

BOOK REVIEW

IN A DEFIANT STANCE. By John Phillip Reid. University Park: Pennsylvania State University Press. 1977. Pp. 225. \$14.50.

The uses and abuses of law in prerevolutionary Massachusetts is the subject of this scholarly, yet eminently readable book. The manipulation of law and legal process by both the colonists and the Crown was, of course, a response to political conditions. A major strength of Professor Reid's analysis is the exposition of how political policies can determine the parameters of peaceful opposition. He accomplishes this by comparing the colonial experience in America with the success of British imperial law in eighteenth-century Ireland. The book is far more than a contribution to comparative legal historiography however; it presents a conception of law which transcends, and therefore challenges the concept of law as simply that which is "set by political superiors to political inferiors."¹

Perhaps Reid's conception is best characterized by the title he initially favored: "Lawless Law and Lawful Mobs." Like that title, the analysis more often suggests by implication than argues directly. That is appropriate, for the book is a historical rather than a philosophical essay. The point is important, nonetheless, because an author's assumptions about the nature of law inevitably color his or her analysis. In this regard it is both interesting and instructive to compare Hiller Zobel's analysis of the Boston Massacre.²

Where Zobel, for example, regards the actions of the Boston mobs as "obviously represent[ing] a retreat from the rule of law,"³ Reid considers them an expression of "whig law." Conceiving law to be a reflection of community values, he also sees whig law manifested in the colonists' control of the civil and criminal traverse juries and of the grand jury. For example, whig control of the grand juries made it impossible for the British authorities to obtain indictments against persons for political offenses. No newspaper editor in prerevolutionary Massachusetts ever went to jail, because although "[i]n term after term [Chief Justice Thomas Hutchinson of Massachusetts] warned of the dangers of seditious libel . . . in term after term the grand jurors could find

1. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 9 (1965).

2. H. ZOBEL, *THE BOSTON MASSACRE* (1970).

3. *Id.* at 47.

no seditious libel to present.”⁴ Reid’s explanation is simply that “American whigs were incapable of recognizing anything offensive in a political statement or newspaper article supporting their side of the controversy with the mother country.”⁵

Whig control of the civil traverse jury illustrates even more dramatically the fundamental differences between whig and tory legal theories. One colonial response to imperial revenue laws was to bring civil actions against the customs official who enforced them.⁶ The case of *Erving v. Cradock*⁷ is typical. Cradock, in the course of his official duties as customs collector had seized Erving’s ship. In a British Admiralty court proceeding Erving agreed to settle the matter by payment of 500 pounds sterling. He then brought an action of trespass against Cradock in the common law court and the whig jury held the latter liable for the damages Erving suffered as a result of the seizure. To conclude that the jury acted in disregard of the law in that case would be to ignore whig legal theory, for “[t]he entire thrust of American discontent was based on constitutional theory. ‘No representation, no taxation,’ was the whig slogan ‘The Question,’ General Thomas Gage admitted in 1765 during the Stamp Act crisis, ‘is not the inexpediency of the Stamp Act, or of the inability of the Colony to pay the Tax, but that it is unconstitutional, and contrary to their Rights, Supporting the Independency of the Provinces, and not Subject to the Legislative Power of Great Britain.’”⁸ Quite simply, Cradock’s color of authority in seizing the ship was disregarded by the jury because it derived from an imperial law that contravened the constitutional rights of the colonists.

It should be clear that Professor Reid’s position is not predicated simply on his own conception of law; he perceives that the colonists themselves shared that conception: “Regarding law as a reflection of community consensus, expressed through the community’s control of its own institutions, the whigs of Massachusetts Bay could not help but define ‘law’ differently than did British lawyers and laymen”⁹ “Law from the imperial perspective meant the command of parliament. For the American whigs it still meant Lord Coke’s custom and right reason.”¹⁰

4. J. REID, IN A DEFIANT STANCE 46 (1977).

5. *Id.*

6. *See id.* at 27-28.

7. *See id.* at 30-32.

8. *Id.* at 11.

9. *Id.* at 65.

10. *Id.* at 71.

By incorporating the perspective of the people whose actions are being explained, Professor Reid provides a meaningful dimension for historical analysis, and also shows great sensitivity to the limitations of traditional social theory revealed in Roberto Unger's recent critique.¹¹ Reid's approach satisfies Unger's injunction that "subjective and objective meaning must somehow both be taken into account,"¹² because he expressly incorporates both the historical actors' and his own concept of law. That is a strength, however, only of method. It is necessary to evaluate the substance of the concept as well.

The fundamental assumption underlying Reid's concept of law is revealed succinctly in the following passage: "The use of whig law for political ends may not have always been legitimate as sanctioned by legal precedent, but between competing legal cultures it is acceptance that creates part of the legitimacy."¹³ The idea of competing legal cultures within a single sovereignty will seem strange to those who associate the very concept of law with the apparatus and institutions of centralized government. That identification is natural for lawyers, who experience the law in the context of courts and legislatures. It has appealed to social theorists¹⁴ and legal philosophers as well.

H.L.A. Hart's approach to the question is interesting in that he declines to define "law," and proposes instead to provide "an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena."¹⁵ Hart appears to use the term "municipal" in the sense of "[r]elating to a state or nation, particularly when considered as an entity independent of other states or nations."¹⁶ In thus emphasizing the structure of the legal system in state societies, Hart does not expressly take a position as to whether or not non-state societies can have law. Yet he subtly affirms the traditional premise by characterizing primitive societies as regimes of primary rules of obligation only,¹⁷ arguing that it is the combination of primary rules with rules of recognition, change, and adjudication which marks the "step from the pre-legal in to

11. See R. UNGER, *LAW IN MODERN SOCIETY* 8-37 (1976).

12. *Id.* at 15.

13. J. REID, *supra* note 4, at 69.

14. R. UNGER, *supra* note 11, at 49.

15. H.L.A. HART, *THE CONCEPT OF LAW* 17 (1961).

16. BLACK'S LAW DICTIONARY 1168 (rev. 4th ed. 1968).

17. H.L.A. HART, *supra* note 15, 89-96.

the legal world.”¹⁸ It seems, therefore, that in Hart’s view the American colonies could have law apart from the British only if they constituted an independent state society.

The point is not simply one of correct word usage, but one of meaning. To the whigs of Massachusetts Bay the issue was the legitimacy of constituted power. Professor Reid’s analysis shows that the positivist concept of law as rules created in the context of formal state government is too limited to capture the essence of whig theory. There is a further point, however, which transcends that of our perception of the colonial experience. Our concept of law is crucially important because it affects our initial perception of the sorts of human activities that are *prima facie* considered to be within the legal realm. If we confine ourselves to what is found in the context of a modern legal system, we severely limit the objects of study and thus lose the opportunity to expand our base of knowledge. Our initial purview, therefore, ought to include any normative system which permits a social “group to function by compelling its members to conform to common principles of behavior.”¹⁹ John Reid’s analysis of “whig law” in prerevolutionary Massachusetts confirms the wisdom of such an approach.

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18. *Id.* at 91. It is also significant that Hart entitles Chapter 15 of his book “Law as the Union of Primary and Secondary Rules.” (emphasis added).

19. Pospisil, *The Ethnology of Law*, 12 ADDISON-WESLEY MODULAR PUBLICATIONS 26 (1972). See Pospisil’s discussion of the “Multiplicity of Legal Systems,” *id.* 26-29. See also E. LEACH, *CUSTOM, LAW, AND TERRORIST VIOLENCE* (1977), for an example of how a functional approach can contribute to our understanding of an important contemporary problem.

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