In a Defiant Stance: The Conditions of Law in Massachusetts Bay, The Irish Comparison, and the Coming of the American Revolution, by John Phillip Reid

Hendrik Hartog
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Legal History Commons

Recommended Citation
Hartog, Hendrik (1978) "In a Defiant Stance: The Conditions of Law in Massachusetts Bay, The Irish Comparison, and the Coming of the American Revolution, by John Phillip Reid," Indiana Law Journal: Vol. 54 : Iss. 1 , Article 4.
Available at: https://www.repository.law.indiana.edu/ilj/vol54/iss1/4
Book Review


HENDRIK HARTOG*

In a Defiant Stance is the fifth book John Reid has published in a little more than a decade. He has written two biographies of important nineteenth century judges, two studies of Cherokee legal institutions, and now this, his first book on the legal context of the American Revolution. These are not insignificant subjects. His learning is immense. And Professor Reid writes with rhetorical grace and a personal voice that are immediately recognizable. Yet he remains a relatively elusive figure in American legal scholarship. Most of his work has been favorably reviewed by the specialists whose interests intersect with his own; but his books have only infrequently been presented as important to the ordinary legal reader.

The problem may be that John Reid remains committed to a monographic tradition which maintains that one obligation of scholarship is to study and apprehend specific and limited subjects. He lacks that flair for the “big think,” for the tendentious argument or the portentous exclamation which a generation of television watchers might demand from their scholarship, if not from their cereal. It is not that he is a modest man; nor are his books shaped by a narrow and dogmatic belief in the particularity of human experience. Professor Reid’s works are graced with comparative insights, with allusions and references to modern analogies, with a concern for the social context of law. But John Reid has never claimed that his work can explain “everything.” One senses that he would rather the pleasures of a fox, of knowing some things, than those of a hedgehog, in an age when hedgehogs get all the glory.

Professor Reid’s new book is a comparative study of the conditions of law and of imperial control in prerevolutionary Massachusetts Bay and

*A.B. 1970, Carleton College; J.D. 1973, New York University; Ph.D. Candidate, Brandeis University. Assistant Professor of Law, Indiana University.

1J. Reid, In a Defiant Stance: The Conditions of Law in Massachusetts Bay. The Irish Comparison, and the Coming of the American Revolution (1977) [hereinafter In a Defiant Stance].


in oppressed -- or unsuccessfully revolutionary -- Ireland. The point of this exercise is not to establish a general model of the role of law in revolution, although the comparative study of revolutions is a well-established theme in modern social science. Several generations of historical sociologists, political scientists, anthropologists, and even historians have drawn scholarly sustenance from metahistorical notions of "revolution" drawn from or applied to the French Revolution, the American Revolution, and the more recent political upheavals of the twentieth century. What Professor Reid is after in his comparison of Ireland and Massachusetts is very different, though. For him it is the failure to shake off English rule in Ireland that focuses and shapes his vision of the American success. That English legal institutions could be mobilized as effective tools of repression in Ireland at the same time that they were so eminently unsuccessful in prosperous Massachusetts Bay raises the central empirical question that In a Defiant Stance answers: How did they (the revolutionary whigs of Massachusetts Bay and other colonies in British North America) get away with it?

Since World War II, historians of the American Revolution have made the question of motivation -- of why "they" did it -- the central concern of study. Professor Reid, by contrast, takes the presence of adequate motivation as a given and asks the reader to consider what an easy time of it the Americans had in making their revolution. Not a single whig was ever forced to stand trial for sedition or treason, no matter how outrageous his attack on English authority. As a result, American patriots were robbed of those martyrs who could "inspire the young or embolden the hesitant." But "no colonist could be a martyr to a law unable to touch him."

The leading American whigs could go about the business of making a revolution without fear of arrest or attack by imperial authority because it was they -- the whigs -- who controlled the effective legal institutions of colonial society. To act as an agent of the crown left one at the legal mercy of any merchant or whig aggrieved by one's actions. British officers and customs officials who attempted to enforce imperial law could expect to be sued for damages before a jury. And even if the superior court of judicature -- the highest court of the province -- ruled that a royal official could not incur private-law liability in the exercise of his public respon-

---

5Of such scholarly enterprise, George Lichtheim once wrote,

To suppose, . . . that "the phenomenon of revolution" can be meaningfully discussed in suprahistorical terms such as "violence," or related to mythical events ("Cain slew Abel and Romulus slew Remus"), is to obliterateseveral centuries of thought starting with Vico if not Machiavelli. This is not conservative empiricism but mere dogmatism -- as doctrinaire as anything produced by the most extreme rationalists.

See G. LICHTHEIM, TWO REVOLUTIONS 118 (1967).

6See text accompanying infra note 38.

7In A Defiant Stance, supra note 1, at 3.

8Id. at 5.
sibilities, juries were free to rule otherwise. "The law was emphatic: a motion for a new trial could not be granted on the ground that the jury had disregarded the court's instruction. In Massachusetts the civil jury's verdict was truly final." Likewise, local justices of the peace could not implement the Quartering Act when British troops first landed in Boston. That statute obliged local justices of the peace to procure various supplies for the enlisted men:

It was an extremely unpopular law and the justices of Boston refused to enforce it. General Thomas Gage thought they were afraid of the whig crowd. We may think they were following their whig predilections. Yet it is possible that we as well as Gage would be wrong. The magistrates may have been afraid, not of the whig mob but of the whig jury. It is unlikely that even a militant tory justice would have dared requisition candles or firewood without first being certain he was immune from an action of conversion or trover....The magistrate did not worry that the owner would not be reimbursed. He worried that the owner would sue him for the seizure even if reimbursed [by the army]. The payment by the military might be a good defense at law, but the plaintiff could always avoid a ruling on the issue by denying the fact, thus bringing the question before a whig jury. The imperial government might enforce its quartering statutes in Ireland, but in America even its friends could be frozen into political inactivity by the thought of a Massachusetts jury.\footnote{Local customary rights did retain a fragile existence in parts of England throughout the eighteenth century; see Thompson, \textit{The Grid of Inheritance}: a \textit{comment}, in \textit{FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE}, 1200 - 1800 328-60 (J. Goody, J. Thirsk, & E. Thompson, eds. 1976).}

Professor Reid's point is not that the revolutionary whigs of Massachusetts Bay and elsewhere were manipulating legal institutions and subverting the authority of English law. To the contrary, it is his contention that the institutional practices of eighteenth century Massachusetts reflected a legitimate, although no longer dominant, theory of English law. The "conditions" of law in Massachusetts were not yet those of a modern centralized state. Authority was diffuse and decentralized; the legitimacy and the potency of local legal institutions were not dependent on the support and the acquiescence of a central authority.\footnote{See Reid, \textit{In Legitimate Stirps}: The Concept of "Arbitrary," the Supremacy of Parliament and the Coming of the American Revolution, 5 \textit{HOFSTRA L. REV.} 459 (1977).} The terms of a positivist jurisprudence that considers law as nothing but the command of a sovereign and unitary state could have had only a limited meaning in prerevolutionary Massachusetts.\footnote{\textit{Id.} at 31 (footnote omitted).} (By contrast, those terms might have had a general but not absolute applicabili
ty in England itself after the Glorious Revolution of 1688.)13 In fact, Professor Reid demonstrates that imperial officials could not act in a society of hostile local institutions, that they were helpless without the support and acquiescence of local "law."

The thesis of In a Defiant Stance is that the legal context of the American Revolution was shaped by the unequal conflict between two competing conceptions of law: a whig law of local institutions and an imperial law of parliament and of the provincial agents of the crown.14 "In Massachusetts Bay the struggle was less between the governed and the governors than between different levels of government."16 In contrast to Ireland, where any revolution would have to be made against the law --the symbol of English oppression -- in Massachusetts whigs made a revolution by enforcing their law, even to the point of assembling and utilizing a mob.16 That a mob no less than a civil jury,17 a grand jury,18 or a governor's council19 could be perceived and justified as a legitimate legal institution might seem to call into question the reality of a whig theory of autonomous local institutions. If the mob is as legitimate as any other institution -- is in fact perceived as a public institution -- is not that theory nothing more than a mere cover for defiance20 or violence,21 as other historians have charged? That Professor Reid successfully meets this charge, that he persuasively argues for a vision of the mob as a partially legal, "constitutional" institution,22 is only one of the achievements of this book. It is, however, a lesser achievement when compared to the general picture of legal conflict within a society of largely autonomous local institutions, which is the main burden of the work. In In a Defiant Stance, the familiar events of the revolution are placed in a strange context, in which strange institutions act in peculiar ways; and it is Reid's skill in leading us into this suddenly unfamiliar world of "our" revolution that marks the true significance of this book.

THE REALITY OF WHIG LAW

A diagram of the public institutions of eighteenth century Massachusetts would differ little from the institutional diagram of a modern American state, the subject matter of a high school civics lesson.

13See text accompanying infra notes 47-51.
14In a Defiant Stance, supra note 1, at 66; in a similar vein, see D. Boorstin, THE GENIUS OF AMERICAN POLITICS 66-98 (1953).
15In a Defiant Stance, supra note 1, at 161.
16Id. at 160-173.
17Id. at 27-40.
18Id. at 41-54.
19Id. at 7-16.
21R. Brown, STRAIN OF VIOLENCE (1975), 41-66.
22This achievement was presaged by his essay, In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution, 49 N.Y.U.L. REV. 1043 (1974), and in the works of Pauline Maier and Gordon Wood; see Maier, Popular Uprisings and Civil Authority in Eighteenth Century America, WM. & MARY Q. (3d ser.) 3 (1970), and Wood, A Note on Mobs in the American Revolution, 23 WM. & MARY Q. (3d ser.) 635 (1966).
There was an executive; there was a legislature; the judicial system was organized in the familiar pyramidal design, with a superior court of judicature at the apex, county courts of common pleas and of general sessions of the peace in the middle, and the lowly courts of individual justices of the peace at the bottom.23

In the first chapters of In a Defiant Stance, Professor Reid enlarges and highlights portions of the diagram, that institutional “map” of Massachusetts Bay, showing how elements of the system operated in the context of the revolutionary conflict. Viewed as aspects of a system -- the perspective of a tory -- those elements did not operate very well. Thomas Hutchinson wrote at one point that, “It was not easy to devise a system of subordinate government less controlled by the supreme, than the governments in the colonies.”24 The Governor’s Council existed not to effect executive action but to neutralize and where possible destroy it. The civil traverse jury, as we have seen, was free of any obligation to obey the dictates of any judge. The grand jury could declare army barracks a “nuisance”,25 indict political enemies, and most importantly, exercise a veto over the actions of tory prosecutors. As a result, “New England whigs did not fear arrest even for serious offenses of the type that would have left their Irish counterparts rotting in dungeons or swinging from gallows.”26

To Tories and to the modern viewer alike the actions of these institutions appear lawless; in countermanding the orders of imperial law, local institutions were undermining respect for law in general. Without respect for a central state authority there could be no legitimacy anywhere.27 Whigs naturally disagreed, not just because they would have severed “their” institutions from those of the British Empire, but also because they saw one purpose in any legal process as being to provide an alternative to violence and self-help. According to Professor Reid, it was their restraint rather than their audacity which most impressed whigs when they reflected on their actions.28 In manipulating their institutions they managed to defend their rights and assert their constitutional arguments without lynchings, without large-scale property damage,29 and without terrorism. It was only the control they exercised over local institutions which kept Massachusetts Bay from becoming another Ireland.

—

23See 1 LEGAL PAPERS OF JOHN ADAMS xxxviii-lii (L. Wroth & H. Zobel eds. 1965).

How representative of other colonies in North America Massachusetts was in this regard (as well as many others) has been a question of serious and continuing debate among historians. See Allen, The Zuckerman Thesis and the Process of Legal Rationalization in Provincial Massachusetts, 29 WM. & MARY Q. (ser. 3) 443 (1972) and Zuckerman, Michael Zuckerman’s Reply, 29 WM. & MARY Q. (ser. 3) 461 (1972).

24In A Defiant Stance, supra note 1, at 8.

25The actual declaration of barracks as a nuisance by justices of the peace occurred in Albany, New York. Id. at 45.

26See Id. at 46.

27Id. at 63.

28Id. at 65-73.

29The great exception to this claim, an exception which worried and disturbed the whigs themselves, was the sacking and burning of Thomas Hutchinson’s house. Id. at 76, 83.
Yet there was more to the "whig theory of law" than just a convenient justification for the exercise of institutional discretion in a political crisis. Professor Reid understandably focuses on the ways Massachusetts institutions performed in the extraordinary events of the years between 1763 and 1775. But if we were to look closely at the ways those institutions handled their ordinary business, it would soon be obvious how incomplete that "system" was and how realistic whig assumptions of local autonomy were in the context of eighteenth century Massachusetts.  

By any modern standard, the Massachusetts legal "system" was no system at all; the very idea of describing Massachusetts local institutions as aspects of a system is as anachronistic as an assertion of whig law would be today. Consider the administration of justice through the county courts of general sessions of the peace. Between 1692 and the 1780's the legislature and the superior court had only the most rudimentary control over the court structure of the province. The act of 1692 which established the county courts declared that sessions courts could hear any case relating to the conservation of the peace. No attempt was made to define or delimit what that meant. Instead, the legislature limited itself to a schedule for the meetings of the various county courts and descriptions of how appeals might be carried to the superior court, the process of jury selection, and the requisite format for appeals from the criminal judgments of individual justices of the peace.  

The whole history of county sessions courts prior to the revolution was marked by a singular lack of legislative attention. Occasional acts were passed specifying the terms of a particular criminal offense cognizable by sessions courts, but until the late 1780's the General Court (the Massachusetts legislature) never tried to direct the activities of the courts. The General Court might indicate areas of provincewide concern through legislation which the courts were in theory bound to enforce. But even that formal power of the legislature over the local court might be ignored when it suited the interests of the court. 

In September 1768, for example, the owners of a milldam in Malden petitioned the Middlesex County sessions court to be relieved from their obligation to build a passageway ensuring the free passage of fish downstream, an obligation defined and reinforced by a steady stream of legislation throughout the eighteenth century. The owners of the dam recognized that there was a provincial statute which explicitly ordered them to maintain a right of way for fish, but they asked the court to excuse them both from compliance and from liability "because the Petit do not think themselves obliged by Law to make such passage way ..." and they asked the court to appoint a committee of three disinterested persons to investigate the "necessity" of such a construction. The court

---

30The following four paragraphs are drawn substantially from my article, Hartog, The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts, 20 Am. J. Leg. Hist. 282 (1976).

31Act of 1692-93, Ch. 33, 1 Mass. Bay Province Laws 72.
agreed and appointed a committee, which made the following report:

'To open a passage way in the same Dam would be a much greater Damage to the Publick than the Fish that might [pass] through the Same Passage Way would be of Advantage, as it appears that there would be but few, if any.

This report was accepted by the whole court, and the prayer of the petition was granted. The petitioners had asked the court to balance a clear legislative directive against the presumed benefits of not enforcing that statute. The petitioners had argued that statutory law, the law of the General Court, need not be the "law" of the Middlesex sessions court. Though lacking in the political context of revolutionary conflict, one can hardly imagine a more direct assertion of the autonomy of local "whig" law.

Or, consider the entire court system, as a system. Despite the apparently integrated hierarchal structure through which we might expect the superior court of judicature to assert its authority over the lesser judicial agencies of the province, in all ordinary civil or criminal cases, "appeal" meant not a review at a higher level of the legal basis for a decision, but rather a new trial. Only in some regulatory cases could a decision of the sessions court be reviewed on certiorari, and even that was a matter of some controversy as late as the 1760's. By the early eighteenth century the principles of certiorari -- of control of local institutions through a review of the record by central agencies -- was well established in England. But in eighteenth century America appeal still had less to do with the functional integration of a legal system or the control of administrative discretion than with the financial ability of litigants to change the legal level of their dispute. There was no system, only a variety of discrete and distinctive institutions.

Whig law was more than just a politically motivated response to the demands of an imperial and centralizing authority; rather, it was a largely accurate description of working institutions. Implicit within that description there remained at least a residual recognition of the ultimate authority of the British parliament. But central authority was ineffectual -- a fact best demonstrated by the course of the prerevolutionary crisis itself -- so long as the troops were not called in. And the whig theory of law was grounded both in a perception of the autonomy of local legal institutions as independent recipients of constitutional power and authority, and in a realistic appreciation of the relative ineffectuality of all governmental institutions whether local or central.

In the Anglo-American tradition of government ... government did not have vast bureaucratic armies of officials to enforce its laws, but instead relied on its subjects to aid the few officials who did exist in their task of law enforcement. There

---

33Hartog, supra note 30, at 314-15.
34'id. 185-96, 314-15.
was no police force during those days; constables and sheriffs did not do what today would be called police work. The constables' job was to summon jurors, not to keep the peace. The sheriff and his deputies were available for making arrests, though not trained for much except serving writs. For maintaining peace Massachusetts law depended upon citizen participation.35

Institutions of government could not function at all without the involvement and the participation of local publics. And in so far as local institutions could hope to perform their "jobs" -- the maintenance of peace and order, the suppression of crime and violence, the administration of public works, and so forth -- they needed to enlist the support and the interest of their constituencies. In the absence of effective instruments of centralized control, in the absence of a positivist monopoly of violence by the state, a "whig" model of decentralized, locally responsive institutions might have been the only available model for reasonably effective government.36

THE REASONABLENESS OF REVOLUTION.

In a Defiant Stance is unmistakeably a "neo-whig" book; it depends on a foundation of scholarship built up by Bernard Bailyn and other so-called neo-whig revolutionary historians of the 1950's and 1960's.37 Yet, it is not just another monograph, an exercise of "normal science" within a dominant "paradigm." And to understand John Reid's contribution to the modern historiography of the revolution, we should begin by briefly summarizing what a "neo-whig" interpretation contributes to the historian's understanding of the events of the American Revolution.

Beginning from a perception of both the inadequacy of earlier economic determinist (often called "progressive") models of revolutionary motivation and of the relative mildness of British actions during the revolutionary crisis, historians of the 1950's and 1960's argued that the actions of the revolutionaries were tooted in a consistent and long-lived world view which justified their belief in the corruption and the conspiratorial designs of the leaders of the British Empire. The American revolution grew out of the commitment of many colonists to "old whig" political values which had led an underground life in England ever since the

35In A Defiant Stance supra note 1, at 77.
36See Id. at 77-78.
37To say that much of Reid's argument is dependent on a Bailynesque view of whig motivation is not to say that Professor Reid is an acolyte at a neo-whig shrine. Indeed, I believe that the origin of this book lies in his dissatisfaction with the treatment accorded the legal arguments of the colonists by professional historians. I was a student in Professor Reid's course in "Legal Thought in American History" at New York University in the fall of 1972, and much of that course was devoted to the development of a perception of the appropriateness of the legal rhetoric used by the whigs in the revolutionary crises, a perception which Bernard Bailyn, with his focus on the intense and seemingly irrational nature of colonial anger and fears, had earlier rejected. See text accompanying supra notes 42-52.
Glorious Revolution of 1688. Because of that commitment, conservative pillars of provincial society might respond radically to events which would not seem to us to justify such a response. Extreme actions, and ultimately revolution, became justifiable and predictable because colonists believed that they were arguing with the English over what was constitutive of their political and social order.

Underlying this explanation of the motivation for revolution is a judgment that social or economic "causes" cannot explain the decisions to revolt. Historians have been unable to distinguish loyalists and patriots from one another by class analysis. The society which earlier historians had posited as wracked by social conflict (else why a revolution?) was found on closer examination to be by and large rather dull and provincial. Extremes of wealth and poverty existed and were growing, but most men and women lived in an agrarian world that at least as compared with England lacked a rigid or even a very perceptible class structure. The franchise was by any contemporary standard remarkably wide. And though there were political hierarchies and political elites, the signs of deference that superiors might exact from inferiors were both limited and culturally legitimated.

The achievement of Bernard Bailyn and other neo-whigs was to force historians to honor and take seriously the explanations given by the revolutionaries themselves for their actions. Neo-whig history has given us a consistent and compelling picture of a system of values and beliefs, of a theory of political behavior, that would explain the radical and revolutionary actions of fundamentally conservative and unrevolutionary men. It has demonstrated the seriousness of whig beliefs, that the contentions and the justifications of the whigs were not "mere" superstructure, rationalization, or propaganda, as earlier progressive historians had believed.

What they have not been able to demonstrate, on the other hand, is that the whigs in Massachusetts and elsewhere really had anything to worry about. Neo-whig historians have honored the seriousness of the revolutionaries' commitment to their beliefs; they have not taken seriously the beliefs themselves. In spite of their insistence on the meaningfulness of revolutionary ideology, neo-whigs, like the progressive historians who preceded them, do not really take the language of the

---

38 At the heart of this theory were the convictions that man in general could not withstand the temptations of power, that power was by its very nature a corrupting and aggressive force, and that liberty was its natural victim. The protection of liberty against the malignancy of power required that each of the various elements in the polity had to be balanced against one another in such a way as to prevent any of them from gaining ascendance over the rest. A mixed constitution was the means by which this delicate balance was to be achieved, but power was so pervasive and so ruthless that nothing was safe from it.

revolutionaries as expressing anything more than a psychological reality.

To progressives, language was often just a smokescreen that could only hide the real action going on elsewhere;39 to Bernard Bailyn, the language of the revolutionaries was an expression of an understandable and culturally validated paranoia.40 Both views assume the ultimate unreality of the actual arguments. To say that responses to events are understandable only in the context of a particular and highly specific set of beliefs, as neo-whigs do, is to impute a kind of dogmatism that we might hesitate to apply to ourselves. More importantly, such an assumption draws attention away from the meaningfulness of the constitutional conflict itself. For neo-whigs, as for progressives, a dispute over constitutional principles is both abstract and highly artificial. For both of them the terms of the British constitution were clearly and finally determined by the Glorious Revolution.

Yet the central fact of the British constitution was that it might change at any time. As John Reid has written elsewhere, “An unwritten constitution must be interpreted functionally, in terms of the existing legal institutions whose functions and procedures as they develop over centuries are accepted by both popular and professional consensus.”41 Imperial authorities might have believed that the terms of parliamentary control of the colonies had been settled by the Glorious Revolution. But they could not claim that debate over the British constitution was abstract or irrelevant or distanced from the society in which that debate occurred. The constitution was a description of the organization of society, and the constitution encompassed in detail and concretely all aspects of legal order and structure. Debate over the nature of the constitution was in essence a debate over the political nature of the society in which one lived.

It is in this context of the constitutional justification of revolutionary motivation that John Reid’s contribution to the historiography of the

39See Carl Becker, The Declaration of Independence (1942) (the “ideas” of the revolution as abstract, Lockean philosophy), and A. M. Schlesinger, Prelude to Independence: The Newspaper War on Great Britain, 1764-1776 (1958) (the “ideas” of the revolution as clever propaganda).

40 . . . American resistance in the 1760’s and 1770’s was a response to acts of power deemed arbitrary, degrading, and uncontrollable – a response, in itself objectively reasonable, that was inflamed to the point of explosion by ideological currents generating fears everywhere in America that irresponsible and self-seeking adventurers – what the twentieth century would call political gangsters – had gained the power of the English government and were turning first, for reasons that were variously explained, to that Rhineland of their aggressions, the colonies.

Inflamed sensibilities – exaggerated distrust and fear – surrounded the hard core of the Anglo-American conflict and gave it distinctive shape. These perceptions and anxieties made accommodation at first difficult and then impossible . . .


41Reid, In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution, 49 N.Y.U.L. Rev. 1043, 1088 (1974).
revolution becomes most apparent. As we noted earlier, *In a Defiant Stance* is in the first instance a discussion of how the revolutionaries got away with it, a discussion of the legal technology of rebellion in Massachusetts Bay. It explicitly incorporates a neo-whig conception of motivation into an analysis of the “conditions of law” that ensured tory frustration. But as it incorporated that neo-whig model of motivation, *In a Defiant Stance* transforms our picture of the reasonableness of whig fears of conspiracy and corruption. What, after all, is the comparison to Ireland but a validation of the whig analysis of the fragility of freedom? If the institutions of imperial control could do that there, it could do something very similar in Massachusetts Bay.

To us, the contrasts between the two societies of Ireland and Massachusetts are overwhelming: the relative wealth of the American colonists, the absolute deprivation of the Irish peasantry; the vibrancy of American institutional life, the centralization of imperial administration and the corruption of local government in Ireland; the century and a half of liberty that preceded the first systematic introduction of parliamentary regulations and controls in 1763, on the one hand, the history of an occupied and oppressed country, on the other hand, “condemned .... to barrenness, and its inhabitants to misery and want.” And John Reid is at pains to point out the contrasts between the two societies. “The legal, social, and economic worlds in which the eighteenth-century American lived,” he writes, “were beyond the comprehension of the average Irishman .... Ireland had a tradition of violence because the Irish had more to be violent about.”

At the same time, we should not underestimate the contemporary significance of the “Irish comparison”:

The lessons of Ireland were important to prerevolutionary America for the Colonial whigs, perhaps more than any other American generation, were attuned to reading danger signals from current history. They feared that what had occurred to other people could occur to them unless they manned the barricades of freedom and fought for every threatened right. Otherwise they could end as “slaves” of the British parliament .... Surely from their perspective, the history of English and British rule in Ireland was the most dangerous signal of all.

---

42 It was not a desire for local rule or American nationalism that persuaded lawminded whigs such as John Adams to suppress fear of the crowd’s ultimate potential and cling to their whig principles. Rather it was the constitutional theory then current that power corrupted rulers no matter how well intentioned. If government were not restrained, tyranny was unavoidable and liberty doomed. In the end the dilemma could be resolved only by individual convictions as to what was the greater danger, which alternative more dreadful and which presented the larger menace.....

*In a Defiant Stance, supra* note 1, at 164 [footnote omitted]; see footnote and text accompanying infra note 45.

44 Id. at 13, quoting J. A. Froude, *The English in Ireland in the Eighteenth Century* (1881), 468.

45 Id. at 13.

46 Id. at 136.

47 Id. at 12.
To us, these fears may seem obtuse. We are all, to one degree or another, materialists; we all believe that social and economic conditions are the preeminent determinants of the quality of political life. American whigs read history differently, however. To them, England had become a great commercial state because of its free institutions. English power ensured and maintained the poverty, the ignorance, and the violence of Irish life.

If John Reid's picture of Massachusetts institutional life is generally correct, as I believe it is, then what was supposed to have been settled by the Glorious Revolution was not. Old whig thought was not an archaic and mistaken vision of an imaginary world, but a more or less realistic analysis of what was constitutive of American society and of what most threatened that unwritten "constitution." The institutions of Massachusetts Bay belonged to the whigs of Massachusetts in a way that we should find incomprehensible; no local public institution can ever be said to belong to us in anything but the most abstract and ultimate sense. But English parliamentary actions, the impositions of a centralized state, could destroy those institutions, could destroy the autonomy to which Americans had grown accustomed, could reduce the American colonies to another Ireland.

A sense of the reasonableness of whig fears for their constitutional order emerges from Professor Reid's continuing emphasis throughout his book on English timidity and restraint. Tories were always on the defensive throughout the period from 1763 to 1775; they were always playing by rules made up and enforced by whigs. The English allowed their parliamentary agents to be sued and indicted by whig juries. They failed to suppress obviously illegal agreements and associations like the nonimportation associations of 1768 or the Stamp Act Congress of 1765.46 They allowed the whig Governor's Council to neutralize official action and legitimate the actions of mobs.48 English officials appeared innocuous and incompetent whenever they faced aroused whigs.

Yet, the reader of In a Defiant Stance is always aware of the incongruity of English incompetence. The agents of the British empire showed restraint and timidity. But they need not have. They played by whig rules. But they could have stopped the game whenever they wished. The imperial state could have sent in troops to close the courts and establish martial law; it could have followed the "Irish comparison." Whigs closed the courts when it suited their purposes, not the British. And one is constantly reminded that the successful exercise of whig law depended not on English powerlessness but on English tolerance and passivity.

Why England did so little to assert its rights, until the very end of the crisis, is not a question Professor Reid deals with. The important point

46Id. at 132.
47Id. at 7-16.
48Id. at 90.
from the perspective of whig motivation is that they might have, and that point was made by the Irish comparison. Whigs were not powerless; their actions and their institutional roles were not play-acting. But they knew they were defenseless against the power of an active and aggressive modern state whose interests were aroused. They attempted in an almost obsessive fashion to justify their actions by conventional standards of the maintenance of public order and the preservation of private property. But ultimately a colonial political culture of largely autonomous local institutions resistant to centralized control could not be in the interests of a modern England undergoing the first stages of an industrial revolution. If a perception of British-colonial community, of a common culture and of common origins, were replaced by an insistence the colonies were only markets for the capitalist economy of the mother country, then tolerance of local autonomy and local freedom would quite probably be replaced by attempted centralized control. And it was therefore not unreasonable for colonists to see in every minor administrative regulation and in the insistence that the colonies ought to be producers of tax revenue for England, the first tentacles of an enveloping Leviathan.

"WE ARE ALL LATENT TORIES."

In a Defiant Stance might be read as a verbal equivalent of an album of photographs, a series of frozen poses of colonists in revolt. There, on one page is a civil traverse jury assigning liability and damages to a hapless customs official; there, on the other side, are Francis Bernard and Thomas Hutchinson apoplectic with rage at the frustration of their hopes for a rationally administered and centrally controlled colony. Throughout

---

49Consider the following excerpt from a letter written by Francis Bernard to a member of the British cabinet:

Ireland affords an Example of the Usefulness of this Work and the Manner of doing it. It was owing to the wise Administration of Sir Edward Poyning in the Henry the 7/th's/ Time, that the Form of Government of that Island, which is as perfect for a dependent, as that of Great Britain for a supreme Power, has lasted now for 270 years, without wanting the least Amendment of Fundamentals....

Ireland also affords Instances of every Kind of Regulation which America wants;.... 5. There should be a solemn Recognition of the Supremacy of the Parliament of Great Britain over the American Governments, which should be the first act of each Legislature after its new Establishment & be the condition of its Activity; &. There should be a general Revival of the Laws of America, that they may be reduced as near as possible to the Standard of England & the Administration of Government & Law may be rendered as similar thereto as well may be.

Id. at 15-16 [footnote omitted].

50Id. at 95.


52IN A DEFIANT STANCE, supra note 1, at 162.
the album we can see a variety of mobs in a variety of poses: sometimes as an ordained posse comitatus doing the sheriff’s bidding, sometimes as an informal “constitutional” institution righting the wrongs committed by more formal political agencies, sometimes as a lesser evil -- the best available alternative to violence. One third of the album is devoted to a series of contrasting images of Irish resistance and revolt: of defiant speeches, random violence, local corruption, and English military power.

The effect of Professor Reid’s book is then roughly like the cumulative impact of a photo essay. His achievements are the achievements of a photographer: of the brilliance of composition, of the intensity and clarity of significant detail, of the shock of contrasting images. What one may miss in the book is a sense of the continuity and constancy of change. In In a Defiant Stance there is change, but it is a change of stark oppositions -- of whig against tory or of Massachusetts Bay against Ireland -- rather than the “change over time” which is the staple of most historical writing.

All forms of representation produce their own characteristic distortions. Narrative histories for example may lull the reader into a false commitment to the inevitable and incremental nature of change. By contrast, John Reid’s frozen images may lead the reader to underestimate the amount of change that was occurring in Massachusetts throughout the prerevolutionary period. As compared to European societies, Massachusetts Bay and other colonies of North America may have remained singularly egalitarian and locally controlled (even “democratic”). But when looked at from the vantage point of its own recent past, Massachusetts was changing rapidly. Land was growing scarce in the older, settled portions of the colony, forcing families to move away from communities and weakening traditional commitments to local institutions.83 Recent studies by historians reveal that Massachusetts society was becoming significantly more stratified. The distribution of wealth was skewed in an increasingly unequal fashion (more wealth being held by a smaller percentage of the population);84 there was, moreover, a growing perception of class differences.85 In the last few years a flood of articles by social historians has demonstrated that the last half of the eighteenth century was a time of great social change. America was developing a “mature” social structure, less unlike the “old world,” and whether

we call those changes "anglicization," commercialization, or modernization. Massachusetts Bay was becoming increasingly unlike the world whigs thought they were defending.

There is at least scattered evidence that the growing geographical mobility of prerevolutionary society was leading to a breakdown of the local publics on which local legal institutions had always depended. Well before the revolution some local courts were becoming increasingly bureaucratic and narrow in the business they would hear, leading to a decline in their local authority and autonomous significance. Some historians, indeed, imply that the 1760's and 1770's were characterized by a general decline in all forms of traditional authority -- public or private. If they are correct we might better see the revolutionary whigs as romantic conservatives of a sort, however accurate their analysis of how to make a revolution, trying, even as they asserted their traditional rights, to recreate a world fast disappearing from their lives.

In any case, in the years immediately after the declaration of independence the new state of Massachusetts moved quickly to assert its centralized authority over all local institutions. During the 1780's most all of the discretionary and rule making authority of local courts were assumed by the General Court, by the legislature of the new Commonwealth of Massachusetts. Towns and counties became mere administrative agencies of the state. After the revolution there was no place for decentralized local problem solvers that were not tied to the sovereign people of the whole Commonwealth. The "public" for the actions of local institutions had become, if effect, the General Court. I have argued elsewhere that this centralization of authority was not so much a radical shift away from a pre-existing state of affairs as a rationalization of much that had occurred in an informal and piece-meal fashion prior to the revolution. The centralization of the new state of Massachusetts was perhaps only the political realization of the fundamental transforma-

---

tion occurring in the society generally. And others have argued that the revolution is only an interlude of relatively minor significance in that transformation, a squiggle in the otherwise straight line on the graph of American modernization.\footnote{Greene, The Social Origins of the American Revolution: an Evaluation and an Interpretation, 88 Pol. Sci. Q. 1 (1973).}

What does this "narrative" approach tell us about the meanings and the truths of John Reid's photographs? It ought, in the first place, to confirm our suspicion that those reigning old whig values of the American Revolution, the values which shaped the political behavior of American whigs, were both premodern and increasingly anachronistic. The responses of the whigs to the perceived threat to their institutions posed by an active British state were reasonable, but they were also doomed to failure. For the threat to a multi-centered, locally controlled polity came not just from the external forces of imperial centralization but also from within, from the changing nature of American society. How did they make a revolution? They made it by temporarily reasserting their control over institutions that were fast slipping beyond their grasp, that were changing even as they, the colonists of Massachusetts Bay, were changing.

The pictures Professor Reid has given us are pictures of a "world we have lost," of a world to which we cannot give even our philosophical loyalty.\footnote{But see, F. Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Ind. L. J. 145, 148 (1978).} It is a world which would be familiar to many anthropologists.\footnote{See Henretta, Families and Farms: Mentalité in Pre-Industrial America 35 Wm. & Mary Q. (3d ser.) 3 (1978).} Like many modern "less-developed" countries, but unlike the legal orders of Western Europe and the United States since the early nineteenth century, eighteenth century Massachusetts had a multiplicity of legal systems, responsive to differing but overlapping publics.\footnote{See L. Pospisil, The Anthropology of Law: A Comparative Theory 98-126 (1971); M. Smith, Corporations and Society (1974).} As in some new states of modern Africa, the instrumental and rationalistic orders of a centralized modern state could be negated at will by the resistance -- the uncooperativeness -- of a traditional local legal infrastructure.\footnote{Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study, 7 Law and Soc. Rev. 710 (1973).} The success of the whigs in manipulating local legal institutions to destroy central planning and control need not be incomprehensible to the modern reader, but it is an unlikely point of origin for our American political and legal life.

Whatever our political values and commitments, we can no longer be eighteenth century whigs, much as we might wish to the contrary.\footnote{See Morgan, Book Review, 25 New York Rev. Books 38 (Aug. 17, 1978) [reviewing G. Wills, Inventing America: Jefferson's Declaration of Independence (1978)].} In revealing that to us, In a Defiant Stance does what all good history books do: it separates us from a spurious identification with an imaginary past.
In the words of Lucien Febvre, books like this are "a way of organizing the past so that it does not weigh too heavily on the shoulders of men."\textsuperscript{71} We have little more in common with the men and women who made "our" revolution than we have with resistant traditional groups in the new states of the Third World. Indeed, if we have anything in common with anyone in John Reid's album, it is with the tories who, according to whig assumptions, would have tied Massachusetts Bay to an unicentric legal and economic order. Since the early nineteenth century -- perhaps since 1787 -- we have chosen to live in a political society in which sovereignty is defined in singular and universalistic terms.\textsuperscript{72} In a Defiant Stance helps reveal both the antecedents to that choice and the alternative we once thought we had.

\textsuperscript{71}L. Febvre, A New Kind of History 41 (1973).
