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ON THE RELATION BETWEEN THE RULE OF LAW AND PUBLIC OPINION

John V. Orth*

THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST. By *Richard A. Cosgrove*. Chapel Hill: The University of North Carolina Press. 1980. Pp. xv, 319. \$19.50.

*The rule of law does not apply in modern Britain which, despite the forms and some appearances of liberal democracy, when a Labour government is in power, is a dictatorship headed by a group of trade union leaders and their political servants.*¹

Blatant editorializing is not unknown in books that purport to be scholarly and scientific, even in reference books — Samuel Johnson, for example, enlivened his great *Dictionary* with idiosyncratic definitions² — but the political diatribe used as an epigraph above seems out of place in the article “rule of law” in the new *Oxford Companion to Law*.³ And yet, the phrase has carried a half-concealed political comment from the time that it was given currency, if not coined, by the Victorian jurist Albert Venn Dicey.⁴

Before the appearance of Professor Cosgrove’s life of Dicey, there was no full-scale biography. At the request of Dicey’s widow,

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1. D. WALKER, *THE OXFORD COMPANION TO LAW* 1094 (1980).

2. He defined “lexicographer” as a “writer of dictionaries; a harmless drudge . . .,” and “excise” as a “hateful tax levied upon commodities, and adjudged not by the common judges of property, but by wretches hired by those to whom excise is paid.” See 2 S. JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE*, s.v. “lexicographer” (1755); 1 *id.*, s.v. “excise.” The Commissioners of Excise consulted the Attorney General about whether Johnson could be prosecuted for libel for the latter definition; they were reportedly told that he could be, but were advised for prudential reasons not to prosecute. See 1 J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 295 n.9 (G. Hill & L. Powell eds. 1934-64).

3. For further polemics in *The Oxford Companion to Law*, see the articles on “social services” (“the sacred cows of modern Britain which constantly grow fatter and more expensive to keep, which it is deemed sacrilege even to touch, and which can never be killed off”) and “trade unions” (“They represent the gravest threat to democracy, liberty, and economic progress and prosperity yet known and constantly call for the law to be kept out of industrial relations to enable anarchy to be promoted.”). See D. WALKER, *supra* note 1, at 1152, 1229-30. The “vigorous personal views” of the author have been noted elsewhere. See Odgers, *Book Review*, 97 *LAW Q. REV.* 143, 145 (1981).

4. Cosgrove makes clear that although the phrase is sometimes attributed to Dicey, it was only popularized by him. P. 87 n.70. As Dicey admitted, he owed much of the concept to W.E. Hearn. See Arndt, *The Origins of Dicey’s Concept of the “Rule of Law,”* 31 *AUSTL. L.J.* 117, 123 (1957).

Robert S. Rait had edited the *Memorials of Albert Venn Dicey*⁵ within a few years of his death. While containing much valuable information, the *Memorials* have a crepe-decked Victorian air; at times, they bring irreverently to mind J.P. Marquand's satiric novel *The Late George Apley*. Rait conscientiously includes, for example, the recollection of a former maid of the Diceys: "She had settled him in the garden with his books. Presently he came hurrying in quite cross: 'Why didn't you come and remind me it was raining? My books have all got wet.'"⁶ Other authors, too, have contributed to the image of Dicey as an ineffectual, absent-minded professor. In his history of the Oxford Law School, F.H. Lawson repeats the story that when Dicey was at Harvard to deliver his famous lectures on *Law and Public Opinion*, "a boy had to be sent to him every morning to take him to the place where he was to lecture."⁷ For a more serious assessment of Dicey, one had to turn to H.G. Hanbury's history of the Vinerian Chair of Common Law at Oxford,⁸ which Dicey occupied from 1882 to 1909. There is no fooling in Hanbury's portrait: Dicey is a thinker first and foremost, "one who was to prove himself worthy to claim parity with Blackstone himself."⁹ It is an intellectual portrait solely, and the colors and highlights are bright and complimentary: "There are hardly enough words in our own, or any other, language to do him sufficient honour."¹⁰ Rait had made "no attempt at an appraisal of the man through his writings." Dicey's biography, wrote Hanbury in 1958, "remains to be written."¹¹

Professor Cosgrove has remedied that deficiency. The great value of his work is that it permits us to see for the first time that the admixture of law and politics in so many of Dicey's works was not an intellectual accident or oversight. Dicey's life was all of a piece; as a lawyer and legal scholar, he was a politician *manqué*. Cosgrove thus stands the received image of Dicey on its head: instead of a

5. MEMORIALS OF ALBERT VENN DICEY (R. Rait ed. 1925).

6. *Id.* at 291.

7. F. LAWSON, THE OXFORD LAW SCHOOL, 1850-1965, at 70 (1968). Lawson sought to palliate Dicey's deficiencies by observing that "the plan of the Harvard Yard is rather confusing, at least to an absent-minded Professor." *Id.* Citations to Dicey's *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (1905) are hereinafter shortened to "LAW AND PUBLIC OPINION."

8. H. HANBURY, THE VINERIAN CHAIR AND LEGAL EDUCATION (1958).

9. *Id.* at 97. See W. HOLDSWORTH, THE HISTORIANS OF ANGLO-AMERICAN LAW 92 (1928) ("Dicey will hold, in the history of the legal literature of the nineteenth century, a place not unlike that which Blackstone holds in the legal literature of the eighteenth century; for both have written books which became classics whilst they were still alive.")

10. H. HANBURY, *supra* note 8, at 102.

11. *Id.* at 102-03.

great intellect with an odd penchant for political controversy, Cosgrove reveals a passionate but unsuccessful politician who produced influential legal books from time to time. Dicey's most enduring legal work, *Conflict of Laws*, was that farthest removed from politics. *Law and Public Opinion*, once equally well-regarded, is now revealed as a disguised political pamphlet, albeit an influential one.

Dicey's life before his appointment, in middle age, to the Vinerian Chair helps to explain his strange dual career as a legal scholar and political pamphleteer. Dicey was born in 1835, three years after the first Reform Act¹² had enfranchised the middle class and also three years after the death of Jeremy Bentham, whose ideas, as Dicey understood them, were to guide him throughout his life. Dicey's parents, as Cosgrove points out, were members of the "intellectual aristocracy" (p. 4): his father's family were hereditary editors of a regional newspaper, the *Northampton Mercury*; his mother's family, the Stephens, were prominent Evangelicals who had produced a distinguished line of judges and writers.¹³ The Diceys, in other words, were of the class that benefitted most from the first Reform Act, and young Albert Dicey imbibed the values of his parents' age and class: earnestness, articulateness, hard work, and self-reliance. The parental influence had extra opportunity to work because an obscure muscular ailment kept Dicey at home until, at seventeen, he went to King's College School in London and then two years later to Balliol College, Oxford. After leaving Oxford, Dicey read law at the Inner Temple and was called to the bar in 1863. Despite his physical handicap, Dicey had great expectations that his inbred ambition to serve the nation would be fulfilled.

Dicey's career was barely begun, however, before the nation he aspired to serve was transformed. The English constitution that Walter Bagehot had so artfully described was passing away even before his book of that name was published;¹⁴ the mid-Victorian "age of equipoise"¹⁵ was terminated by the second Reform Act in 1867,¹⁶ which enfranchised a large part of the working class. Dicey

12. 2 & 3 Will. 4, c. 45 (1832).

13. Albert Dicey's grandfather, James Stephen, was a master in Chancery. His uncle, Henry John Stephen, was a serjeant-at-law and the author of a *Summary of the Criminal Law* (1834) and of *New Commentaries on the Law of England* (1841). His cousin, Sir James Fitzjames Stephen, became a judge and wrote a *History of the Criminal Law* (1883). Another cousin, Sir Leslie Stephen, was a formidable Victorian intellectual; the latter's daughter was Virginia Woolf.

14. See W. BAGEHOT, *THE ENGLISH CONSTITUTION* (London 1867).

15. See W. BURN, *THE AGE OF EQUIPOISE* (1964) (covering 1852 to 1867).

16. 30 & 31 Vict., c. 102 (1867). Compare R. HARRISON, *BEFORE THE SOCIALISTS* (1965) with M. COWLING, 1867: *DISRAELI, GLADSTONE AND REVOLUTION* (1967).

was unable to find his place in the new political world. After years of unceasing labor, he was forced to the bitter admission that his ambition was to be denied: "By 1880 he had reached middle age without the success at the bar he had envisioned; his journalistic endeavors had not yet made any appreciable mark on public opinion; and his government career was bogged down in minor legal work" (p. 43). Like his near contemporary Oliver Wendell Holmes Jr., Dicey may have felt that if a man was to make his mark in life, he must do it before he was forty.¹⁷ But while Holmes met the deadline, publishing *The Common Law* five days before his fortieth birthday, Dicey missed it: In his mid-thirties he published the competent, but uninspired *Treatise on the Rules for the Selection of the Parties to an Action* (1870), and in his mid-forties he produced the more successful, but no less esoteric *Law of Domicil as a Branch of the Law of England* (1879). In 1882, he was offered the Vinerian Chair at Oxford, an academic appointment that Blackstone had held first, but that had fallen to undistinguished appointees throughout the nineteenth century. The hope was that the next tenant would restore the tarnished luster of the chair. Forsaking his youthful ambitions of political office, Dicey took up the academic challenge.

The first fruits of Dicey's professorship, his lectures on *The Law of the Constitution*, were published in 1885. The principal elements of his jurisprudential and political philosophy were already firmly established. "Two features have at all times since the Norman Conquest characterised the political institutions of England,"¹⁸ he confidently declared. The first of these venerable features is the supremacy of the central government, since 1688 the supremacy, specifically, of Parliament. The second feature, "closely connected with the first," is the rule of law.¹⁹ As Dicey defined it, the rule of law has three meanings in England: (1) that no one can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law; (2) that everyone's legal rights and liabilities are determined by the ordinary courts of the realm (*i.e.*, that England has no equivalent of the French *droit administratif*, distinct laws and courts for government officials); and (3) that everyone's individual rights are derived from the ordinary law of the land, not from a written constitution, with the result that the English constitution is the product of the ordinary functioning of the courts and not the source of

17. See 2 M. HOWE, JUSTICE OLIVER WENDELL HOLMES 8, 135 (1963).

18. A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179 (7th ed. 1908).

19. *Id.*

the courts' jurisdiction.²⁰

In succinctly summarizing Dicey's argument, Cosgrove both focuses on this key concept of the rule of law and conscientiously reviews the cogent criticisms that have been leveled at Dicey's ill-informed, but nonetheless influential opposition to *droit administratif*. These criticisms had begun in Dicey's lifetime and induced him to qualify his original view in later editions of his influential book. Cosgrove's research in Dicey's private correspondence discloses, however, how obstinately Dicey clung to the second article in his definition of the rule of law — that the ordinary courts should determine all questions of rights and liabilities. "In his public writings Dicey grudgingly acknowledged the merits of *droit administratif*; privately he still maintained that no other legal system matched that of England" (p. 102). As Cosgrove demonstrates, Dicey's claim to be a "political expert" was hollow indeed. It therefore seems odd to me that *The Law of the Constitution* escapes Cosgrove's political analysis. Perhaps it does so because it was composed before the most blatant phase of Dicey's politicking opened in late 1885. But Dicey was no less a politician out of his *métier* when he wrote *The Law of the Constitution* than when he wrote his later volumes on Home Rule. In any event, constitutional law is inevitably the continuation of politics by other means. Dicey may have been arming the constitutional lawyers for the struggle that each year brought closer.

Dicey soon began to exhaust his energies writing political works for the popular press. No sooner had *The Law of the Constitution* been published than the news was leaked that William E. Gladstone, the Grand Old Man of the Liberal Party, had been converted to the view that Home Rule should be conceded to Ireland.²¹ Despite his lifelong commitment to Liberalism, Dicey was a diehard Unionist, opposed to any weakening of the tie that bound England and Ireland. Along with a considerable portion of the Liberal Party, Dicey broke with Gladstone and entered into a uneasy alliance with the Tories, an alliance that eventually produced the modern Conservative Party.²² For the rest of his life Dicey used his name and talents in the battle against Home Rule; he wrote half a dozen books²³ and a

20. *Id.* at 198-99.

21. See 3 J. MORLEY, *THE LIFE OF WILLIAM EWART GLADSTONE* 264-65 (1903).

22. See R. BLAKE, *THE CONSERVATIVE PARTY FROM PEEL TO CHURCHILL* 162 (1970); Cornford, *The Transformation of Conservatism in the Late Nineteenth Century*, 7 *VICT. STUD.* 35 (1963).

23. See *ENGLAND'S CASE AGAINST HOME RULE* (1886); *WHY ENGLAND MAINTAINS THE UNION* (1887); *LETTERS ON UNIONIST DELUSIONS* (1887); *THE VERDICT: A TRACT ON THE POLITICAL SIGNIFICANCE OF THE REPORT OF THE PARNELL COMMISSION* (1890); *A LEAP IN*

dozen articles²⁴ for the cause. From Irish policy, Dicey's antipathy to the Liberal Party spread to other issues. Abandoning his earlier misgivings, he promoted the referendum as a check on parliamentary power,²⁵ but only because he was convinced that Home Rule would be perennially unpopular with the electorate. He criticized the social legislation of the Liberal government,²⁶ especially the Old Age Pensions Act of 1908²⁷ and the National Insurance Act of 1911.²⁸ He also denounced the Trade Disputes Act of 1906.²⁹ Reversing his earlier commitment to the enfranchisement of women, he worked against what was to become, in effect, the fourth Reform Act.³⁰ Cosgrove's study of Dicey's political evolution has added a valuable case study to the political history of late Victorian and Edwardian Britain, and has placed Dicey's later legal scholarship in a new light.

During these years of constant political publication, Dicey also produced two of his most celebrated legal works. In 1896, he published *A Digest of the Law of England with Reference to the Conflict of Laws*. Unlike American conflicts scholarship, which primarily concerns myriad and troublesome problems of jurisdiction among the states, the study of the conflict of laws in England is a branch of private international law — largely a matter of the enforceability of

THE DARK: A CRITICISM OF THE PRINCIPLES OF HOME RULE AS ILLUSTRATED BY THE BILL OF 1893 (1893); A FOOL'S PARADISE (1913).

24. See *Ireland and Victoria*, 49 CONTEMP. REV. 169 (1886); *The Duties of Unionists*, in THE CASE FOR THE UNION: A COLLECTION OF SPEECHES, PAMPHLETS, AND LEAFLETS ON HOME RULE FOR IRELAND (3d ser. 1887); *The Defense of the Union*, 61 CONTEMP. REV. 314 (1892); *The Protest of Irish Protestantism*, 62 CONTEMP. REV. 1 (1892); *The Unionist Outlook*, in 3 PUBLICATIONS OF THE IRISH UNIONIST ALLIANCE 463 (1894); *Unionists and the House of Lords*, 24 NATL. REV. 690 (1895); *The Due Representation of England*, 38 NATL. REV. 359 (1901); *To Unionists and Imperialists*, 84 CONTEMP. REV. 305 (1903); *Can Unionists Support a Home Rule Government?*, 89 CONTEMP. REV. 247 (1906); *Facts and Thoughts for Unionists*, 75 THE NINETEENTH CENTURY AND AFTER 717 (1914); *The Appeal to the Nation*, 75 THE NINETEENTH CENTURY AND AFTER 945 (1914); *Is It Wise to Establish Home Rule Before the End of the War?*, 82 THE NINETEENTH CENTURY AND AFTER 1 (1917); *Ireland as a "Dominion,"* 82 THE NINETEENTH CENTURY AND AFTER 700 (1917).

25. Compare *The Referendum*, 23 NATL. REV. 65 (1894) and *The Referendum and Its Critics*, 212 Q. REV. 538 (1910) with R. RAIT, *supra* note 5, at 122. The referendum did not in fact become a recognized part of English constitutional law until 1975 when it was used to authorize British accession to the European Economic Community. See Referendum Act, 1975, c. 33.

26. See LAW AND PUBLIC OPINION, at xxxv-xxxix, quoted in M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 98-99 (1979).

27. 8 Edw. 7, c. 40.

28. 1 & 2 Geo. 5, c. 55.

29. See text at notes 44-46 *infra*.

30. See The Representation of the People Act, 1918, 7 & 8 Geo. 5, c. 64 (enfranchising women over 30). For Dicey's explanation of his volte-face on this issue, linking it with his opposition to Home Rule, see LETTERS TO A FRIEND ON VOTES FOR WOMEN 3-4 (1908), quoted at p. 217.

foreign contracts and the validity of foreign marriages. Within this narrow field Dicey made his greatest mark. His talent for extracting principles from cases and then arranging them systematically was well-suited to the subject matter. Among lawyers the book was an immediate success. Cosgrove describes it as Dicey's "foremost contribution," the book "on which his reputation as a legal scholar rests" (p. 163). But however venerated in legal circles, *Conflict of Laws* understandably did not catch the public eye. *Law and Public Opinion* did.

When, at the close of the nineteenth century, Dicey ventured into legal history, he located the motive power of legal change in public opinion. In his *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, delivered at Harvard in 1898 and published in 1905, Dicey essayed a legal history of his own century. The undertaking was ambitious in scope: to place legal developments in the context of social evolution during an eventful hundred years. About the time he began working on *Law and Public Opinion*, a constellation of brilliant scholars was examining the intellectual underpinnings of the great achievements of the nineteenth century. Edwin Cannan dissected classical economic theory;³¹ Graham Wallas studied the psychological factors in politics;³² Elie Halévy and Leslie Stephen (Dicey's cousin) investigated utilitarianism.³³ Like his contemporaries, Dicey looked to ideas for the secret of change in his discipline. Unlike them, he imposed a frame of reference on his discipline that has endured into the late twentieth century. While explanations of historical change in terms of changing ideas have been displaced by newer theories, the intellectual history that Dicey talked about at the end of the nineteenth century continues to shape English legal historiography.³⁴

31. See E. CANNAN, A HISTORY OF THE THEORIES OF PRODUCTION & DISTRIBUTION IN ENGLISH POLITICAL ECONOMY FROM 1776 TO 1848 (1898); A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (E. Cannan ed. 1904) (the standard edition).

32. See G. WALLAS, HUMAN NATURE IN POLITICS (1909); G. WALLAS, THE LIFE OF FRANCIS PLACE 1771-1854 (1898).

33. E. HALÉVY, LA FORMATION DU RADICALISME PHILOSOPHIQUE (1904); E. HALÉVY, THOMAS HODGSKIN (1903); L. STEPHEN, THE ENGLISH UTILITARIANS (1900).

34. See, e.g., A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 333-39 (1966); 13 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 41-155 (1952); LAW AND OPINION IN ENGLAND IN THE TWENTIETH CENTURY (M. Ginsberg ed. 1959); A. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES, 1750-1950, at 13-15, 224-25, 242-44, 333-34, 408-10 (1980); R. STEVENS, LAW AND POLITICS (1978) (reviewed by Orth, 54 TUL. L. REV. 798 (1980)); Finer, *The Transmission of Benthamite Ideas, 1820-50*, in STUDIES IN THE GROWTH OF NINETEENTH-CENTURY GOVERNMENT 11 (G. Sutherland ed. 1972). Echoes of the Diceyan interpretation may even be detected in America. *Compare* LAW AND PUBLIC OPINION 64 (Benthamism "has swept away restraints on individual energy") with J. HURST, LAW AND THE

In examining his own century, Dicey perceived "three periods, during each of which a different current or stream of opinion was predominant, and in the main governed the development of the law of England."³⁵ These great periods were, first, the period of "Blackstonian complacency and old Toryism," ending about 1825; second, the period of "Benthamism or individualism," ending about 1870; and third, the period of collectivism, which still dominated England when Dicey made his final reflections on the subject in 1914.³⁶ Dicey's scheme was not wholly original. Just as Dicey borrowed the concept of the rule of law from Hearn, so also he borrowed from another the idea of the crucial importance of Benthamism. Although Cosgrove rightly stresses the former, he unaccountably overlooks the latter debt. In 1875, Roland K. Wilson published a short volume on *The History of Modern English Law*.³⁷ Finding no general study of the subject since Blackstone's *Commentaries* a century earlier, Wilson sensibly began his work with a sketch of "English law in the time of Blackstone."³⁸ He then searched for a convenient way of organizing later developments. Perhaps taking a cue from Henry Maine,³⁹ Wilson attributed "legal changes since 1825"⁴⁰ to the influence of Jeremy Bentham. Dicey seems to have followed Wilson's lead:⁴¹ Dicey's first two great periods were dominated by Blackstone and Bentham; the delay in shifting from one to another was attributed to "old Toryism." Dicey's only original contribution to the tripartite scheme he made famous was his discovery of collectivism. At first, he was uncertain when to date the dawn of this new age. At Harvard he apparently described the little-known Molestation of Workmen Act of 1859⁴² as the morning star of collectivism; however, when he prepared *Law and Public Opinion* for the press, he moved

CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 7 (1956) ("the release of individual creative energy was the dominant value") and L. FRIEDMAN, A HISTORY OF AMERICAN LAW 157 (1973) ("the first half of the [nineteenth] century was a period of . . . the release of creative energy").

35. A. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 62 (2d ed. 1914).

36. *Id.* at Introduction to the Second Edition *passim*.

37. R. WILSON, THE HISTORY OF MODERN ENGLISH LAW (1875).

38. *Id.* at 1-132.

39. See H. MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 397 (1875) ("I do not know a single law-reform effected since Bentham's day which cannot be traced to his influence," used as an epigraph by Wilson). Cf. BENTHAMIANA: SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM 350-51 (J. Burton ed. 1843) (list of reforms attributed to Bentham).

40. R. WILSON, *supra* note 37, at 171-276.

41. See LAW AND PUBLIC OPINION, *supra* note 7, at ix.

42. 22 Vict., c. 34.

the date to around 1870.⁴³ This background, of course, only reinforces Cosgrove's assessment of the book not as a pure history, but rather as a picture of "the Victorian world as Dicey remembered it, indeed as he hoped it had been, because that portrait was crucial to his 1905 politics" (p. 192).

Dicey did not sympathize with the public opinion that he denominated collectivist. By the time he wrote *The Law of the Constitution*, the Reform Acts had put the power of Parliament in hands that he could not trust. In particular, he disliked the Trade Disputes Act of 1906,⁴⁴ which exempted trade unions from liability in tort. Like the author of the article in the current *Oxford Companion to Law*, he deplored what he saw as the politicians' subservience to the public opinion favoring the trade unions: "An enactment which frees trade unions from the *rule of equal law* stimulates among workmen the fatal delusion that workmen should aim at the attainment, not of equality, but of privilege."⁴⁵ Implicitly, Dicey was adding to his earlier definition of the rule of law the notion of uniformity, *i.e.*, that everyone's legal rights and liabilities ought to be the same.⁴⁶ Measured after the fact by this standard, the Trade Disputes Act of 1906 was found wanting, just as, for reasons that also go unexpressed,⁴⁷ the modern Labor Party is found wanting. The rule of law, it seems, is a counter in the political game as well as a chapter heading in constitutional law.

Although the phrase "the rule of law" is used in America, where it is the equivalent of "due process of law,"⁴⁸ its primary role is in the English context. The rule of law is meant to impose a limit on

43. See Orth, *English Law and Striking Workmen: The Molestation of Workmen Act, 1859*, 2 J. LEGAL HIST. 238, 253 (1981).

44. 6 Edw. 7, c. 47.

45. LAW AND PUBLIC OPINION at xlvii (emphasis added). See also 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 446 (1923) ("It is not till these last days that Parliament itself has allowed exemptions from the *rule of law* in favour of the supposed indefeasible rights of turbulent Trades Unions, conscientious churchmen, and conscientious objectors, to the great detriment of the peace and stability of the state.") (emphasis added).

46. I cannot accept Cosgrove's assertion that Dicey viewed the Trade Disputes Act of 1906 as a violation of "the rule of law as he had popularized it." P. 207 (emphasis added). Later, also in the heat of political passion, Dicey enlarged the concept still more. In 1909 he called on Unionists to "pledge themselves to restore the rule of law in Ireland," quoted at p. 232, by which he meant simply that they should promise to reestablish law and order in that troubled island.

47. Although the author of *The Oxford Companion to Law* repeats Dicey's definition of the rule of law, he is content himself to describe it as "a concept of the utmost importance but having no defined, nor readily definable, content." D. WALKER, *supra* note 1, at 1093.

48. See G. GILMORE, THE AGES OF AMERICAN LAW 105-07 (1977); *Symposium, Post-War Thinking About the Rule of Law*, 59 MICH. L. REV. 485 (1961); Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145-56 (1958).

the power of Parliament, or at least to provide a standard by which the exercise of parliamentary power may be evaluated. The problem is peculiarly English. When, in the early seventeenth century, the Stuart monarchs made a bid for absolute power based on the French model, their opponents searched for some counterbalancing English institution. Not unnaturally, the great lawyer Sir Edward Coke sought to locate the limits on royal power in the common law, that is, as a practical matter, in the courts. Despite the facts that law is normally an instrument of government power, not of restraint, and that English judges are political appointees, Coke sought to use certain powerful medieval concepts, such as natural law and customary right, to limit the sovereign; he counted on a cadre of resolute and well-connected judges, led by himself, to stand up to the king. As things turned out, of course, the courts were frail reeds. The only institution that was a match for the crown was Parliament. It finally proved itself superior both on the bloody battlefields of the English Civil War and in the Glorious Revolution of 1688. In the middle of the eighteenth century Blackstone, Dicey's predecessor in the Vinerian Chair, made it plain that he understood the significance of the victory. One Parliament could do anything, except bind a later Parliament.⁴⁹

49. See 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90 (1765).

As a token of his recognition that the medieval verities were gone, Blackstone took up a hoary problem of English constitutional theory — whether a man can be a judge in his own case. The issue is, in fact, not whether a man can decide his own case, but whether such a decision-maker can appropriately be labeled a “judge,” in the legal sense of that word. Medieval thinking on the subject was summed up in the seventeenth century by Lord Coke:

[I]f any Act of Parliament gives to any to hold, or to have conusans [*sic*] of all manner of pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is a part; for, as hath been said, *iniquum est aliquem suae rei esse judicem* [it is wrong for a man to be a judge in his own case].

Dr. Bonham's Case, 8 Co. Rep. 107a, 118b, 77 Eng. Rep. 638, 654 (1610). See Thorne, *Dr. Bonham's Case*, 54 LAW Q. REV. 543 (1938). In the eighteenth century, Blackstone agreed that it was “unreasonable that any man should determine his own quarrel,” 1 W. BLACKSTONE, *supra*, at 91 (footnote omitted), and therefore advised contemporary judges to construe a general grant (such as that supposed by Coke) to exclude that result; but he fully recognized the logic of parliamentary supremacy:

[I]f we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

Id. See J. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 189-91 (1955). Blackstone could, however, afford to be logical. The aristocrats who ruled England from 1688 to 1832 were unlikely to do anything that would outrage him. His trust, in other words, was in men, not laws. Blackstone's American contemporaries had, of course, more reason to fear the class in power. The Constitution of 1787 was meant to prevent the powerful from disregarding the principles dear to the Founding Fathers. On the question of whether a man can be a judge in his own case, for example, the Supreme Court has found a negative answer in the Constitution. *Cf.* Connally v. Georgia, 429 U.S. 245 (1977) (justice of the peace paid a fee if he issued a search warrant but nothing if he denied the application); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (mayor responsible for village finances and mayor's

In terms reminiscent of Coke's, Dicey sought to limit Parliament's power. Ironically, his arguments have appealed to more than the turncoat Liberals in Edwardian England; they have even earned praise from a modern Marxist historian. In his recent study of the Black Act,⁵⁰ the most sanguinary part of England's bloody criminal code, E.P. Thompson pledged his allegiance: "The rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good."⁵¹ Less theoretically, Thompson used the concept of the rule of law to explain what for him is a historical conundrum: Why did not "the rulers of England," the group in which Blackstone put his trust, resort to force to maintain their grasp on power? Why, in other words, did Dicey ever have to face the unpalatable prospect of power in working-class hands? The answer that Thompson has offered is the rule of law. When the Industrial Revolution disrupted the "equilibrium of class forces" that maintained the aristocracy in power, "the rulers of England were faced with alarming alternatives. They could either dispense with the rule of law, dismantle their elaborate constitutional structures, countermand their own rhetoric and exercise power by force; or they could submit to their own rules and surrender their hegemony."⁵² Thompson argued that they took "halting steps" in the direction of the first alternative, at least insofar as they promulgated, among other repressive legislation, the Combination Acts of 1799 and 1800,⁵³ which outlawed trade unions. "But in the end," Thompson conceded, "rather than shatter their own self-image and repudiate 150 years of constitutional legality, they surrendered to the law."⁵⁴ The Combination Laws were repealed in 1824⁵⁵ by the political skills of Francis Place.⁵⁶ Jeremy Bentham and the rule of law had apparently

court provided a substantial portion of village funds through fines, forfeitures, costs, and fees); *Tumey v. Ohio*, 273 U.S. 510 (1927) (due process violated where mayor before whom defendant was compelled to stand trial for traffic offenses received fees and costs levied against violators).

50. 9 Geo. I, c. 22 (1722).

51. E. THOMPSON, *WHIGS AND HUNTERS* 266 (1975). Although Thompson may here be using "the rule of law" in a broader sense than that used elsewhere, he would seem to subscribe to the narrower view as well. See E. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 80, 83 (1964) (John Wilkes could defy the government because "[t]here was no *droit administratif*"; "the rule of law was the distinguishing inheritance of the 'free-born Englishman'").

52. E. THOMPSON, *WHIGS AND HUNTERS*, *supra* note 51, at 269.

53. 39 Geo. 3, c. 81 (1799); 39, 40 Geo. 3, c. 106 (1800).

54. E. THOMPSON, *WHIGS AND HUNTERS*, *supra* note 51, at 269.

55. 5 Geo. 4, c. 95 (1824). See also 6 Geo. 4, c. 129 (1825).

56. See G. WALLAS, *LIFE OF FRANCIS PLACE*, *supra* note 32, at 197-240.

triumphed.⁵⁷

Thompson's excitement about the rule of law has not gone uncriticized. Morton J. Horwitz, in his review of Thompson's book, posed a seditious question: Is the rule of law an unqualified human good?⁵⁸ Horwitz expressed surprise that "a Man of the Left" could answer in the affirmative:

It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality — a not inconsiderable virtue — but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations It may be true that restraint on power (and simultaneously on its benevolent exercise) is about all that we can hope to accomplish in this world. But we should never forget that a "legalist" consciousness that excludes "result-oriented" jurisprudence as contrary to the rule of law also inevitably discourages the pursuit of substantive justice.⁵⁹

Power, of course, is the key. When the "right people" ruled, Blackstone had no need for the rule of law. When the working class was powerless, Thompson was relieved when the rulers of England surrendered to the law. When the trade unions could work their will in Parliament, Dicey was alarmed for the safety of the rule of law, and so is the author of *The Oxford Companion to Law* today.

57. But see Orth, *The British Trade Union Acts of 1824 and 1825: Dicey and the Relation Between Law and Opinion*, 5 *ANGLO-AM. L. REV.* 131 (1976); Orth, *The Legal Status of English Trade Unions, 1799-1871*, in *LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY* 195 (A. Harding ed. 1980).

58. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *YALE L.J.* 561 (1977).

59. *Id.* at 566. See also Diamond, *The Rule of Law Versus the Order of Custom*, in *THE RULE OF LAW* 115 (R. Wolff ed. 1971) (imposition of law diminishes ability of custom to generate spontaneous order).