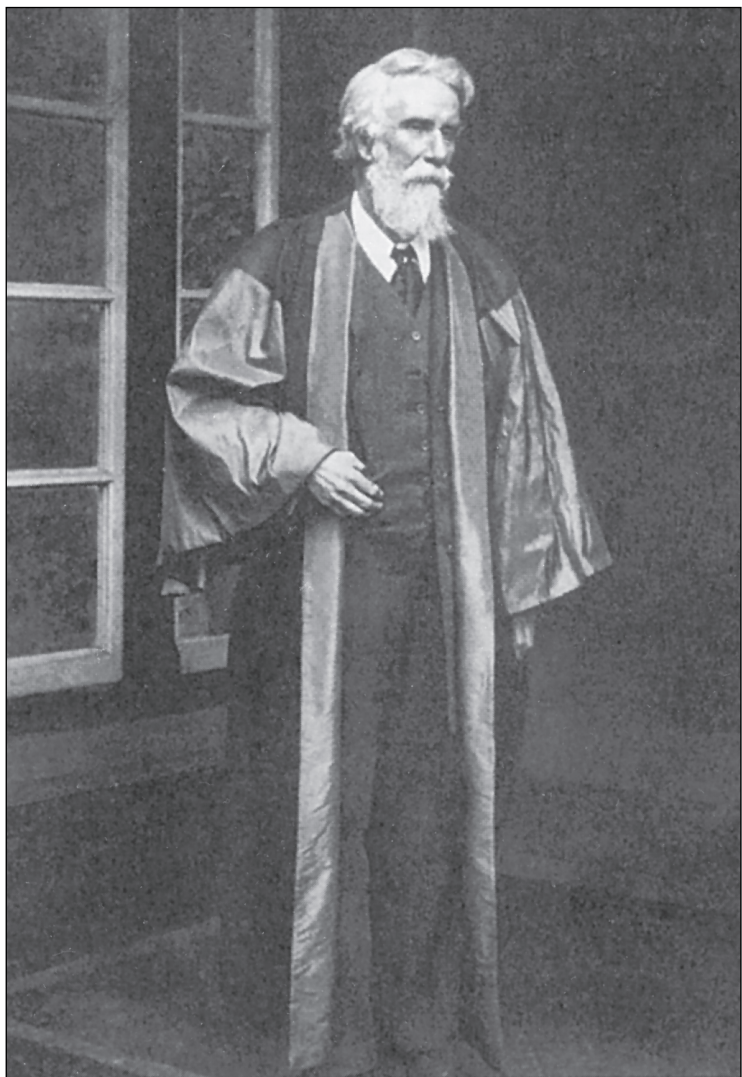


*Lectures on the Relation between Law and Public Opinion
in England during the Nineteenth Century*

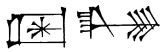


A. V. DICEY

*Lectures on the Relation between
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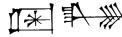
BY A. V. DICEY

Edited and with an Introduction by Richard VandeWetering



Liberty Fund INDIANAPOLIS

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

New introduction, editor’s note, new annotations, translations,
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The Liberty Fund edition is based on the 1917 printing of the second edition, published by Macmillan in 1914.

Frontispiece: Courtesy of Richard A. Cosgrove

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Contents

Introduction to the Liberty Fund Edition, by Richard VandeWetering	xiii
Editor's Note	xxiii
Preface to the First Edition	xxv
Preface to the Second Edition	xxix

LECTURE I. Relation between Law and Public Opinion

Law not always the result of public opinion	3
(i.) Law may be the result of custom	5
(ii.) Opinion governing law may not be public opinion	5
(iii.) Want of legislative organ representing public opinion	6
Law in modern England the result of public opinion	8
How far law-making public opinion is always the opinion of the sovereign power	9
Objection considered, that in legislation men are guided not by their opinion but by their interest	10

LECTURE II. Characteristics of Law-making Opinion in England

Precise scope of lectures	14
Characteristics of English legislative opinion	15
(1) Existence at any given time of predominant current of legislative opinion	16

(2) Legislative opinion may originate with thinker or school of thinkers	17
(3) Development of legislative opinion in England slow and continuous	21
Slowness	21
Continuity	24
(4) Dominant legislative opinion never despotic	27
(5) Laws create legislative opinion	30

LECTURE III. *Democracy and Legislation*

Does not advance of democracy explain development of English law since 1800?	36
The plausibility of idea suggested by question	36
Advance of democracy only to slight extent explanation of development of English law	37
Delusion that democratic form of government always favours same kind of legislation	40

LECTURE IV. *The Three Main Currents of Public Opinion*

Three main currents of legislative opinion corresponding to three periods	45
I. The period of old Toryism or legislative quiescence (1800–1830)	45
II. Period of Benthamism or Individualism (1825–1870)	46
III. Period of Collectivism (1865–1900)	46
Observations on the three different currents of opinion	47
(i.) Number of years during which each current of opinion predominant	47
(ii.) Different relation of each current of opinion to legislation	48
(iii.) Peculiar difficulty presented by examination into character and influence of Collectivism	48

LECTURE V. *The Period of Old Toryism or Legislative Quiescence*

(A) State of Opinion	51
<i>Optimism—</i>	
Blackstone—Burke—Paley—Goldsmith	
<i>Reaction—</i>	
Eldon	
(B) Absence of changes in law	60
<i>Abuses</i>	62
<i>Legal fictions and survivals</i>	66
(C) Why considerable changes took place during period of quiescence	68
<i>Reactionary laws</i>	68
Combination Act, 1800	
The Six Acts, 1819	
<i>Reforms</i>	75
Act of Union with Ireland	
Humanitarian reforms—Health and Morals Act, 1802	
(D) Close of period of quiescence	80
(1) Change in social conditions of England	81
(2) Incongruity between social condition and legal institutions of England	83
(3) Lapse of time	88
(4) Existence of Benthamism	89

LECTURE VI. *The Period of Benthamism or Individualism*

Bentham's genius	91
(A) Benthamite ideas as to the reform of the law	96
<i>The principles of law reform</i>	96
I. Legislation is a science	97
II. The right aim of legislation is the carrying out of the principle of utility	98
III. Every person is in the main the best judge of his own happiness	104

<i>Corollaries—</i>	
(i.) Extension of sphere of contract	107
(ii.) Every man to count for one and no man for more than one	113
<i>The method of law reform</i>	117
(B) The acceptance of Benthamism	119
Why did Benthamism obtain acceptance?	120
<i>General answer</i>	120
Benthamism furnished reformers with ideal and programme	
<i>Special answers</i>	122
Benthamism met wants of day	
Utilitarianism the creed of the time	
Benthamism fell in with English Conservatism	
Benthamism is only systematised Individualism	
To what extent did Benthamism obtain acceptance?	126
<i>Answer</i>	126
Acceptance all but universal	
(C) Trend and tendency of Benthamite legislation	131
The congruity of Benthamite legislation; its objects	131
<i>Transference of political power to middle class</i>	131
Parliamentary Reform Act, 1832	
Municipal Reform Act, 1836	
<i>Humanitarianism</i>	133
Mitigation of criminal law	
Prohibition of cruelty to animals	
Emancipation of slaves	
<i>Extension of individual liberty</i>	135
Freedom of contract	
Combination Acts, 1824, 1825	
Companies Acts, 1856–1862	
Freedom in dealing with property in land	
Poor Law Act, 1834	
Freedom of opinion or discussion	
Extension of Toleration Act to Unitarians, 1813	
Roman Catholic Relief Act, 1829	
Oaths Acts	

<i>Adequate protection of rights</i>	146
Evidence Acts, 1833–1898	
County Courts Acts, 1846–1888	
Procedure Acts, 1851–1862	
Judicature Acts, 1873–1894	
Benthamite reform an illustration of influence of opinion	149

LECTURE VII. *The Growth of Collectivism*

Opposition even at era of Reform Act between Individualism and Collectivism	150
Transition from Individualism of 1832 to Collectivism of 1870–1900	154
Explanation of change to be found not in advance of democracy, but in following conditions	154
<i>Tory philanthropy and factory movement</i>	156
Movement originally fruit of humanitarianism	
Movement guided by Tory leaders	
Southey—Oastler—Sadler—Lord Shaftesbury	
Movement the first battlefield of individualism and collectivism	
Movement introduced socialism into law of England	
<i>Changed attitude of working classes</i>	170
<i>Modification in economic and social beliefs</i>	172
<i>Characteristics of modern commerce</i>	174
<i>Introduction of household suffrage</i>	176

LECTURE VIII. *Period of Collectivism*

(A) Principles of Collectivism	183
Fundamental assumption—Faith in benefit to be derived from State intervention	183
<i>Extension of idea and range of protection</i>	184
Workmen's Compensation Acts	
Agricultural Holdings Acts	

Restriction of labour of women in factories	
Adulteration of Food Acts	
<i>Restrictions on freedom of contract</i>	186
Irish Land Acts	
Agricultural Holdings Acts	
<i>Preference for collective action</i>	188
Combination Act, 1875	
Modern Arbitration Acts	
<i>Equalisation of advantages</i>	195
Elementary education	
Employers' liability	
Municipal trading	
(B) Trend of collectivist legislation	204
Factory Acts	
Public Health Acts	
Housing of Working Classes Acts and Allotments Acts	
Change in ideas as to poor law	
Collectivist Bills of 1904	
Legislation of British colonies	
Reflections on course of law and opinion from 1830	

LECTURE IX. *The Debt of Collectivism to Benthamism*

Modern socialism inherits from Benthamism:	
(1) Legislative principle—the principle of utility	215
(2) Legislative instrument: use of parliamentary sovereignty	216
(3) Legislative tendency: extension and improvement of governmental mechanism	217

LECTURE X. *Counter-Currents and Cross-Currents of Legislative Opinion*

Effect of counter-current already sufficiently explained	221
Effect of cross-current best understood from history of ecclesiastical legislation, 1830–1900	222

(A) Course of legislative opinion with regard to ecclesiastical legislation	222
Apparent weakness of Church establishment in 1832, and anticipation of policy of comprehension or of disestablishment	222
The actual policy of conservatism and concession and the reasons for its adoption	225
Liberals without any ecclesiastical policy	226
Strength of Church	231
(B) Actual course of ecclesiastical legislation	238
Concessions to liberalism tempered by conservatism, <i>i.e.</i> , deference to ecclesiastical opinion	238
<i>As to internal reform</i>	238
Ecclesiastical Commission	
<i>As to external reform</i>	244
Marriage Law	
Divorce Act, 1857	
Burial Law	
University Tests	
Tithes and Church Rates	
Consideration of objections to above view of ecclesiastical legislation	251
Attempts to widen foundations of Church	
Disestablishment of Irish Church	
Survey of ecclesiastical legislation	254

LECTURE XI. *Judicial Legislation*

I. Special characteristics of judicial legislation in relation to public opinion	257
(i.) Judicial legislation logical	259
(ii.) Judicial legislation aims at certainty rather than amendment of law	260
(iii.) Difference between judicial and parliamentary ideas of expediency	261

II. Effect of judge-made law on parliamentary legislation	264
Law as to property of married women	264
Comparison between judicial and parliamentary legislation	281

LECTURE XII. *Relation between Legislative Opinion and
General Public Opinion*

I. Analogous changes of opinion in different spheres of thought and in convictions of individuals	284
<i>Different Spheres—</i>	
Theology	284
Politics	291
Political economy and jurisprudence	293
<i>Convictions of Individuals—</i>	
Harriet Martineau	295
Charles Dickens	297
John Mill	300
II. Dependence of legislative opinion on general tendencies of English thought	307
Freedom of discussion and the disintegration of beliefs	307
Apotheosis of instinct	318
Historical method	324
All these tendencies have weakened authority of Benthamism	329

APPENDIX

NOTE I. The Right of Association	331
" II. The Ecclesiastical Commission	340
" III. University Tests	342
" IV. Judge-made Law	346
" V. Proposed Collectivist Legislation of 1905	356

Introduction to the Second Edition	359
------------------------------------	-----

Index	403
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Introduction to the Liberty Fund Edition

“Law + Opinion” is the best thing I have ever written + much more mature than the “Law of the Constitution.”¹

IN THE LAST DECADE of his life Albert Dicey repeatedly claimed that *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* was his “best” and most “mature” book.² This was peculiar coming from the author of the famous and authoritative *The Law of the Constitution*. Why did he favor *Law and Opinion*? It was a mature work in several senses; the product of great age, of a long process, and of long-held beliefs. It articulated the beliefs and fears of a typical intelligent English Edwardian Benthamite Liberal responding to the apostasies of Gladstonian Liberals and to the socialism of J. S. Mill, Asquith’s Liberals, and the British Labour Party. *Law and Opinion* therefore also has an elegiac aspect: a mature writer facing the displacement of his cherished theories by irresponsible new experiments.

Albert Venn Dicey (1835–1922) wrote *Law and Opinion* near the end of a long and productive life. In 1905 he was seventy, and by the time of the second edition, in 1914, he was seventy-nine. Dicey’s life spanned the Victorian era, and he knew personally many of the important Liberal thinkers in English politics and letters. Dicey came from a typical Liberal family. His father, Thomas Edward Dicey, was a Whig reformer and the editor of the family newspaper, the *Northampton Mercury*. His mother, Anne Mary

1. A. V. Dicey, Macmillan Papers, British Library, Add Mss 55085, July 1, 1912.

2. Ibid., see, for example, March 23, 1917, July 4, 1917, and August 27, 1920.

Stephen, came from a leading Evangelical family.³ While Dicey was not particularly religious, in either a spiritual or a dogmatic sense, he embraced the humanitarian mission of the Evangelicals.⁴ Dicey noted that Benthamite Liberals and Evangelicals were the leading forces of reform in nineteenth-century England. Both groups believed in the individual's duty to promote reform (78).⁵ Dicey himself accepted these duties.

Dicey's experiences when he went to Oxford in 1854 reinforced these beliefs. He was one of a generation of earnest, hardworking young Liberals who excelled in their studies. They gravitated to John Stuart Mill's writings. Mill's *Political Economy* (several editions starting in 1848) and *On Liberty* (1859) dominated political discussion and, in Dicey's view, promoted a rigorous Liberal Benthamism (361, 363, 130, 275). Some of the most talented joined the Old Mortality Society, an undergraduate discussion group Dicey helped found in 1856. These young men were interested in politics and reform, and many were influential in English politics and letters for the next half century.⁶ Dicey developed some of his most important friendships in this group, including with James Bryce, who was later a Liberal M.P., cabinet minister, ambassador to the United States, and author of *The American Commonwealth*. As Richard Cosgrove notes, Dicey's basic beliefs were in place by the time he left Oxford in 1861, and to them he remained true.⁷

Dicey spent twenty years as a journalist, a practicing lawyer, and as a political hopeful. He contributed to *Essays on Reform* (1867), a prominent Liberal project.⁸ He also wrote several legal texts that helped gain for him in 1882 an appointment to the position of Vinerian Professor of English

3. Robert S. Rait, *Memorials of Albert Venn Dicey* (London: Macmillan, 1925), 11–13. Dicey was related to Leslie Stephen.

4. Richard Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill: University of North Carolina Press, 1980), 6. In passing, Dicey mentioned original sin (393), but since he was not a particularly devout Christian, we are better off interpreting human nature in Benthamite terms—that is, that individuals universally pursued pleasure and sought to avoid pain.

5. *Law and Opinion*; page numbers cited within the text of this introduction refer to this volume.

6. Christopher Harvie, *The Lights of Liberalism* (London: Allen Lane, 1976), 13, 64–67.

7. Cosgrove, *Rule of Law*, 22.

8. Harvie, *Lights of Liberalism*, 131–32.

Law at Oxford. This chair had once been held by Sir William Blackstone, who features prominently in *Law and Opinion*. Dicey became famous as a legal scholar and for the book *Introduction to the Study of the Law of the Constitution* (1885). Dicey was pleased with the impact of the book. It was cited in Parliament by Gladstone within a year of its publication and was used as an “educational manual” in universities.⁹

In a 1911 letter, Dicey identified himself as belonging to the “Mid-Victorian” generation.¹⁰ He was certainly Victorian in his work ethic. I do not have a comprehensive list of books and articles, but Cosgrove has a bibliography of five pages, and this does not list the hundreds of contributions Dicey made to the *Times*, the *Nation*, and the *Mercury*.¹¹ The second edition of *Law and Opinion* was published when Dicey was seventy-nine, but it was *not* his last book. He produced a 1915 book on World War I, another in 1917 on Wordsworth, and his final book in 1920 with Robert S. Rait on the Scottish-English Union. What made this all the more remarkable was that Dicey had had to cope with physical infirmities from his youth that left him weak and unable to write for any length of time.¹²

By the time of the publication of the second edition of *Law and Opinion*, Dicey had been working on these lectures for seventeen years. After finishing writing the useful but dense 1896 legal text *A Digest of the Law of England with Reference to the Conflict of Laws*, Dicey wished to pursue a more interesting area of research.¹³ He considered writing on the spirit of constitutions, but it was a late 1897 invitation from Charles Eliot (the president of Harvard) to deliver a set of lectures that prompted Dicey to think in terms of law and public opinion.¹⁴ He had been interested in the topic of public opinion since 1848, when he wondered why England had not

9. Roger E. Michener, foreword to A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982), xi; Macmillan Papers, Add Mss 55084, December 23, 1907.

10. Bryce Papers, Bodleian Library, 3 folio 100, Dicey to Bryce, August 11, 1911.

11. Cosgrove, *Rule of Law*, 302–7.

12. Rait, *Memorials*, 6, 18.

13. Cosgrove, *Rule of Law*, 169–71.

14. Bryce Papers, 2 folio 214, Dicey to Bryce, August 21, 1895, and 2 folio 240, Dicey to Bryce, March 16, 1897, and 2 folio 249, Dicey to Bryce, November 24, 1897.

been tempted by the continental revolutions.¹⁵ However, in 1897 his interest was prompted by some worrying trends involving English public opinion and legislation. As a portion of the working class had obtained political power (especially after the expansion of the electorate by the 1885 Reform Bill), collectivist, (or socialist) ideas had become politically prominent. Worse, Dicey felt that the Liberals had not remained true to the Benthamite liberalism that Dicey had adopted at Oxford. The liberal hero Mill declared himself a Socialist just before his death in 1873. During the 1880s and 1890s New Liberals accepted collectivist policies as solutions to political problems. Further, in the 1880s Dicey became estranged from even more Liberals when the Gladstonian wing of the Liberal Party embraced Home Rule to deal with Irish unrest. *Law and Opinion* was in part Dicey's attempt to understand these changes.

Dicey welcomed the chance to visit the United States. He had visited in 1870 with James Bryce and counted it as a formative event, opening his eyes to a non-English political system, without which *Law and Opinion* would never have been written.¹⁶ During October and November 1898 Dicey delivered eleven lectures at Harvard under the title "Development of English Law during the Nineteenth Century in connection with the Course of Public Opinion in England."¹⁷ He thought they went well, despite the large room and large audience.¹⁸ Other accounts were not flattering. Even before the series started, Dicey noted some difficulties with his voice.¹⁹ Additional problems could be related to the content of the lectures. Dicey could be critical of the American political system (for example, he was not a fan of federalism nor of a factional or party-based democracy), and his lectures were so Anglo-centric and sometimes self-congratulatory that it is easy to imagine an American audience becoming

15. Rait, *Memorials*, 1–2. Dicey specifically mentioned several authors who kindled his interest in public opinion: Mark Pattison's contribution on English religious thought to *Essays and Reviews* (1861), W. E. H. Lecky's *A History of the Rise and Influence of the Spirit of Rationalism* (1865), and, "above all," his cousin Leslie Stephen's *English Thought in the Eighteenth Century* (1876) and *The English Utilitarians* (1900).

16. Bryce Papers, 3 folio 49, Dicey to Bryce, February 12, 1907.

17. Rait, *Memorials*, 145.

18. *Ibid.*, 151, 159.

19. Bryce Papers, 2 folio 266, Dicey to Bryce, September 23, 1898.

impatient with him.²⁰ Trowbridge Ford notes that the audiences were not impressed by Dicey, and the lecture series petered out.²¹

Upon his return to Oxford, Dicey gave several versions of these lectures to his law students and in April 1903 sent a proposal to Macmillan, the London publishers, to publish them, including a draft of the first six lectures. Dicey's *Law of the Constitution* was a reliable seller for Macmillan, and Frederick Macmillan quickly responded affirmatively, agreeing to pay £300 for an edition of 3000.²² Dicey promised the manuscript for October 1903, then April 1904, and then October 1904. Delays occurred because of the weight of Dicey's workload, but also because he consulted friends and experts for various parts of the book—for example, Bryce helped Dicey on the discussion of the definition of democracy.²³ The book was published in May 1905.

Dicey was pleased with the reception of *Law and Opinion* in both England and the United States. It was translated into French in 1906, and Dicey noted that it was the basis for several examination questions at Oxford.²⁴ By 1912 the first edition had nearly sold out, and Macmillan was willing to publish another edition. Dicey—now in his late seventies—did not feel capable of doing a complete revision (*Law and the Constitution* also needed doing) and therefore elected simply to add a new introduction to the book.²⁵ The new introduction replaced his very short Note V, “Proposed Collectivist Legislation of 1905,” found in the appendix of the first edition. Again, Dicey underwent the consultations with friends and experts, the promises made to editors and the deadlines missed, and the

20. Please note that Dicey chose to say England rather than Britain. Dicey's vision of England would annoy many. See, for example, where Dicey suggested that England, unlike other countries, lacked emotional historical hatreds (329), or where he defined imperialism as the policy of maintaining unity (319n63).

21. Trowbridge H. Ford, *Albert Venn Dicey: The Man and His Times* (Chichester: Barry Rose, 1985), 246–47.

22. Macmillan Papers, Add Mss 55084, April 3, 1903, April 8, 1903: amazingly, Dicey sent his only copy of the manuscript to the publisher.

23. Bryce Papers, 2 folio 173, Dicey to Bryce, a typewritten letter dated Thursday, August 25, 94, but obviously 1904.

24. Macmillan Papers, Add Mss 55084, May 14, 1906, June 26, 1906, and August 17, 1908.

25. Ibid., Add Mss 55085, July 1, 1912.

agony of writing, The book was basically finished in April 1914. The consciousness of his advancing age was ever present, even in his humorous desire to be paid at publication rather than via royalties that would only go to his executors.²⁶

It is not outlandish to consider *Law and Opinion* as Dicey's mature and final testament.²⁷ The book may be divided into three parts. Lectures I to III define "public opinion." Lectures IV to IX are a history of public opinion in nineteenth-century England. Lectures X to XII and the appendices are generally dedicated to specific types of legislation. We will concentrate on the first two parts.

The purpose of the first three lectures is to define the term "public opinion" and to discuss its importance in England. Dicey defined the term "in reference to legislation."

This term, when used in reference to legislation, is merely a short way of describing the belief or conviction prevalent in a given society that particular laws are beneficial, and therefore ought to be maintained, or that they are harmful, and therefore ought to be modified or repealed. And the assertion that public opinion governs legislation in a particular country, means that laws are there maintained or repealed in accordance with the opinion or wishes of its inhabitants (4).

He briefly tells us what did *not* count as public opinion. It is not custom or habit; neither is public opinion the same as the set of ideas held by a small group around a leader.

Dicey believed that nineteenth-century England was the best example of a country in which public opinion ruled. Public opinion ruled in England, first, because England was an "advanced civilisation" (5). He does not go into detail about what he means by this. Second, the English Constitution was well-suited for allowing public opinion to express itself. It was a democratic state, and therefore public opinion had a direct influence on the making of laws. Please note that in 1905 England did not have universal male suffrage (unlike the United States), and no women had the vote, and

26. Ibid., April 7, 1914, May 13, 1913.

27. Trowbridge Ford describes *Law and Opinion* as Dicey's "Bible," but this does not quite sound right: Ford, *Albert Venn Dicey*, 258.

that Dicey thought that this was for the best. Dicey also thought that England was better able to respond to public opinion because it was a unitary rather than a federal state. Thus Dicey believed that the English political system was more responsive to public opinion than the American.

Nevertheless, Dicey was concerned about the future of English democracy. This was related to several issues little-mentioned in *Law and Opinion*. The first was the increasing importance of an Irish nationalist movement led (in Dicey's view) by demagogues and pandered to by weak English politicians. The presence of an obstructionist Nationalist party in the House of Commons weakened the institution and threatened the unity of the empire.²⁸ The second issue concerned expanding the franchise to women and the remaining men. Dicey thought that the addition of inexperienced, uneducated, and emotional electors would undermine English power in the face of an increasingly threatening German empire.²⁹

The most famous part of the book is Dicey's description of the three currents of public opinion that each had a turn dominating English law-making. Lectures IV through VIII explain how the century was divided into thirds, with a different current dominant in each part. During the first third of the century Toryism was the dominant creed; in the middle third, individualism (or Benthamism); and in the final third, collectivism (or socialism). Dicey left no doubt that he preferred the era of individualism and that he feared that collectivism would lead to disaster.

Dicey was an individualist. He identified several versions of individualism but focused on Jeremy Bentham (1748–1832) as the summarizer of individualism and the inspiration for Liberal thinkers and politicians. Benthamite liberalism, or Benthamite individualism, accepted the principle of “laissez faire.” Laissez faire was a “war-cry . . . [sounding] the attack upon every restriction, not justifiable by some definite and assignable reason of utility . . .” (107). Therefore, the sole justification for interference in the freedom of individuals was, as Mill said, the protection of the freedom of other individuals. Further, this provided an argument for as small a gov-

28. Cosgrove, *Rule of Law*, 114–69.

29. A. V. Dicey, “Letters to a Friend on Votes for Women” (1909), in *John Stuart Mill's “The Subjection of Women”: His Contemporary and Modern Critics*, ed. Lesley A. Jacobs and Richard VandeWetering (Delmar, N.Y.: Caravan, 1999), 308–12.

ernment as possible (362). The state should not do what individuals could do for themselves. “State help kills self-help” (182). It should not regulate wages or provide free elementary education or interfere with trade. The state should tax only to raise revenue for its basic duties and not to equalize wealth.³⁰

Individualism and collectivism had “different, if not absolutely inconsistent, ways of regarding the relation between man and the State” (212–13). The former saw individuals as “separate persons” (213) and wanted their relations guided by *laissez faire*. The latter saw citizens as “parts of the great organism” (213) of the state and trusted the state to arrange their affairs; indeed, its “fundamental principle” was “faith” in the benefit when the state intervenes, even where the people could do things themselves (183). Therefore “opposition to *laissez faire* . . . is characteristic of every collectivist” (163). For these reasons, in 1914 Dicey claimed that collectivism threatened “the gravest danger to the country” (398). Here we must note how broadly Dicey defined collectivism. He was not arguing against Karl Marx. Marx was not mentioned in the book, and it could be argued that Marxism was not very influential in England until after World War I. The Labour Party in Britain was not yet a force in Parliament in early 1905. Marx and the Labour Party would certainly be included as collectivists, but in *Law and Opinion* Dicey was primarily focused upon Liberals arguing in favor of free elementary education, old age pensions, and trade unions.

Dicey also attempted to explain why Benthamism had declined and why collectivism had become the main current of opinion. Essentially he was asking why England in 1905 was no longer the Benthamite country it had been in 1850. The working class obviously believed in collectivism. It was comfortable with restraining the freedom of individuals in all aspects of life and trusted the state as a tool of their class. Toryism never accepted *laissez faire*, and Tory philanthropists and High Church Anglicans were “conscious or unconscious allies of collectivism” (289). More surprising, perhaps, was Dicey’s recognition that Bentham’s principle of utility could give justification to collectivism: the majority were the poor, and the society should be organized for their benefit (216). Some Benthamites, such as

30. Taxation was “interference” (292) with the liberty of individuals; it was “a gigantic evil” (292).