leading various important Chambers to take united, instead of separate or opposing, action on many public questions of importance, which has greatly tended to bring some of these to a successful issue. It was strongly felt, however, that the constitution of the Social Science Association, comprising, as that body does, so large a proportion of non-commercial members, unfitted it to become

[13] N.A.P.S.S. *Transactions* (1857), John Darlington, "On the Legalization of Chambers of Commerce," p. 151.

> a permanent medium for intercourse and joint action between Chambers of Commerce."[14]

For this reason, the Association of British Chambers of Commerce came into existence in 1860. For the next quarter of a century, the two Associations were heavily involved in reforming the commercial code. Bankruptcy, debt, partnerships, companies, marine and international law, the transfer of land, copyright, patents, trade marks and a speedier and cheaper administration of justice were regularly recurring themes in meetings, reports and attempts to push Parliament to legislate. *The Times* might sneer that the Social Science Association "purports to be a joint stock company with unlimited liability for making the world better than it is,"[15] but assuredly it was a main contributor to the limping process of adjusting substantive law and legal institutions to the expanding economy and changing social structure.

The Social Science Association, "the social evil" as some contemporaries cynically dubbed it, was a body of central importance in its heyday. Cities competed to be hosts and redecorated their town halls for its week-long annual meetings. Five cities welcomed it twice in the three decades of its existence. On the first visits between 1858 and 1866, the average number of tickets sold at half a guinea was two and a quarter thousand; on the second visits to the same places between 1874 and 1881, the number had fallen by half. Even so, our present sociological and social administration associations would be overjoyed if they could attract one-half of the audiences of the mid-Victorian Social Science Association in decline. Its collapse in 1885 may be attributed to causes as disparate as the revival of socialism, the development of new techniques of social inquiry and its very success in spawning new and more specialised bodies, which, when they became independent, weakened the parent organisation and took over parts

[14] Quoted A. R. Ilersic, *Parliament of Commerce: The Story of the Association of British Chambers of Commerce, 1860–1960* (1960), pp. 6 and 7.

[15] September 24, 1864, p.8.

of its work. Further, many of the great figures associated with it had died by the 1880s.

Brougham was 79 when he became President; he was still in office when he died in 1868. He had been far more than a figurehead. He cast over the Association the spell of his prestige, at that time unique; and he attracted many of the contemporary giants to its service. Yet a scene at his chateau in Cannes when the daguerrotype process was first introduced seems mournfully to anticipate his treatment by history. Brougham and his guests were asked by the photographer to stay still for five seconds; characteristically, he moved too soon and, in the daguerrotype, there was a blur where Brougham should have been.[16] There exists no modern, completed, full-scale life of that law reformer extraordinary which places him firmly within the society which he did so much to change, and there is still a blur where Brougham should be. I know no better single illustration of the present poverty and future possibilities of a social history of Victorian legal institutions than this neglect. But whatever Brougham's role in the Social Science Association, there can be no doubt that it was sustained administratively by George Hastings, its General Secretary and, later, Chairman of Council. Hastings is a forgotten figure whose career, personality and tragic end were worthy of a portrait by Lytton Strachey. Seven years after his call to the Bar he wrote to Brougham: "I am a young man with my way to make in the world . . . ," and the old lion gave him a helping hand. He got on in the world; into Parliament; onto the board of a railway company; and became Chairman of Worcester Quarter Sessions besides being a Justice of the Peace. The very first paper he read to the Association in 1857 was on the Statute of Frauds. In 1892, at the age of 67, he was sentenced by Mr. Justice Smith to five years' penal servitude for fraudulently converting to his own use property of which he was possessed as a trustee; and he was expelled from

[16] The story is told by Harriet Martineau, *Biographical Sketches, 1852–1875* (1888), p. 164.

the House of Commons on a resolution moved by A. J. Balfour. Could ever a philanthropist who had committed his life to legal and prison reform have suffered so hideous an end?

CHAPTER 4

THE STATISTICAL CONTRIBUTION TO LAW REFORM OF SIR JOHN MACDONELL

The papers read at the meetings of the Social Science Association were mostly compilations of information, descriptive social reporting, directed to arguments for securing reforms. Mr. Brian Rogers[1] has pointed out that participants at meetings, like the Association itself, were sometimes regarded as exponents of the science of pantopragmatics which Thomas Love Peacock guyed in *Gryll Grange*, published in 1861.

> "Like most other science, it resolves itself into lecturing, lecturing, lecturing, about all sorts of matters, relevant and irrelevant; one enormous bore prating about jurisprudence, another about statistics, another about education, and so forth. . . . "

However, the quantitative habit of mind, essential in an industrial society, was substituting counting for lecturing, and confronting the figures of speech with the figures of arithmetic. It was symbolical of this changing outlook that Charles Booth began his great survey of *Life and Labour of the People in London* in the year in which the Social Science Association met for the last time. In the last quarter of the nineteenth century, statistical data became an indispensable foundation of new methods of investigation and social reform. The Law Amendment Society had been precocious in demanding in 1857 informative civil judicial statistics. "Such statistics", they insisted, "afford the best, if not the only means of noting the

[1] "The Social Science Association, 1857–1886," *The Manchester School*, Vol. XX, No. 3, September 1952. This article is the only account of the Association which has been published in England. There is an unpublished Ph.D. thesis in the Faculty of Political Science, Columbia University, New York, 1959, by Dr. Lawrence Ritt, *The Victorian Conscience in Action: the N.A.P.S.S., 1857–1886*. Unhappily, Mr. Rogers allows his dislike of "a generalised social science" to cloud his historical judgment.

practical working of laws and tribunals, of testing the principles of legal reforms, and of estimating the utility of any system of jurisprudence by the testimony of actual fact."[2] The new judicial statistics did not arrive until 1894, and then only as the result of the initiative and labours of Sir John Macdonell, a great public servant and law reformer, but yet another largely forgotten figure ignored in the histories. His career was remarkable. Called to the Bar in 1873, he was appointed a Master of the Supreme Court 16 years later and became Senior Master in 1912, holding that office until one year before his death in 1921. He helped to found the Society of Comparative Legislation in 1894, and edited its Journal from 1897–1920. He was also a founding member of the Grotius Society becoming its President in 1919. In 1901 he was elected Quain Professor of Comparative Law at University College, London, and became the first Dean of the Faculty of Law in the University of London as well as President of the Society of Public Teachers of Law. In addition, he served as a member of several official inquiries, and undertook special studies for others.

In 1894, Lord Herschell, then Lord Chancellor, appointed Macdonell to a committee to inquire into the civil judicial statistics with a view to their improvement. Some 40 years earlier, Brougham had introduced a Bill requiring the Home Office to collect judicial statistics in order to obtain,

> "the regular and constant record of the whole proceedings connected with the administration of the law in all its branches; its administration by all courts, civil and criminal, general and local; the state of those courts as to judges and other office-bearers; their whole proceedings through every stage; together with every matter concerning the working of the law . . . in a word, the record, in minute detail, and for the most part in a tabular form, of all the facts connected with the execution of our laws."[3]

[2] Quoted by the Adams Committee on Civil Judicial Statistics, Report, Cmnd. 3684 (1968), para. 9.

[3] *Civil Judicial Statistics*, (1896), C. 8263, p. 15.

Brougham's Bill did not become law. However, in 1857, the Home Secretary arranged for judicial statistics to be collected, and the first returns appeared in 1859, remaining substantially unchanged until they fell under the harsh eye of the Departmental Committee in 1894. "The 'Introductory and Explanatory Report' is not what it professes or what it ought to be," they complained. "Certain stereotyped remarks . . . are repeated from year to year in the Introduction . . . no adequate attempt is made to analyse the figures, to draw from them conclusions, or to point out important changes."[4] The Committee wished the Introduction to be remodelled and saw

> " . . . no reason why, in the case of the Civil Judicial Statistics, there should not be an attempt to arrive at general conclusions and to answer the questions as to which these statistics are generally consulted. What is the total number of cases begun annually in the High Court and in the inferior courts of all kinds, what is the whole volume of litigation of the country, in what courts is it increasing, in what is it diminishing, and what is the total amount of fees raised in the courts."[5]

The recommendations of the Departmental Committee were accepted; Macdonell was appointed editor and the Civil Judicial Statistics were published by the Home Office under his direction until 1921. Exceptionally, his mastery of comparative law extended to the judicial statistics of other countries, in particular to those of France, Germany and Italy. His desire to reshape the English statistics was in part motivated by the ideal of international uniformity of compilation which would have made possible well grounded comparisons with developments in European countries. "The model for a report may, perhaps," said the Report of the Departmental Committee, "be found in the Introduction to the Italian statistics of 1892, which contains a careful critical examina-

[4] *Ibid.* Appendix A., *Extracts from the Report of the Departmental Committee on the Civil Judicial Statistics*, p. 239.
[5] *Ibid.* p. 242.

tion of the whole facts stated in the returns with reference to changes in procedure and the statistical history of the courts."[6]

Macdonell's aims as editor are set out, and his achievements over the next quarter of a century were anticipated, in the first volume for which he was responsible. This dealt with 1894 though it did not appear until two years later. This was hardly surprising in the case of a new annual publication which, in royal quarto format with an eight page table of contents, contained a commentary of 72 pages, 165 pages of statistical tables and a very useful index of 24 pages. Macdonell provided a critical assessment of developments since 1858, and he was remarkably inventive in demonstrating new relationships by devising ingenious tabulations. The distinctiveness of the new statistics is well illustrated by the bundle of tables which he handed in to the Gorell Commission appointed in 1909.[7] These included the figures of petitions for divorce and tables showing over a run of years the duration of marriage of divorcing couples, their age and status before marriage and the number of their children. Of special interest was a statement of "the number of petitions presented by persons apparently belonging to the working classes" which had been derived from an analysis of the occupations of husbands, as shown on marriage certificates, and published in the Civil Judicial Statistics from 1895 onwards. Official information about the social and occupational structure of the divorcing population ceased to be available after the end of the first world war; unofficial data have been published at irregular intervals only since 1958. Macdonell also provided some information about the exercise of the summary matrimonial jurisdiction, which had been much enlarged in 1895, and showed how the numbers of non-cohabitation orders made by magistrates' courts varied in different parts of the country.

Macdonell did not restrict his interest to the civil law. In 1892, the Home Secretary had set up a Committee to revise the criminal

[6] *Ibid.*

[7] Royal Commission on Divorce and Matrimonial Causes, Appendices to the Minutes of Evidence, Cd. 6482 (1912), pp. 27–40.

portion of the judicial statistics. Its final report appeared in 1895[8] and found the criminal statistics in poor shape. Edward Troup became editor and implemented the recommendations of the Committee, which ran along lines very similar to those laid down for the civil statistics. Macdonell wrote the Introductions to the Criminal Statistics for 1899, 1902, and 1905, and brought to this task the same care and penetrating eye as he bestowed upon the other set of statistics. However, the only part of this statistical work that has been remembered is his analysis of the murder statistics in 1905. He drew attention to the facts that the great majority of murders were committed by men and that the majority of victims were women—wives, mistresses or sweethearts. "I am inclined," he concluded "to think that this crime is not generally the crime of the so-called criminal classes, but is in most cases rather an incident in miserable lives in which disputes, quarrels, angry words and blows are common."[9] The Gowers Commission examined the statistics for the first half of this century and found that they confirmed "Sir John Macdonell's statement that murder is not, in general, a crime of the so-called criminal classes."[10]

The doing of justice requires knowledge of its own procedures. Macdonell provided this in the tradition of the Victorian civil service which produced regularly, and commented critically upon, all the information necessary for the politically influential public to form a view about the choice of policies concerning matters within a Department's control. Regrettably, it cannot be said that he laid the foundations of today's mature civil judicial statistics. Shortage of staff in the Home Office during the first world war; hard-faced reductions in public expenditure in its aftermath; and the growth of new attitudes among officials who came to see a duty in using annual reports and the like as a means of concealing rather than revealing the activities and work of their departments, led to the

[8] It is printed in *Judicial Statistics England and Wales 1893, Part I Criminal Statistics*, C. 7725 (1895), pp. 2–68.

[9] Quoted Royal Commission on Capital Punishment, 1949–1953, Report, Cmd. 8932 (1953), p. 330.

[10] *Ibid.*

destruction of Macdonell's heritage. When the compilation of the statistics was transferred in the 1920s from the Home Office to the newly formed County Courts Branch of the Lord Chancellor's Office, their content was greatly reduced and the critical Introduction disappeared. So remained the condition of this annual volume for the next 40 years. It is a sad reflection that data first provided by Macdonell in the 1890s on, for example, divorce, were not again published until 30 years after he retired. Their publication was, moreover, undertaken by the Registrar General and not by the Lord Chancellor's Office. However, in the 1960s as in the 1890s, official inquiries were set up into the criminal and the civil judicial statistics, and the latter have improved marginally although the impetus given by the Report of the Adams Committee petered out fairly soon. It could hardly have been otherwise in an office which, at the time, enjoyed the services of one statistician half-time. Most importantly, the need for a critical annual commentary with, perhaps, regular and detailed studies of particular topics, remains neglected. I shall demonstrate later some of the consequences, for those who use the civil courts, of statistical ignorance of the results of the exercise of their jurisdiction.

CHAPTER 5

THE CASE OF IMPRISONMENT FOR DEBT

I have examined the sources and course of the present collaboration between lawyers and other social scientists and suggested that this will advance best by eschewing for the time being at any rate, the attempt to construct grand theories, and by concentrating instead on large-scale fact gathering, historical and contemporaneous, undertaken in the light of middle-range hypotheses. I welcome the initiative for such work which comes from the pursuit of law reform, from the exigencies of politics or from the concerns of administrators. I have drawn attention to the failure of lawyers and historians to provide a social history of English legal institutions since the industrial revolution, and argued that one crucial consequence of this void has been that the England of the history books, from which most citizens derive their perception of their country past and present, appears as a society almost without civil courts, without a machinery for the administration of civil justice and without a legal profession. I suggested that this neglect of recent legal history had resulted in a widespread unawareness of the civil law which is only now beginning to give way to a wakening desire among laymen for a knowledge of the nature and role of legal institutions. Knowledge of the past is one indispensable foundation of law reform. In the present state of knowledge, I believe that social history provides the best framework for undertaking and interpreting empirical studies of the present as a means of analysing legal institutions and promoting their improvement on reform. I have used the almost forgotten contribution of the Society for Promoting the Amendment of the Law to the foundation of the National Association for the Promotion of Social Science to illustrate the co-operation between lawyers and empirical investigators in achieving social and law reform in mid-Victorian days. I have shown how the descriptive social reporting, which was the main outcome of investigations in that period, was

deepened by the labours of Sir John Macdonell in creating the civil judicial statistics and demonstrating new ways in which the administration of justice could be judged by its social results.

The "Common People," for whose edification the Hamlyn Lectures were established, are likely to encounter the civil law only if they are injured, in debt or in difficulties over family matters. In the last 10 years or so, there have been major official inquiries into these three branches of the law, and they could all be used to illustrate my main themes. However, I shall use as examples only the related subjects of debt, a major economic institution, and the breakdown of marriage, which affects the family, the most important social institution. I shall consider how the law in these two areas has responded to social change, and how well it serves the people whose financial and marital circumstances fall to be regulated by it.

Historians have very little to say concerning the ways of debtors during and after industrialisation. Much has been written about joint stock companies and limited liability, banks and other financial institutions. But economic historians[1] have been relatively uninterested in commercial failure or in the machinery of credit which kept going the majority of the population who had to live, as Adam Smith said, from hand to mouth. They have presented the expansion of industrialisation as a story of one economic success after another. It is even harder to put together a systematic account of changes in the law relating to debt and the courts in which it was enforced from Holdsworth's monumental work. Josiah Dornford, writing in 1786, observed that: "Debtors may be considered in three classes. The first under the description of Merchants and capital Traders. The second of Tradesmen, Mechanics and Artificers, in the middle walk of life. The third, of the lower orders

[1] An exception is R. M. Hartwell, *The Industrial Revolution and Economic Growth* (1971).

of Journeymen, of Labourers and Domestics."[2] These different groups were dealt with in different courts under different laws: the merchants and traders by the Bankruptcy Court, the tradesmen by the insolvency courts and the lower orders by the small debt courts. Bankruptcy allowed substantial debtors the exclusive privilege of ultimate and complete relief from the burden of their debts by repaying a proportion of them; the only relief for the small debtor was to pay in full. By the end of the eighteenth century, economic development and occupational diversification had made nonesense of whatever justification had once existed for three separate systems. Moreover, they were unable to cope with the great increase in debt and bankruptcy which resulted from industrialisation during the early decades of the nineteenth century when about half the prison population consisted of debtors. The increase in committals for debt and crime in this period put prisons under strain and led to a programme of new building. Methods of procedure and enforcement rendered all the jurisdictions intolerably expensive for creditors, useless against dishonest or recalcitrant debtors and grievously harsh for the honestly unfortunate who were subjected to arrest and imprisonment before judgment and imprisonment afterwards until the debt and the creditor's costs had been fully discharged. Creditors could not have execution against freehold land before the 1830s because the territorial class, with its habit of primogeniture, would not tolerate any threat to the integrity of family estates which had to be passed on intact to the next generation. Other important forms of property were also beyond the reach of creditors. The Common Law Procedure Commission reported in 1832 that the creditor's only remedy against a substantial debtor was to keep him in prison until "as a condition of obtaining his liberty (he) cedes the property." Poor debtors stayed in prison until their friends or relatives paid off the creditor. As Samuel Romilly observed, the system was "too harsh towards the

[2] *Seven Letters upon the Present Mode of Arresting Debtors*, (1786), p.9, quoted by Dr. I. H. P. Duffy in his learned, lucid and very helpful thesis for the D. Phil. (Oxford).

person and too relaxed towards the *property* of the debtor. It imprisons the debtor for not applying his property to the fulfilment of his engagements, while it leaves the property itself, which might have been adequate for the purpose, free and untouched."[3]

The campaign to reform a system which Earl Stanhope described as "the English slave trade" was supported by many groups. There were people shocked on humanitarian grounds by indiscriminate and judicially uncontrolled imprisonment and by the horrifying cruelty and squalor of debtors' prisons. Many creditors wanted their money but not the bodies of their debtors, and some reformers sought to establish a unified structure of cheap and accessible county courts. By 1869, the worst features of the eighteenth century system had been removed and imprisonment brought under judicial supervision. In that year two Acts introduced the modern history of this sorry subject. The first was entitled an Act for the Abolition of Imprisonment for Debt.... This provided that no person should thereafter be "arrested or imprisoned for making default in payment of a sum of money." Nevertheless, it also contained a saving power of committal to prison for a term not exceeding six weeks where a defaulter on a court order, having the means to pay, refused or neglected to pay. The other Act amended and consolidated the law of bankruptcy which afforded remedies against a debtor owing more than £50 who, if made bankrupt, could not be imprisoned. Complaints about this inequality in the law in relation to debtors for large and small sums led to the appointment in 1873 of a strong Select Committee, under the chairmanship of Spencer Walpole, to inquire into imprisonment for debt by county court judges.

The Committee reported that the main difference between the larger and smaller debtor is

> "that if the larger debtor be made bankrupt, and his estate pays not less than 10s in the pound, or if he makes an arrangement with his creditors (as he usually does for less than 10s in

[3] Quoted by Patrick Medd, *Romilly* (1968), p.245, italics in original.

> the pound), he is entirely discharged from his debts .... But the smaller debtor may have all his goods taken in execution and he may also be imprisoned from time to time .... "[4]

The Committee's Report cited one witness, a solicitor, who was asked whether he could see any essential difference between the wage-earning class and the shop-keeping class to warrant such a difference in their treatment. "Not in the slightest" was the reply, "it ... thoroughly justifies the expression that there is one law for the rich and another for the poor: I know the working men think so."[5] To the argument that, as a defaulter could be imprisoned only if he were adjudged contumacious, he could therefore suffer no hardship in being compelled to meet his liabilities, the Committee replied:

> "... the debtor is usually absent (from court) for fear of losing his employment, and he has no attorney ... to protect his interests .... the information (available to the court) is more or less conjectural, and although the judges take great pains to ascertain the facts, and to adjudicate upon them justly and equitably, it constantly happens that the materials are wanting. The debtor's ability to pay his debts depends in part on the circumstances and demands of his family, and in part on his indebtedness to other people. Of these three facts, the first and second are roughly proved; but the third is seldom, if ever, ascertained. Hence arises that broad distinction ... between the treatment of the larger and smaller debtors; namely, that the former can obtain his discharge by making a reasonable arrangement with his creditors; whereas the latter never does so, and where his debts are in the hands of a debt collector it is hardly probable that he ever should do so."[6]

The Committee recommended that the power of the county court judges to imprison for debt should be abolished on the grounds,

[4] Select Committee on Imprisonment for Debt, Report, C. 348 (1873), p. vi.
[5] *Ibid.*
[6] *Ibid.* p. vii.

inter alia, that the administration of the law was unequal and uncertain, that it did not deter the dishonest and often inflicted unmerited punishment upon the honest, and that it made the taxpayer liable for the unnecessary expense of keeping defaulters in prison.

Parliament rejected the Committee's unanimous recommendations, and there the matter and the law rested for the next 92 years. Most people went on believing that imprisonment for debt was abolished in 1869, as, indeed, in a technical sense it had been. Even so, nearly 10,000 debtors, adjudged contumacious, were being sent to prison every year on the eve of the first world war. In our own period, with the revival of credit trading in the late 1950s, the number of committals increased sharply. The annual average in 1961–64 reached almost 7,000, nearly treble that of the previous decade. By the early 1960s, debtors constituted some 14 per cent. of the prison population. At a time of general difficulty for the prison service, this increase in numbers of civil prisoners was unwelcome, and it was one of the influences leading to the appointment of the Payne Committee on the Enforcement of Judgment Debts in 1965. In fact, the Lord Chancellor took the unusual step of pressing the Committee early in its deliberations for an immediate recommendation on the retention or abolition of committal under the Debtors Act 1869. The Committee obliged with the anticipated answer to abolish committal which they justified in their Report three years later at somewhat greater length than the nine pages which had sufficed for the whole Report of the Walpole Committee. However, this time the Government did accept the unanimous recommendation.

Of the Payne Committee's arguments concerning civil debt, five are relevant for my present purpose. First, they insisted that what

> "is required is an effective machinery for recovering money from the debtor who has some earnings, income or assets. The whole purpose of the new enforcement procedure proposed in this *Report* is to provide a more effective means of compelling a debtor to meet his obligations than has existed in the past. If

> a debtor has money, goods or property, it must not be conceded that it is beyond the power of the court . . . to attach his wages or assets. . . . If he has no means or assets the threat of imprisonment is futile."[7]

Second, the Payne Committee gave an unequivocal answer to the question: does the imprisonment of civil debtors help to inculcate or to maintain among the community at large the social and moral obligation to repay debts freely contracted? They could find no evidence that

> "the vast structure of credit trading can depend upon the threat of imprisonment or the ultimate sanction of imprisonment which results in a few thousand people being sent to prison, even if it were abundantly clear that those in prison were all deliberate defaulters or dishonest or in some other way determined not to pay."[8]

On this view, there is no evidence of a causal connection between the threat or reality of imprisonment for debt and a disposition among citizens to pay their debts, and the Committee accordingly rejected any argument for imprisonment based on the theory of general deterrence.

Third, the Committee reiterated in 1968 the Walpole Committee's criticism in 1873 of the judgment summons procedure as failing to maintain a proper administration of justice. At that time county court judges were issuing some 180,000 committal orders annually, of which around 3 per cent. actually resulted in defaulters going to prison, and the Committee thought that the practice of the county courts did not

> "enable county court judges to exercise a proper supervision over committal orders. They do not have the time to examine

[7] Committee on the Enforcement of Judgment Debts, Report, Cmnd. 3909 (1969), para. 999.

[8] *Ibid.* para. 960.

> debtors' means and circumstances before making such an order and in many cases they do not examine . . . a debtor before a warrant of commitment is executed."[9]

The Committee declared that

> "the present judgment summons procedure is not compatible with the administration of justice, especially in circumstances involving the liberty of the subject. The wide variation in the practice of county court judges and the sheer volume and pressure of the work . . . make it impossible to distinguish in all cases between the recalcitrant and the inadequate debtor."[10]

The Payne Committee believed that "in many cases the decision whether a debtor is actually conveyed to prison or not rests effectively not with the court but with the creditors and the bailiffs,"[11] just as it had done in the eighteenth century.

Fourth, the Payne Committee attached great weight to evidence from prison governors and from research by Dr. Pauline Morris which showed that

> "the vast majority of debtors who are actually received in prison . . . are inadequate, unfortunate, feckless or irresponsible persons; they are for the most part not dishonest, and do not, therefore, require punishment, many of them do not really qualify for imprisonment under the Debtor's Act 1869."[12]

Finally, the Committee was impressed by the heavy burden of expense which the imprisonment of a proportion of debtors inflicted upon taxpayers. "The judgment summons procedure," they observed laconically, "is not a profit making enterprise."[13]

[9] *Ibid.* para. 983.
[10] *Ibid.* para. 961.
[11] *Ibid.* para. 983.
[12] *Ibid.* para. 982.
[13] *Ibid.* para. 1000.

These were among the reasons they advanced in favour of abolishing imprisonment for debt. Their recommendation was adopted in the Administration of Justice Act 1970. In no circumstances can a debtor now be sent to prison for failing, no matter how deliberately, to pay a hotel bill or an account with a shop or a hire purchase debt; yet there is no evidence that credit traders have found it more difficult to recover their money. But the debtor can still be incarcerated for failing to pay his rates or taxes or for defaulting on a maintenance order.

I have rehearsed these chapter headings from the social and legal history of debt in order to make three points to which I shall return later. First, the fiction that imprisonment for debt was abolished in 1869 gained wide currency, partly as a result of the misleading title of the Act but largely because the story of what happened to debtors thereafter has found no place in the economic or general histories and hence in most people's awareness of the past and present. At best, there is a vague recollection that Dickens's novels had contributed greatly to the ending of that particular social evil. Indeed, the history of debt and debtors hardly even features in social or legal monographs. Second, the maladministration of justice which had been inseparable from the judgment summons procedure and in the resulting deprivation of liberty suffered by some debtors, continued almost unnoticed and without protest for a century after the Walpole Committee had drawn attention to it. Strikingly, for example, even Gerald Gardiner and Andrew Martin, in their clarion call for *Law Reform Now*, published in 1963, and to which I have already referred, ignored debt altogether. A partial abolition of imprisonment for debt was achieved in the last major legislation of Lord Gardiner's period of office as Lord Chancellor, by the Administration of Justice Act 1970. It was partial because imprisonment for contumacity has been retained as punishment for defaulters on crown debts and maintenance payments. Third, attachment of earnings orders were introduced (some 100,000 are now being made annually) to secure payment of judgment debts, without any of the changes in the machinery and services of the county court which the Payne Committee had unanimously recom-

mended in order to assist debtors and their creditors brought before it.

I shall now consider one other area in which the Common People are likely to encounter the civil law.

CHAPTER 6

THE CASE OF FAMILY LAW

In medieval times, the Church maintained that marriage was indissoluble but so feared the eternal reprecussions of sexual waywardness that canon lawyers turned it into a formless contract requiring little more than the clandestine consent of the parties, preceded or followed by sexual intercourse. Nowadays, unwanted marriages are thought to be so oppressive to personal happiness that they can be dissolved with a minimum of legal fuss, very often by nothing more elaborate than a postal application to the court. Thus, today there has been fashioned a procedure for the exit from matrimony which reproduces the unfettered simplicity of the arrangements which the Middle Ages devised for entry into the institution. It is instructive to observe the change in lawyers' attitudes over the last thirty years in respect of the function of the court in the dissolution of marriage. In 1946, the Committee on Procedure in Matrimonial Causes, under the chairmanship of Mr. Justice (as he then was) Denning reported that

> "the attitude of the community towards the status of marriage is much influenced by the way in which divorce is effected. If there is a careful and dignified proceeding such as obtains in the High Court for the undoing of a marriage, then quite unconsciously the people will have a much more respectful view of the marriage tie and of the marriage status than they would if divorce were effected informally in an inferior court."[1]

Not only have the great majority of divorces been transferred to an inferior court but the introduction in 1973 of the special procedure, which permits postal application to the divorce county court, has marked the only fundamental change in divorce since it ceased to be obtained by private act of parliament. The issue of licences to

[1] Second Interim Report, Cmd. 6945 (1946), para 4.

marry again is in process of becoming an administrative rather than a legal procedure. At first, the special procedure was restricted to petitioners, without dependent children, proceeding on the ground of consensual separation for two years. By 1977, it had been extended to all undefended divorces. Petitioners send the papers to the Registrar who has to be satisfied that they are in order, and he submits a list to the judge who grants the decrees.

One other feature of the special procedure was its introduction by administrative action as a result of changes approved by the Rules Committee. The far reaching nature of this development received neither parliamentary nor public discussion. It was in fact established by the fiat of judges and officials, an example of the strong influence of procedure upon substantive law which, in Maine's famous phrase, has "the look of being gradually secreted in the interstices of procedure."

Present procedures for dealing with marriages which have collapsed have to be simple, otherwise the courts could not cope with the weight of the business. Since the end of the last war, the number of divorce petitions has more than quadrupled and, by 1979, some 11 per cent. of all families with dependent children were one-parent families. The absolute numbers are formidable. The National Council For One Parent Families estimates[2] that 850,000 single parents are currently responsible for the upbringing of one and a half million children under sixteen. There is no simple explanation of these statistics. There have been demographic changes which, by eliminating distortions in the sex ratio as well as the large number of women for whom there used to be no husbands, have given women equality of opportunity to marry for the first time since the Registrar General began to collect the statistics. The proportion of the population which marries has also increased greatly; and the age at marriage has fallen. Economic and occupational developments have altered the role of married women in the labour market, and given increased opportunities for

[2] All the relevant statistics and estimates are conveniently summarised and printed in the annual reports of the National Council.

a degree of financial independence from their husbands. New conceptions of desirable familial, parental and sexual relationships have become accepted bases of behaviour. Finally, nobody is excluded by poverty from the legal remedies for matrimonial troubles. Licenses to marry again are freely issued and the Lord Chancellor's Office now publishes a cheap pamphlet explaining the procedures for "do-it-yourself" divorce. The marital failure to which a decree of divorce publicly witnesses used to be held to unfit men and women for political and civic office. The social attitudes of today require that the breakdown of a marriage should impose no shameful disabilities on spouses, and they are no longer stigmatised if they marry again. 60 years ago, it was common to pity the widow but to attach varying degrees of moral culpability to divorced and separated wives and unmarried mothers. This tariff still influences politicians and they do not extend the same measure of sympathy to one-parent families as they reserve for the disabled or the long-term unemployed. But there is more awareness now than in the past of the peculiar disadvantages, especially the harsh poverty, suffered by many single parents and their children.

In this century the problems arising from the legal regulation of marriage breakdown have been the central concern of two Royal Commissions and three departmental committees. Of these, the most recent, the Committee on One-Parent Families (the Finer Committee), which was appointed in 1969 and reported in 1974, had the widest remit. It was required generally "to consider the problems of one-parent families in our society" having regard to all the relevant social policies as well as "the law on family matters and the practices of the courts." The provisions of social policy are the same in England and Scotland but family law and the structure of the courts is markedly different in the two countries. In Scotland, for example, there is no summary matrimonial jurisdiction, and debt collecting is a private enterprise activity. Nevertheless, the Government refused to appoint a Scots lawyer to the Committee either as a member or as an assessor, and so there was much indignation in Edinburgh. In the event, the Committee received a great deal of help from the Scottish Law Commission.

The other ramifications of these terms of reference were formidable. They involved an examination of some of the fundamental moral, social and economic issues of today. How is the huge increase in the amount of divorce to be interpreted? Is the law dealing with financial provision and the disposition of property after divorce satisfactory? What is the proper relationship between a man's legal obligation to maintain his wife and children and the obligations that the community has assumed to provide welfare benefits and income maintenance for all citizens in need? To what extent is the financial hardship of lone mothers a reflection of the economic subjection of women, so that the remedy should be to cease treating women as a source of cheap labour rather than to subsidise their employers through a new social security benefit? In such case, how can women's opportunities in the labour market be increased? But, on the other hand, should the mothers of young children be encouraged to go out to work, and is it a wise use of public funds to expand day care provision for the under-fives? Most of the questions (and there were many more) which had to be answered focused on the social status and economic situation of women. In essence, the Report of the Finer Committee was an essay on the status and social situation of women in British society. Thus, the Committee had to begin their work by searching for light and order among a welter of disparate issues.

One route lay through family law. Since the law and the courts are prime agents in the regulation of the consequences of marriage breakdown and unmarried parenthood, the state of the law and its administration has a direct bearing on everyone—parents and children—in one-parent families. This becomes even clearer given the fact that the law here includes the law of social security and, in particular, of supplementary benefits. In 1978, there were 339,000 single parents living on supplementary benefit and more than half of all the children on such benefit lived in one-parent families. The heavy dependence of poor one-parent families on the law of supplementary benefit explains why the Committee paid a great deal of attention to the relationship between the private law of family maintenance and the public law of social security, and the institu-

tions which administer them. The Committee quickly discovered that the legal scene was a chaos of overlapping jurisdictions and conflicting philosophies, strewn with so much debris from earlier centuries that no progress could be made without the guidance of a social history of family law. None was available. Accordingly, Morris Finer and I spent two years writing six hundred pages of typescript which we circulated to our dismayed colleagues under the title, *Obligation to Maintain*.[3] We traced the history of the three systems of family law which grew up in England. One served the wealthy and powerful; another developed for the remainder of the economically independent population and a third dealt with the destitute, the poor who, for whatever reasons, did not earn their own subsistence. A main function of the poor law was to enforce a distinction between the independent poor who earned their own subsistence and the paupers who did not. The family law imposed upon this latter class comprised support obligations upon relatives; the denial or subordination of parental rights to the control or custody of children and the determination of their education or occupational training; as well as a general regulation of familial relationships. In a most penetrating analysis of the early relationship between the poor law and family law, Professor Jacobus Ten Broek observes that

> "the poor law was not only a law *about* the poor but a law *of* the poor. It dealt with a condition and it governed a class. The special legal provisions were designed not to solve the causes and problems of destitution but to minimise the cost to the public of maintaining the destitute. They were accordingly concomitants of the central concept and great achievement of the poor law—the assumption of public responsibility for the

[3] A very truncated version was printed by the Committee on One-Parent Families, Report Vol. 2, Cmnd. 5629–1 (1974), Appendix 5 ("The History of the Obligation to Maintain"), pp. 84–149.

> support of the poor—and of the necessity it entailed of keeping public expenditure down."[4]

After 1948, the poor law was replaced, first by the National Assistance Board and then by the Supplementary Benefits Commission, but income maintenance, without the stigma of pauperism, still remained intertwined in administrative thought and procedure with the old regime of a separate family law for the dependent poor.

Knowledge of the social history of family law gave the Committee a framework within which they could undertake empirical inquiries into the present functions of the concurrent jurisdictions about which they were required to make recommendations. They began by considering a divorce law which granted people licences to marry again if it could be demonstrated that their marriages had broken down irretrievably. In dealing with financial provision and the division of property, courts began increasingly to disregard conduct and to treat the breakdown of marriage as giving rise to circumstances similar to those which arise in settling partnership rights upon winding up. Although the Committee had little in the way of statistical or other information on which to draw, the high rates of subsequent marriage by divorced persons suggested that, for many couples, the financial difficulties associated with divorce, although severe, are temporary. A proportion of the maintenance orders could be regarded as bridging loans for wives in the period between one marriage and the next. This was decidedly not the case with the parallel but more limited jurisdiction in the magistrates' courts. These were patronised almost exclusively by very poor people for half of whom the summary court served as the terminus at which their marital journey ended. Thus, while public policy embodied in the Divorce Reform Act held that the public interest and morality required the decent burial of dead marriages, the tendency of the magisterial jurisdiction was to preserve dead marriages legally intact. Further, it rested upon proof of guilt which

[4]"California's Dual System of Family Law: Its Origin, Development and Present Status," *Stanford Law Review*, Part I, Vol. 16, 1963–64, p.286. Italics in original.

had been expelled from the superior jurisdiction. Moreover, the summary cure for marital ills was all that most working class people could afford. For long after the introduction of legal aid in 1950, the firmly entrenched habit of going to the magistrates' court was sustained by the social assumptions of local solicitors, probation officers and social workers. More important still, the Supplementary Benefits Commission went on herding their clients into these courts to obtain maintenance orders. As no official statistics existed, the Finer Committee had to conduct extensive research into the results of these orders. This showed that, even if orders had been paid regularly and in full, recipients would still have been on supplementary benefit as the orders were invariably for amounts less, often substantially less, than their entitlements under minimum rates of benefit. Thus, the social security authorities were requiring (they said "encouraging") unsupported wives and mothers to obtain court orders, and helping them to receive legal aid for the purpose. The orders were in fact legal fictions and rarely complied with, so that responsibility for supporting such women fell almost exclusively upon the Commission. When the Finer Committee was sitting, the Commission estimated that the contributions paid under court orders or voluntarily by liable relatives in respect of their dependants receiving supplementary benefit, amounted to about 17 per cent. of the Commission's expenditure upon such cases. By 1977, the figure had fallen to 12 per cent.[5] There is no summary matrimonial jurisdiction in Scotland. The Scottish Law Society is powerful enough to stop the social security authorities giving what amounts in England to legal advice to applicants for benefit. Accordingly, in Scotland the Supplementary Benefits Commission seeks to make a voluntary agreement with male liable relatives to contribute to the maintenance of those for whom they are legally responsible. On the one occasion when information was obtained about the working of the voluntary system in Scotland, it appeared

[5] Supplementary Benefits Commission, Annual Report, Cmnd. 7392 (1978), Table 3.8, p.13 and Finer Committee. Report, *op cit.* para. 4.215. The crucial table is printed in para 4.101.

that it produced roughly the same proportion of the Commission's expenditure on one-parent families as is squeezed out of liable relatives by weight of the whole legal apparatus in England. Be that as it may, it is beyond dispute that the financial support provided for this group by those who have the legal responsibility for maintaining the casualties of broken homes is marginal, whilst that of the community, operating through the Commission, is fundamental. Thus, the Committee identified a stage army being marched as if they were separate companies between the magistrates' court and the supplementary benefits office, with each of these institutions pretending that they had nothing to do with the other.

This analysis pointed to two fundamental changes in family law and its administration. First, the Committee recommended the abolition of the family jurisdiction of magistrates and the establishment of family courts. There was nothing revolutionary in these recommendations. The Royal Commission on Divorce and Matrimonial Causes of 1909 under Lord Gorell reported that

> "We should have been glad if we could have recommended that the whole of the jurisdiction at present exercised by these courts should be transferred to a superior court. It cannot be considered satisfactory that a court of summary jurisdiction should have power to make orders, which may separate married persons for the rest of their lives .... Moreover, these courts form part of the judicial system for administering the criminal law in the case of petty offences. We think there is a serious objection to a court, whose main duties are of a criminal character, entertaining applications, which are of a civil nature, concerning the domestic relations of men and women and their children, applications which, if granted, may produce the practical although not the legal dissolution of the marriage tie. The evidence satisfies us that the general administration of the Acts is not satisfactory where these cases are dealt with by lay magistrates.... "[6]

[6] Cmnd. 6478 (1912), paras. 140–142.

The Gorell Commission were deterred from making the recommendation because they thought that it would be impractical to withdraw the summary jurisdiction altogether at that time, there being nothing else available for the poor. However, they did recommend considerable restrictions on the powers of magistrates. When Mr. J. E. S. Simon (as he then was), later the President of the Family Division of the High Court and subsequently a Lord of Appeal in Ordinary, proposed to the Royal Commission of 1951 "a system of specialist matrimonial and family courts," he included in his plan the abolition of the family jurisdiction of magistrates.[7] When the Government was compelled to deal belatedly with the indefensible anomalies of the inferior and superior jurisdictions, which resulted from the Divorce Reform Act 1969, they ignored the arguments for abolition and, with the advice of the Law Commission, framed the Domestic Proceedings and Magistrates Court Act 1978 which revises and increases the powers of magistrates. Not only does this backward looking Act retain the matrimonial offence and hence keep the summary law on a different moral basis from that administered by the higher courts but, by making new provisions to give an applicant threatened by violence exclusive occupation of the home, it actually extends the overlap of jurisdiction in family matters among the courts. This duplication has been denounced by every inquiry and commentator in recent years, notably by Judge Jean Graham Hall,[8] as well as by the Finer Committee, the Society of Labour Lawyers, the Society of Conservative Lawyers and the Family Law Sub-Committee of the Law Society. All have proposed a family court as part of the remedy and most have urged the abolition of the summary family jurisdiction. There can be little advantage in speculating about the hostility of the Government towards the Finer Committee's proposal in 1974; it must be supposed that one element was unwillingness to handle a

[7] Royal Commission on Marriage and Divorce, Minutes of Evidence, Seventh and Eighth Days, 1952, para. 19, p. 202.

[8] Especially useful is her *A Unified Family Court* (1978), published by the National Council for One Parent Families.

demarcation dispute in Whitehall between the Home Office and the Lord Chancellor's Office, and that the stated anxieties about public expenditure and judicial manpower reflected more than financial difficulties. However that may be, a system is preserved which is universally condemned. Sir Jack Jacob, the leading authority on civil procedure, has pointed to

> "two systems of jurisdiction, two sets of procedures, two ranges of remedies and two kinds of justice which are being administered by two different kinds of courts, the Family Division of the High Court and the summary jurisdiction of the Magistrates' Courts. The differences, anomalies and evils of these two systems, existing side by side, seem to me as indefensible as was the co-existence of the Courts of Common Law and the Court of Chancery before 1875 . . . for my part I would strongly urge the early consolidation of these two systems of courts in to one court. How it should be constituted, and how its procedures should work are, by comparison, matters of detail which it should not be difficult to arrange. . . . "[9]

In fact, the fairly detailed blueprint of the Finer Committee[10] has been widely accepted as a model, and it satisfies the criterion of the present Lord Chancellor, Lord Hailsham, who declared last summer " . . . if the system can be grafted onto the pyramid of existing courts I am a family courts man." However, he warned that there would be a good deal of "difficulty inside and outside of the Government machine before it becomes law."[11] The proposal cannot now usefully be taken further until the Lord Chancellor's Office produces costings in terms of judge power and money of a small choice of possible structures, based on the use of existing buildings.

It is ironic that the Domestic Proceedings and Magistrates Court Act 1978 should have been passed just when the substantive

[9] "The Reform of Civil Procedural Law" (1980) 14 L. Teach., pp. 13–14.
[10] Report, *op. cit.* sections 13 and 14, pp. 170–223.
[11] H.L. Official Report, July 19, 1979, cols. 1461 and 1462.

jurisdiction of magistrates is dying of inanition. In the early 1970s, there were nearly 32,000 applications for matrimonial orders every year; by 1978, the number had fallen to some 13,000.[12] Among the reasons for this development is the widespread dislike of working class people for litigating their matrimonial disputes in a court the main business of which is the country's petty crime. Again, knowledge is spreading that all the remedies for marital ills which magistrates' courts offer are available, together with divorce, in the divorce county court. But the precipitating cause was a change of policy forced on the Supplementary Benefits Commission by the Lord Chancellor's Legal Aid Advisory Committee in 1976. I have already referred to the practice of the Commission which required unsupported wives and mothers in receipt of benefit to obtain a maintenance order from a magistrates' court. The Finer Committee recommended that the Commission should abandon a practice which brought the women no financial benefit and compelled them to appear before magistrates, when it would have been much more to their comfort and advantage to go in the first instance to the divorce court where many of them would end up anyway. In that court they could obtain all the remedies available in the magistrates' court and, had they wished, their broken marriages could have been properly sorted out, at least so far as the law was involved. But Finer's recommendations cut no ice with the Supplementary Benefits Commission, and there the matter would have rested had not the Legal Aid Advisory Committee been searching for methods of saving expenditure under pressure of the Treasury's economy cuts. Their eyes fell upon the £3 million of civil legal aid funds which were thought to be absorbed by the Commission's encouragement to their clients to go to the summary courts for maintenance orders at the expense of the Lord Chancellor's legal aid fund. The Commission were persuaded in 1975 to abandon their long-standing policy of "encouraging" women to obtain orders and to substitute in its place an explanation to their clients of

[12] Judicial Statistics Annual Report, 1978, Cmnd. 7627 (1979), Table J.7, p. 118.

the various courses of action and courts open to them for dealing with their failed marriages. The dramatic fall in the number of applications since 1976 has demonstrated the extent to which the magisterial jurisdiction has been sustained by the policy of the social security authorities. By such side winds do law reforms occasionally occur.

However, if their substantive matrimonial jurisdiction is withering fast, the summary courts are quickly acquiring a new function. For a long time, it has been possible for a wife who has a maintenance order made by the High Court or divorce county court to register it for enforcement in a magistrates' court, which has the facility of a court collecting office lacking in the others. Ten years ago, some 3,800 such orders were registered; in 1978, the number had risen to almost 19,500.[13] So magistrates' courts are reaching the position of serving as the enforcement agency for many of the maintenance orders made by the superior courts. Moreover, in the course of discharging this function, they have the power both to vary orders made by a superior court and to commit defaulters to prison.

The history of the power to commit for default on maintenance reveals the different origins of the separate regimes of family law to which I have already referred, and the manner of its present use throws light on the exercise of a jurisdiction with which the common people are much involved. The power of the High Court to send defaulters to prison stemmed from the Debtors Act 1869 which provided for a term of imprisonment not exceeding six weeks, or until the sum due had been paid. Execution of a committal order could be suspended on terms that the debtor would pay by a specified time or by instalments. The Act provided that the power to commit "shall only be exercised where it is proved to the satisfaction of the court that the person making the default either has or has had since the date of the order . . . the means to

[13] For 1968, Civil Judicial Statistics, Cmnd. 4112 (1968), Table 11H, p. 66; for 1978, Judicial Statistics Annual Report 1978, Cmnd. 7627 (1979), Table D.8(f), p.72.

pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."[14] This test applied to all debtors for the next hundred years. They were not sent to prison because they owed money, they were committed for contumacity, for having the money but failing to pay in the face of a court order.

The maintenance orders of the divorce court have been dealt with since 1857 under the general civil law for the enforcement of debt. On the other hand, the power of magistrates to commit maintenance defaulters was different in origin and extent. The Act which conferred a family jurisdiction on them in 1878 drew not on the Debtors Act but on the bastardy laws, and provided that a wife's maintenance order should be enforced in the same manner as an affiliation order. This formula has been retained ever since and appears unchanged in the Domestic Proceedings and Magistrates' Courts Act 1978[15] which will soon replace the previous legislation governing the summary matrimonial jurisdiction. In 1878, lay magistrates were given a greater and less controlled power of committal than that entrusted to the divorce judges in the High Court. Contumacity was not an issue before the magistrates, and no proof that the defaulter could have paid was necessary. The bastardy law provided simply that "... two justices ... may, if they see fit ... cause such putative father to be committed to the common gaol."[16] There was no effective appeal from a decision of the magistrates. Moreover, whereas the professional judge was permitted to sentence for a maximum term of six weeks, the lay bench were empowered to commit for a maximum of three months. In 1935, following a recommendation in the Report of the Fischer Williams Committee, magistrates were put and have remained under much the same restraints as High Court judges in respect of committing maintenance defaulters. They now have to be satisfied that non-payment resulted from wilful refusal or culpable neglect.

[14] s. 5.
[15] s. 27 (1).
[16] Bastardy Laws Amendment Act 1872, s. 4.

In 1952, the term of sentence which magistrates can impose was reduced to six weeks.

In 1959, a procedure for attaching the earnings of maintenance defaulters was introduced. Under it, an employer could be required to deduct from the wages of an employee an amount fixed by the court. The procedure was stiffened and improved in 1971 when it was extended to all civil debts, with the result that some 100,000 attachment orders are being made annually to secure payment of judgment debts. Nevertheless, this mode of enforcement is little used either by the divorce county courts or by magistrates. Indeed, the number of such orders in respect of maintenance and affiliation orders made by magistrates' courts has more than halved since they were introduced in 1959. In the absence of any recent study of the efficacy of attachment,[17] it is difficult to assess the reasons for the failure of a mode of attachment from which much was hoped and which, if successful, would, unlike imprisonment, actually produce money.

Magistrates have been steadily committing some 3,000 men every year for the past 17 years for default on matrimonial and affiliation orders. Both the Payne and Finer Committees reported on the procedures and effectiveness of this form of punishment. Half the members of the Payne Committee said that they thought "the imprisonment of maintenance defaulters . . . is morally capricious, economically wasteful, socially harmful, administratively burdensome and judicially wrong. We wish it abolished forthwith."[18] They could not understand how imprisonment could be preferred to action designed to get at a defaulter's resources. Defaulters either "have the means to pay or they have not. If they have the means, the maintenance order will not be flouted because the machinery of extraction will be exercised to the full. If they lack the means to pay, they are not wilfully or culpably refusing to

[17] There have been several small studies but none satisfies the ordinary statistical criteria of reliability.

[18] Report, *op. cit.* para. 1099.

pay"[19] and should not therefore be sent to prison. As in the case of civil debt, these members could find no evidence that the reality or threat of imprisonment helped to inculcate a willingness among the population at large to support their families. They went on to state in sharp terms their lack of confidence that

> "magistrates' courts succeed in applying the distinction between inability and refusal to pay.... They have to draw a fine distinction in respect of allocations of income by the poorest and most inadequate husbands in the married community, many of whom have acquired not only a maintenance order but also an illicit family or a paramour.... We think there is some evidence to suggest that magistrates' courts in England and Wales too readily and too easily make a finding of wilful refusal or culpable neglect to pay maintenance.... We conclude that there are grounds for thinking that the liberty of the subject, if he be a maintenance defaulter, is no better protected in the magistrates' courts than if he be a civil debtor appearing in the county court...."[20]

This group cited Dr. Morris's study of *Prisoners and their Families*, on which the whole Committee had relied for their information about the social and mental characteristics of civil debtors, to show that maintenance defaulters who ended in prison were just as inadequate as the civil debtors who were committed.

Of the remaining six members of the Committee, two were willing to abolish committal for maintenance defaulters at an unspecified time in the future, one was undecided and the Chairman and two of his colleagues wished to retain it. They held that the obligation upon a man to maintain his family is of a different nature from the duty of a debtor to satisfy his creditor.

> "The selfishness and irresponsibility by which (a defaulter) is motivated are, in our view, no less morally reprehensible and

[19] *Ibid.* para. 1096.
[20] *Ibid.* para. 1093.

> socially damaging in their effects than many offences against the criminal law in respect of which the courts' power to pass a sentence of imprisonment is not questioned....[21] [Moreover,] "the essential distinction between a wife and a civil creditor (is that) her debt is recurring and ... she cannot terminate the husband's credit. It is this which leaves her so much at his mercy and, perhaps more than any other reason, requires ... the retention of the final sanction of imprisonment."[22]

This was the view accepted by the Government which retained the sanction in the Administration of Justice Act 1970, which implemented some of the recommendations of the Payne Committee. The Government also ignored a central recommendation of the Report for the establishment of an Enforcement Office which would deal with the money judgments of all courts and use the services of specially trained social workers accountable neither to the creditor nor the debtor but to the courts. The Committee believed that "there is great need for social workers to perform, for financially incompetent or inadequate or irresponsible debtors, the functions which are discharged for more successful members of the community by bank managers, accountants and solicitors."[23] Such welfare workers would undertake independent means inquiries on behalf of courts so that they would know how best to order debtors to satisfy the debts being enforced through the Enforcement Office, and assist it to formulate the kind of order which should be made, particularly as to the amount of any order for attachment of earnings. The lack of such an office and of the advice which it could give to men with maintenance orders may help to explain the limited use that magistrates' courts are making of attachment of earnings orders.

[21] *Ibid.* para. 1039.
[22] *Ibid.* para. 1044.
[23] *Ibid.* para. 1216.

The Finer Committee reviewed the imprisonment of maintenance defaulters in its Report of 1974. They accepted the views of the six members of the Payne Committee and unanimously recommended abolition. "Everyone agrees," they wrote,

> "that sending maintenance defaulters to prison is an essay in economic and social futility as far as the taxpayer is concerned. The defaulter has to be kept in prison where his future earning power is reduced, the wife and family upon whose maintenance he has defaulted fall upon the Supplementary Benefits Commission as do his second wife or his mistress and her children . . . if he has acquired a second family. This might be a justifiable social cost if the result were to inculcate or to strengthen among the population at large a disposition to maintain their dependants. Not only is this proposition manifestly unsustainable in the light of a vast body of sociological knowledge about the family, but what little empirical knowledge we possess suggests that imprisonment hardly serves to deter even those who are sent to prison.[24]

Nevertheless, many involved in the administration of family justice hold that the value of the procedure which permits a court to make a committal order and then suspend it, subject to regular payments being made, lies chiefly in what the court can threaten. Just as some teachers argue that, though they would never themselves use a cane, the sight of one lying on their desks helps to secure obedience and good behaviour among their pupils. so it is said that a committal order will extract money from men who are unwilling to pay but more unwilling to go to prison. Undoubtedly, this is true. When parliament was debating the Domestic Proceedings and Magistrates' Courts Bill in 1978, a Home Office Minister explained that "an informal survey" carried out by his Department in six

[24] Report of the Committee on One-Parent Families, Cmnd. 5629 (1974), para. 4.169.

magistrates courts showed that in nearly 90 per cent. of the cases in which a committal warrant had been issued and then suspended, the defaulter escaped imprisonment because he paid up.[25] Perhaps the findings of this unpublished survey testify as much to the inadequacy of the machinery for extracting money from those who have it as to the virtues of suspended committal orders. However that may be, such arguments did not impress the Finer Committee. They noted that the rate of recovery of civil debts had not been adversely affected by the abolition of the threat of imprisonment, despite the evidence to the Payne Committee of the great majority of county court judges that their power to make suspended committal orders was an indispensable feature of the procedure for enforcing judgment debts. The Finer Committee regarded an empirical demonstration of the effectiveness of the threat as irrelevant to the point of principle which is that "if imprisonment is ... inadmissible as a sanction to enforce family obligations, so equally must be the threat of imprisonment."[26] I do not believe that (pathological situations apart) the policeman and the prison officer are appropriate agents for the regulation of family life because they bring penal sanctions into a social and personal area where compensation or restitution are the only tolerable aims, and moral censure the only proper method of expressing disapproval. Citizens in 1980 do not think of failure to discharge marital obligations as criminal behaviour and to treat it as such by imprisoning defaulters damages the law and degrades the institution of marriage.

Three general considerations seem to me to emerge from this account of the treatment of one small group of social nuisances. First, the defaulter's liability to imprisonment imposes a duty upon magistrates which they do not discharge and, indeed, are in no position to discharge in accordance with the law. Lay magistrates are required to distinguish between the contumacious and financially incapable defaulter who is frequently a very poor man.

[25] H.L. Official Report, February 14 1978, cols. 1302 and 1303.
[26] *Ibid.* para. 4.170.

Such delicate domestic arithmetic demands full information about incomes, expenditures and needs. Yet there is no obligation placed upon magistrates, and hardly any means available to them, to obtain such information other than what they can elicit from the witnesses who appear before them. Of course, there is great variation in the practice of different courts. Some require a questionnaire relating to means to be completed whilst others base decisions on little more than a pay slip. In this connection, it has to be remembered that magistrates are not compelled to give reasons for their assessments and are very unlikely to do so, and that the bench which deals with the same case on subsequent occasions may be constituted by different magistrates. Nothing has changed since the Graham Hall Committee on Statutory Maintenance Limits noted in 1968 that magistrates "are dependent, subject to their own assessment of its veracity, on the information volunteered by defendants; and they do not commonly include the relevant information in the court records, including the notes of evidence."[27]

It is difficult to make a refined statistical comparison of the propensities of professional judges and of lay magistrates to issue committal orders and then to suspend them. The inadequacy of the official statistics permits only a rough estimate of the population of maintenance defaulters at risk of committal within the jurisdiction of the different courts. Moreover, the Home Office provides no information about the proportion of live maintenance orders in respect of which magistrates have made suspended committal orders. However, a rough estimate suggests strongly that the High Court in England, the divorce county courts and the Sheriff Courts in Scotland apply the test of wilful refusal or culpable neglect to pay maintenance much more strictly than it is applied by magistrates' courts in England and Wales. In 1978, the High Court and the divorce county courts in England probably committed no more than thirty defaulters to prison; the Sheriff Courts in Scotland committed 15 and the magistrates' courts in England committed

[27] Committee on Statutory Maintenance Limits, Report, Cmnd. 3587 (1968), para. 121.

almost 3,000.[28] Imprisonment is punishment by deprivation of liberty, the extreme penalty which the courts in Britain can inflict upon a citizen. If it is to be inflicted, the criminal law and appropriate standards of proof beyond reasonable doubt should be strictly and scrupulously observed. I regard this situation as an affront to the administration of justice in England, and I find it shocking that Home Secretaries have persistently ignored this aspect of the jurisdiction for which they are responsible. The situation today in respect of maintenance defaulters is precisely what it was between 1869 and 1970 for civil debtors.

Secondly, the establishment of family courts would make it easier to achieve one other fundamental change in family law; namely, to bring the courts and the social security authorities into a close working relationship. One of the most astonishing features of the backward looking Domestic Proceedings and Magistrates' Courts Act 1978 is that it gives no guidance about the relationship of the magistrates' jurisdiction to the powers of the Supplementary Benefits Commission. The role of this jurisdiction in enforcing the maintenance orders of superior courts will make this defect a very important feature of a system which has been denounced with little effect by four official inquiries in the past 50 years. Finally, I have already stressed the crucial importance of the taxpayers support for many of the casualties of broken homes, and shown how small a

[28] For the first time, the Judicial Statistics Annual Report 1978, Cmnd. 7627 (1979) showed the number of persons conveyed to prison by the Tipstaff of the Supreme Court classified according to the different divisions of the Court. The Family Division issued a total of 59 warrants, Table F.1(f), p. 96. This figure covers everything, including breaches of injunctions. No indication is given of the actual number of maintenance defaulters but I am told that it is unlikely to exceed a handful. On advice, I have estimated the number as 7. The 1978 Report also shows for the first time that the total number of maintenance defaulters conveyed to gaol by county court bailiffs could not have exceeded 23, Table F.1(e), p. 95. I have therefore taken the total number of committals by the High Court and by the divorce county courts to be 30. The annual average number of imprisonments for default on the payment of alimony in Scotland was 10 during the period 1974–78, *Prisons in Scotland*, Report for 1978, Cmnd. 7749 (1979), Appendix No. 3, p. 30. For the Magistrates' Courts in England, Prison Statistics in England and Wales 1977, Cmnd. 7286 (1978), Table 6.1, p. 48.

proportion of the cost is met by what the legally liable relatives contribute by way of reimbursement of the payments made by the Supplementary Benefits Commission. The resentment which many people feel against husbands who shirk or seem to shirk obligations to their families because, as is often said, they know that the social security authorities will provide, cannot be the last word. The truth is that there arises here a direct conflict of values, now clearly defined, between the notion of the moral and legal obligation to maintain dependents and the freedom which a democratic, welfare society accords to all its citizens to regulate their matrimonial and sexual conduct within the law. A poor man is as entitled to seek divorce or to change his sexual partner as is a wealthy man; but often, if he does so and acquires a second family, the taxpayer must bear the cost of his first, for a time at least. The only alternative would be to argue for different marital and sexual rules for different income groups. Given existing and anticipated rates of marriage breakdown, the community will have to face up to the need for rational decisions about the nature of the obligation to maintain; whether, and if so, to what extent, it should be enforced and how the methods of enforcement should relate to public morality. Ancient legal fictions ought no longer to be allowed to mask present social realities.

CONCLUSION

I have been considering two areas of the civil law which affect the lives of the "Common People" very closely. Their histories had not been written: indeed, they had no histories until members of government committees were compelled to learn and write them in order to understand the parts of the present which they had been appointed to inquire into. The findings of the social histories of their subjects provided the framework within which the committees were able to undertake contemporaneous empirical inquiries. The lack both of historical knowledge and of official statistical information about the actual working and social results of the two jurisdictions meant that there was no public awareness of the issues involved, no public assessment of the quality of justice with which citizens were being served, and no general public opinion upon which committees' recommendations could bite. The truth is that nobody knew what was happening, and nobody cared. Those subjected to the jurisdictions were never in a position to make their discontents felt. Among those who did know, the lawyers and court officials and judges and magistrates, there was a very disturbing willingness to tolerate maladministration of justice which deprived poor citizens of their liberty without the proper safeguards. The liberty of the subject was not well protected if he was a civil debtor or cared for if he is a maintenance defaulter today. In these two areas of the law, there has been a casualness about committal to prison which mocks the general virtues of our system. My plea is for a social history of law and a continuous flow of statistical and other types of intelligence about the working of the institutions of justice.

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CONSTITUTIONAL FUNDAMENTALS

by

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