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*John V Orth\**

## **‘THE RELEASE OF ENERGY’: REFLECTIONS ON A LEGAL HISTORY TROPE\*\***

### ABSTRACT

Historians of American law, particularly of American law in the nineteenth century, often summarise its development with the phrase ‘the release of energy’. This paper traces the prevalence of that trope and compares it with AV Dicey’s influential periodisation of English legal history. In Dicey’s uncomplicated view, Tory repression yielded to the logic of Liberal Benthamism, which swept away statutory ‘restraints on individual liberty’, until at last Socialism subordinated the individual to the state. If energy could be released in nineteenth century England by the repeal of statutes, in contemporary America, its release required an ill-assorted pairing of laissez-faire judicial doctrines with legislation that subsidised desired behavior. The story was further complicated in America by federalism, which contributed to competition among states for the most attractive (from one point of view or another) set of legal rules, derogatively known as ‘the race to the bottom’. Of course, ‘the release energy’ can equally describe legislative programs less likely to appeal to Victorian values, as illustrated by the permissive culture of modern-day Las Vegas, the product of the repeal of restrictive social legislation.

Few discoveries are more irritating than  
those which expose the pedigree of ideas.  
— Lord Acton\*\*\*

**H**istorians of American law, particularly of American law in the nineteenth century, often summarise its development with the phrase ‘the release of energy’. Bernard Schwartz in his mammoth volume, *Main Currents in American Legal Thought* (1993), proclaims that ‘individualism, fostered by the

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\*\*\* John Emerich Edward Dalberg-Acton, ‘Sir Erskine May’s Democracy in Europe’ in John Emerich Edward Dalberg-Acton, *The History of Freedom and Other Essays* (John Neville Figgis and Reginald Vere Laurence eds, Macmillan, 1907) 61, 62.

power to make contracts freely, supplied the motive force for the needed mobilization and release of energy'.<sup>1</sup> Lawrence Friedman in his path-breaking *History of American Law* (1973) describes the first half of the nineteenth century as 'a period of promotion of enterprise, of the release of creative energy; government, reflecting its powerful constituencies, wanted business and the economy to grow; where this required subsidy or intervention, no overriding theory held government back'.<sup>2</sup> Turning to the second half of the nineteenth century, Kermit Hall in *The Magic Mirror: Law in American History* (1989) describes a federal policy of promoting 'the release of individual creative economic energy by placing the nation's natural wealth at the people's disposal',<sup>3</sup> while in the states 'the release of creative economic energy that characterized state economic policy in the [pre-Civil War] years grew stronger after Appomattox'.<sup>4</sup>

The provenance of this trope may be traced to Willard Hurst, the dean of American legal historians, whose essay on the subject, appropriately titled 'The Release of Energy', leads off his foundational study, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956). The first 'working principle' of American law in the period, according to Hurst, was that 'the legal order should protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression'.<sup>5</sup> 'Not the jealous limitation of the power of the state', Hurst reiterates a few paragraphs later, 'but the release of individual creative energy was the dominant value'.<sup>6</sup>

A V Dicey had earlier said much the same thing about the history of English law in the nineteenth century. In his influential *Lectures on the Relation Between Law and Public Opinion*, delivered at Harvard in 1898 and published in 1905, he too had described a dynamic of repression and release.<sup>7</sup> In Dicey's uncomplicated

<sup>1</sup> Bernard Schwartz, *Main Currents in American Legal Thought* (Carolina Academic Press, 1993) 193; see also at 22–3 ('The challenge of the untamed continent required a release of Americans' innate capacities; the way to such release was to be a conception of property that catered to enlightened self-interest').

<sup>2</sup> Lawrence M Friedman, *A History of American Law* (Simon & Schuster, 1973) 157.

<sup>3</sup> Kermit L Hall, *The Magic Mirror: Law in American History* (Oxford University Press, 1989) 192; see also at 206 (The *Sherman Antitrust Act of 1890*, ch 647, 26 Stat 209 was 'at odds with the promotional role (the release of creative economic energy) that Congress was pursuing elsewhere').

<sup>4</sup> *Ibid* 192.

<sup>5</sup> James Willard Hurst, *Law and the Conditions of Freedom: In the Nineteenth-Century United States* (University of Wisconsin Press, 1956) 6. Friedman expressly acknowledges Hurst as the source of the phrase in the second edition of his book: Lawrence M Friedman, *History of American Law* (Simon & Schuster, 2<sup>nd</sup> ed, 1985) 177.

<sup>6</sup> Hurst, above n 5, 7.

<sup>7</sup> A copy of A V Dicey's syllabus for the Harvard lectures, delivered in October 1898, entitled 'Development of English Law During the Nineteenth Century in Connection With the Course of Public Opinion', is preserved in the collection of the Harvard Law Library ('Syllabus'). The lectures eventuated, first, in the publication of an article

view, nineteenth century English legal history could be divided into ‘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’.<sup>8</sup> Tory repression, with which the century opened, eventually yielded to the logic of Liberal Benthamism, which ‘swept away restraints on individual energy’,<sup>9</sup> until at last Collectivism subordinated the individual to the state. Whatever else may be true of his legacy, Dicey’s periodisation left a permanent mark on English history, not just legal history.<sup>10</sup> Even Friedrich Hayek in *The Road to Serfdom* (1944) got in the game: ‘We had before [World War II] once again reached a stage where it is more important to clear away the obstacles with which human folly has encumbered our path and to release the creative energy of individuals than to devise further machinery for “guiding” and “directing” them’.<sup>11</sup> And the conservative historian Andrew Roberts recently made the claim that ‘capitalism, when allied with the right to own secure property and the rule of law, has unleashed the energy and ingenuity of Mankind’ and ‘forms the basis of the English-speaking peoples’ present global hegemony’.<sup>12</sup>

Born in 1835, after the close of the period of repression, Dicey looked back on the first phase of nineteenth century English law with the detachment characteristic of a succeeding generation. As to the second and third epochs, which he lived through, Dicey was less objective. Bentham, as Dicey understood him, was his intellectual hero, and individualism was for Dicey, as for many of his contemporary middle-class Liberals, the summum bonum. The Benthamite project, as it came to be implemented by the master’s disciples, consisted primarily of a legislative agenda,<sup>13</sup> as was to be expected from the followers of a man who contemptuously dismissed ‘judge-made law’ as law made ‘on the same principle as a man makes laws for his dog — he waits till the dog has done something he does not like and then punishes him for it’.<sup>14</sup>

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in the *Harvard Law Review*, A V Dicey, ‘The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century’ (1903) 17 *Harvard Law Review* 511, then in the book, A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan, 1905). A second edition of the book appeared in 1914, unchanged and with the same pagination, but with a lengthy and significant introduction.

<sup>8</sup> Dicey, *Law and Public Opinion*, above n 7, 62.

<sup>9</sup> *Ibid* 64.

<sup>10</sup> See, eg, Morris Ginsberg (ed), *Law and Opinion in England in the Twentieth Century* (Stevens, 1959); Samuel H Beer, *British Politics in the Collectivist Age* (Knopf, 1965).

<sup>11</sup> F A Hayek, *The Road to Serfdom* (Routledge & Kegan Paul, 1944) 261.

<sup>12</sup> Andrew Roberts, *A History of the English-Speaking Peoples Since 1900* (Phoenix Press, 2007) 39.

<sup>13</sup> See S E Finer, ‘The Transmission of Benthamite Ideas 1820–50’ in Gillian Sutherland (ed), *Studies in the Growth of Nineteenth-Century Government* (Routledge & Kegan Paul, 1972) 13.

<sup>14</sup> John Bowring (ed), *Works of Jeremy Bentham* (William Tait, 1843) vol 5, 235–6. Even John Austin, one of the master’s most loyal followers, thought he carried his contempt for judicial legislation too far: ‘I by no means disapprove of what Mr Bentham had

As a man, if not as a scholar, Dicey regretted the trajectory of legal history that he described in his lectures. Having risen from torpor and repression to energetic individualism, English law was now fast declining into collectivism. From his vantage point at the end of the nineteenth century, Dicey looked back with longing at the Age of Bentham, which coincided with his own coming of age and maturity, as the Golden Age of English law. As he freely admitted, he borrowed the image of the liberating force of Benthamism from a now forgotten legal scholar, Sir Roland Knyvet Wilson, whose *History of Modern English Law* had appeared in 1875.<sup>15</sup> Wilson in turn had attributed it to Sir Henry Maine.<sup>16</sup> Dicey's only original contribution to the tripartite scheme that he made famous was his identification of the dawning Age of Collectivism.

The turning points in Dicey's history are marked by statutes; in fact, by statutes concerning what was the central issue in English society and economy in the nineteenth century, the position and power of labor. The repeal in 1824 and 1825 of the Combination Acts, which outlawed trade unions, marked the beginning of the transition to Benthamism.<sup>17</sup> At Harvard, Dicey apparently described the obscure *Molestation of Workmen Act 1859*, which somewhat liberalised the law concerning strikes and picketing, as the morning star of collectivism,<sup>18</sup> although by the time he prepared his lectures for the press in 1905, he chose the more credible date of 1870, the eve of major legislation on labor organisations: the *Trade Union Act 1871*, the *Conspiracy and Protection of Property Act 1875*, and the *Employers and Workmen Act 1875*.<sup>19</sup>

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chosen to call by the disrespectful, and therefore, as I conceive, injudicious, name of judge-made law'. John Austin, *The Province of Jurisprudence Determined* (H L A Hart ed, Weidenfeld & Nicolson, 1954) 190–1.

<sup>15</sup> A V Dicey, *Law and Public Opinion*, above n 7, ix (Preface to the First Edition); Sir Roland Knyvet Wilson, *History of Modern English Law* (Rivingtons, 1875).

<sup>16</sup> Wilson chose as the epigraph of his book a sentence from Maine's contemporary *Lectures on the Early History of Institutions* (J Murray, 1875) 397: 'I do not know a single law-reform effected since Bentham's day which cannot be traced to his influence'. But Maine had long claimed that it was Bentham who had opened the floodgates; 'Bentham made the good of the community take precedence of every other object, and thus gave escape to a current which had long been trying to find its way outwards': Sir Henry Sumner Maine, *Ancient Law* (J Murray, 1861) 46.

<sup>17</sup> *Combination of Workmen Act 1824*, 5 Geo 4, c 95; *Combinations of Workmen Act 1825*, 6 Geo 4, c 129. See John V Orth, 'The British Trade Union Acts of 1824 and 1825: Dicey and the Relation Between Law and Opinion' (1976) 5 *Anglo American Law Review* 131.

<sup>18</sup> 22 Vict, c 34. Dicey, Syllabus 4 (dating the third period, 'the period of legislation of trade combinations', 1859–75). On the 1859 Act, see John V Orth, 'English Law and Striking Workmen: The Molestation of Workmen Act, 1859' (1981) 2 *Journal of Legal History* 238.

<sup>19</sup> *Trade Union Act 1871*, 34 & 35 Vict, c 31; *Conspiracy and Protection of Property Act 1875*, 38 & 39 Vict, c 86; *Employers and Workmen Act 1875*, 38 & 39 Vict, c 90. See John V Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721–1906* (Oxford University Press, 1991) 136–52.

Ironically, what so impressed and inspired Dicey about the Benthamite legislative program was not the social engineering of the New Poor Law,<sup>20</sup> but the removal of ‘every kind of oppression’ on the expression of ‘individual energy’.<sup>21</sup> The image is of a pent-up force released by the repeal of repressive legislation. Certainly the fifty years following 1825 witnessed an extraordinary burst of parliamentary activity, and just as certainly the same years saw exceptional development — political, social, and economic. Not only were the Combination Acts repealed, restraints on Catholics removed,<sup>22</sup> the franchise broadened,<sup>23</sup> and the Corn Laws repealed,<sup>24</sup> but legislation also encouraged the private ordering of the economy. The mid-century Companies Acts extended the opportunity to create limited liability companies.<sup>25</sup> ‘In the name of freedom of contract’, Dicey continued, ‘the crimes of forestalling and regrating and of usury ceased to exist; in 1846 and 1849 the Navigation Laws were repealed’.<sup>26</sup> Dicey implied that law, specifically statute law, and more specifically statutes of repeal, caused the dramatic advance of English society, that all this could not have happened if parliament had not been awakened from its Tory stupor, stung into action by Benthamite gadflies.

In America the story is more complicated. If in nineteenth century England energy could be released by repealing statutes, in contemporary America its release, as we have seen, required an ill-assorted combination of creative judicial decisions and legislation offering subsidies of one sort or another. Even as English courts, increasingly aware of the implications of parliamentary supremacy, were becoming reluctant to make new law, American courts were embarking on a remarkable period of judicial creativity, developing new doctrines of tort and property, and engrafting (to use Justice Story’s metaphor) a modern commercial law on the old stock of the common law.<sup>27</sup> Massachusetts Chief Justice Lemuel Shaw’s decision in *Farwell v Boston & Worcester Railroad* (1842) relieved railroads, then a new and untested means of transportation, of the costs of industrial accidents if the cause could be attributed to the fault of a ‘fellow servant’.<sup>28</sup> New York’s Court of Appeals in an influential decision curtailed manufacturers’ tort liability by refusing to allow an

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<sup>20</sup> *Poor Law Amendment Act 1834*, 4 & 5 Wm 4, c 76.

<sup>21</sup> Dicey, *Law and Public Opinion*, above n 7, 217.

<sup>22</sup> *Roman Catholic Relief Act 1829*, 10 Geo 4, c 7.

<sup>23</sup> *Reform Act 1832*, 2 Will 4, c 45.

<sup>24</sup> *Importation Act 1846*, 9 & 10 Vict, c 22.

<sup>25</sup> *Joint Stock Companies Act 1856*, 19 & 20 Vict, c 47; *An Act to Amend the Joint Stock Companies Act 1856*, 20 & 21 Vict, c 14; *Companies Act 1868*, 25 & 26 Vict, c 89.

<sup>26</sup> Dicey, *Law and Public Opinion*, above n 7, 190 (footnotes omitted). See *Forestalling, Regrating, Etc, Act 1844*, 7 & 8 Vict, c 24; *An Act to Repeal the Laws Relating to Usury and to the Enrolment of Annuities 1854*, 17 & 18 Vict, c 90; *Navigation Act 1849*, 12 & 13 Vict, c 29.

<sup>27</sup> Joseph Story, ‘Growth of the Commercial Law’ in William W Story (ed), *Miscellaneous Writings of Joseph Story* (Little, Brown & Co, 1852) 269, 272.

<sup>28</sup> 45 Mass (4 Metc) 49 (1842).

action by an injured consumer in the absence of privity of contract.<sup>29</sup> Property, once conceived in patrimonial and static terms, came to be seen as a dynamic asset to be exploited, leading to pro-productive rules favoring prior appropriation of water and fugitive minerals such as oil and natural gas, the refusal to recognise easements for light and air, and the abandonment of traditional restraints in the law of waste. The list is not complete — and probably never will be if, as Morton Horwitz maintains, ‘Willard Hurst’s famous phrase’ can equally describe judicial action or ‘judicial refusal to act’.<sup>30</sup>

The awesome power of judicial review gave American judges an unusual opportunity to sweep away restraints. In *Gibbons v Ogden* (1824), ‘the Steamboat Case’, the Marshall Court struck down a state-created monopoly,<sup>31</sup> and in the celebrated *Charles River Bridge Case* (1837), the Taney Court cabined the rights of vested property in order to keep open the opportunity for technological advancement, a vivid illustration of the power of ‘creative destruction’.<sup>32</sup> But the most dramatic judicial intervention, of course, was the discovery in the Due Process Clause of a constitutional guarantee of freedom of contract.<sup>33</sup> Yet, even as American courts were constitutionalising ‘Mr Herbert Spencer’s *Social Statics*’ — to borrow Oliver Wendell Holmes’ famous conceit<sup>34</sup> — American legislatures were enthusiastically intervening in the market with give-aways to business in the form of public property, exemptions from taxation, or guarantees of loans. Huge incentives were offered and vast improvements undertaken. English legislation released energy by freeing it, American legislation by paying for it.

The American story is further complicated by the federal system, which permitted competition among states for the most attractive (from one point of view or another) set of legal rules. In the late nineteenth century, New Jersey and Delaware ran a ‘race to the bottom’ for the privilege of chartering corporations — and winning the associated economic benefits.<sup>35</sup> Corporate energy may be released by removing government regulations — not all of them a bad idea. And sweeping away restraints

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<sup>29</sup> *Thomas v Winchester*, 6 NY 397 (1852).

<sup>30</sup> Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press, 1977) xv.

<sup>31</sup> 22 US 1 (9 Wheat) 1 (1824).

<sup>32</sup> *Proprietors of Charles River Bridge v Proprietors of Warren Bridge*, 36 US (11 Pet) 420 (1837). See generally Stanley I Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Lippincott, 1971).

<sup>33</sup> See John V Orth, *Due Process of Law: A Brief History* (University Press of Kansas, 2003) 58–66.

<sup>34</sup> *Lochner v New York*, 198 US 45, 75 (1905) (Holmes J, dissenting).

<sup>35</sup> In 2011 it was estimated that ‘900,000 businesses are incorporated in Delaware, including half of all publicly traded companies and 63 percent of the Fortune 500 [list of top 500 US closely held and public corporations compiled by *Fortune Magazine*]. Franchise taxes contribute 21 percent of the states revenue’: Rita Farrell, ‘At Top of Delaware Chancery Court, Adherence to Tradition’, *New York Times* (New York), 7 July 2011, B4.

on individual energy, the hallmark of Benthamism according to Dicey, can equally describe legislative programs unlikely to appeal to Victorian values. It can describe, for example, Nevada in the twentieth century as aptly as England in the Age of Reform. With permissive divorce laws, relaxed marriage requirements, legalised gambling, and the option in most counties to permit prostitution, Nevada has energetically exploited its law-making, or rather its law-repealing, advantages.<sup>36</sup> No one can visit Las Vegas today without sensing a certain ‘release of energy’.

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In our increasingly globalised economy it is conventional wisdom that legal arrangements can help or hinder, perhaps even prevent, social and economic development. The emphasis now is not particularly on statutes, either of adoption or repeal. While the modern agenda does include sweeping away restraints and is critical of subsidies or other interventions in the market, the release of energy (although it is not usually called that) is more often said to depend upon the establishment of ‘the rule of law’ — a concept, incidentally, for which Dicey is commonly given credit, although he borrowed it from the distinguished Australian jurist W E Hearn.<sup>37</sup> Rather than insist on the adoption of specific rules, either by legislators or judges, business today is more likely to insist that impartial courts, capable of rendering effective judgments and applying stable rules concerning contracts and property, create the most favorable conditions for economic development.<sup>38</sup> Indeed, if the Coase Theorem is to be believed, ‘in the absence of transaction costs, it does not matter what the law is’.<sup>39</sup>

This is not the place to enter into a discussion of developmental economics — nor am I the person to do so — but I will venture to say that I find the ‘release of energy’ to be an unhelpful trope in legal history. As the American story makes plain, energy can be released by repealing statutes or by adopting them. It can be released by legislatures or by courts. It can be released by changing the law or by leaving it unchanged. To the extent that it means ‘the power to make contracts freely’, it may be no more than a polite expression for *laissez-faire*. To the extent that it

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<sup>36</sup> See Lawrence M Friedman, *American Law* (Simon & Schuster, 1984) 131–2. For other examples of jurisdictional competition in the development of the law, see John V Orth, *Reappraisals in the Law of Property* (Ashgate Publishing, 2010) 95–104.

<sup>37</sup> See H W Arndt, ‘The Origins of Dicey’s Concept of the “Rule of Law”’ (1957) 31 *Australian Law Journal* 117, 123. Dicey admitted that Hearn ‘would be universally recognized among us as one of the most distinguished and ingenious exponents of the mysteries of the English constitution, had it not been for the fact that he made his fame as a professor, not in any of the seats of learning in the United Kingdom, but in the University of Melbourne’. (!) A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 7<sup>th</sup> ed, 1908) 19–20.

<sup>38</sup> See, eg, John V Orth, ‘Exporting the Rule of Law’ (1998) 24 *North Carolina Journal of International Law and Commercial Regulation* 71.

<sup>39</sup> R H Coase, *The Firm, The Market, and The Law* (University of Chicago Press, 1988) 14.

means 'placing the nation's natural wealth at the people's disposal', it may be simply a euphemism for Gilded Age corporate giveaways. Nor can the political content of the phrase be ignored. Dicey wore his politics on his sleeve. If it were not obvious from the first edition of *Law and Public Opinion* in 1905, he made his preference for classical liberalism unmistakable in the second edition in 1914 — really the first edition reprinted with a lengthy new introduction. Government should be 'cheap', he said; its proper role, to encourage 'individual energy'.<sup>40</sup> Dicey had an agenda. Modern professional historians may simply be repeating the phrase out of habit. It is time to recognise it for what it is, a dated slogan rather than a useful summary.

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<sup>40</sup> A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan, 2<sup>nd</sup> ed, 1914) lxxxvi; cf at lxxi: '[T]he dogma of *laissez faire* has commended itself, and does commend itself to hundreds of Englishmen, and for very obvious reasons. It has stimulated energy of action'.