BOOK REVIEW

The Briefs of the American Revolution, JOHN PHILLIP REID, ed. New York University Press, New York and London, 1981. Pp. 1, 194; **Law in the American Revolution and the Revolution in Law**, HENDRIK HARTOG, ed. New York University Press, New York and London, 1981. Pp. IX, 264.

The late C.P. Snow, English novelist, social commentator and raconteur in his classic essay *The Two Cultures*[1] commented on the growing gap which he perceived existed in Western culture between those devotees of the sciences, and those devotees of the humanities. Snow cited this chasm of misunderstanding as a reason for the growing difficulties involving interaction between the two intellectual cultures. He saw this lacuna as having a continuing baleful effect on the growth of scholarly enterprises whereby "the intellectual life of the whole of Western society is increasingly being split into two polar groups" between which there is a "gulf of mutual incomprehension."[2]

On a far less cosmic level, one could analogize Snow's concept of estrangement to the lack of interaction between lawyer-trained legal historians and general historians which has existed between the university and the law school.[3] These two groups of historians have often labored in separate vineyards. It has been this writer's impressionistic observation that traditional historians have often been unfamiliar with parallel research found in legal periodicals. This ignorance often seems to be based on sheer lack of availability and access to legal journals, a narrow imagination which refuses to conceive that legal journals or materials might be a fruitful source of consultation, or fear of legal writers as being purveyors of esoteric jargon and concerns beyond the scope of the traditional historian's professional interests. A subsidiary estrangement has existed between the legal historian at the law school and the rest of the law faculty. The legal historian is often seen as a well-meaning person who cannot be of much help in the teaching of "real law." Thus, his insightful and unique perspective concerning the development of "real law" remains untapped. Hence, first year law classes seem to be characterized by a smattering of disconnected and often gratuitous historical anecdotes. Most students can roam through an entire semester or even a year of

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[1] C.P. SNOW, THE TWO CULTURES 4 (1963).

[2] *Id.*

[3] See R. GORDON, *Introduction: J. Willard Hirst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC. REV. 9 (1976).

torts without learning anything about the "fellow servant rule." Then students are presented with the crucial case of *Brown v. Kendall*[4] as if it were a *deus ex machina*, which suddenly materialized out of the brooding legal universe and established negligence as the doctrine of the future.

Negligence doctrines are presented in class as a historical phenomenon without any antecedent roots. The great name of Judge Lemuel Shaw is often passed over without comment, let alone the accolades reserved for John Marshall.[5] The Shaw example shows how the student leaves the first year with little sense of the history of the private and public law doctrine. While the days of law as described by Trevor Colbourn in *The Lamp of Experience*, where for the colonial lawyer "to study law was to study its history,"[6] are long gone, the notion that legal history is somehow alien to the present study of law and too obscure for the general historian is too quaint a notion to be tolerated. It is basically limiting to both the law faculty and history faculty.

It is with these concerns in mind that the Lindon Studies in the Historiography of American Law has been launched. As one of our editors under review, Hendrik Hartog, states in his introduction to essays in *Law in the American Revolution and the Revolution in the Law*, one of the main purposes of the book of essays, and by extension the series, is "to introduce historians and other non-legal scholars to the kind of historiographical writing that is going on in American law journals."[7] Similarly, the second book under review, edited by Professor John Reid, *The Briefs of the American Revolution*, seeks to gather for the first time in published form the grand debate between Governor Thomas Hutchinson and the Massachusetts Council and House of Representatives which took place in 1773. The debate is a lengthy exchange over the "true" meaning of the British Constitution and constitutes a series of crucial documents in our understanding of the legal nature of the American Revolution. What these two works offer, for both the non-lawyer historian and the law school professor interested in expanding his legal horizons, is a glimpse of the vigorous and intense scholarship centering around the legal origins of what

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[4] Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).

[5] The best treatment of Shaw's life is found in Leonard Levy's masterful biography. L. LEVY, CHIEF JUSTICE SHAW AND THE LAW OF THE COMMONWEALTH (1957).

[6] H. COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 25 (1965).

[7] LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW (H. Hartog ed. 1981) [hereinafter cited as Hartog].

Michael Kammen has called the "single most important source for our national sense of tradition," the American Revolution.[8]

The format of the Hartog book is primarily a series of essays on various recent books which have appeared in law reviews on works dealing with law and the American Revolution. In this category we have Bruce Mann's essay on M.H. Smith's magnum opus on *The Writs of Assistance Cases*, John Reid's review of Bernard Bailyn's *The Ordeal of Thomas Hutchinson*, Robert Gordon's critique of William Nelson's *The Americanization of the Common Law*, Hendrik Hartog's review of John Reid's *In a Defiant Stance: The Conditions of Law in Massachusetts Bay*, the *Iris Comparison*, and the *Coming of the American Revolution*, Peter Teachout's review of the same book, and Stephen Presser's review of Morton Horwitz's *The Transformation of American Law 1780-1860*.

In addition to these six reprints, there are two original essays in the volume. One by John Reid is entitled *The Irrelevance of the Declaration;* and the second by Hendrik Hartog is called *Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History*. All but the last named Hartog piece, which is a sort of summation of the themes of the volume, are ostensibly reviews of books. But in reality they are more than mere book reviews and the focus is beyond the books themselves. They are more in the nature of reflections on the book reviewer's views regarding the nature of law in eighteenth century America. The book review format serves as a means to give form to the author's extended analyses of the period and acquaint the reader with the main body of current writings growing out of the burgeoning field of American legal history.

The essays in the Hartog volume are diverse in form and tone. They are not even united by the eighteenth century and the American Revolution, since the Presser review of Horwitz's *The Transformation of American Law* really deals with a book about the nineteenth century legal universe. While it is true that Horwitz's initial chapter set the stage for the Horwitz thesis, a fundamental change in attitudes towards substantive law occured as a result of the American Revolution. The main focus of the book lies not in a tracing of the eighteenth century development, but rather in the new nineteenth century universe as contrasted to that of the eighteenth century.

The book of essays thus seems to be a tribute to the very lack of unity which exists in legal historiography and the lack of a general

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[8] M. KAMMEN, A SEASON OF YOUTH: THE AMERICAN REVOLUTION AND THE HISTORICAL IMAGINATION 256 (1978).

field theory of the basic precepts regarding the origins of this event. Hence, we have Bruce M. Mann's review of Smith's *Writs of Assistance* case, wherein Mann casually mentions, as if it were a truism, that James Otis' argument against the use and constitutionality of writs of assistance in the colony was based upon "appeals to natural law on which its notoriety rests."[9]

Mann seems blithely unaware or at least finds it unnecessary to deal with the body of scholarship produced by the dominant figure of the volume and of the enterprise, John Reid, whose central thesis is that the American Revolution had little, if anything, to do with natural law but was based on appeal to English customary and constitutional law and a Whig theory of fundamental law.[10]

Reid makes this point in abundant fashion throughout his writings. This casual disregard for the work of a fellow author in the volume is curious indeed, if not unique, since Morton Horwitz's entire chapter on the revolutionary period also assumed its natural law origins. It is only Horwitz's and Reid's glossators, in this volume, Stephen Presser and Peter R. Teachout, who seek to frame the dichotomy of scholarship which seems to exist between those who believe that the Revolution was primarily a result of enlightenment ideas, John Locke, and natural law, and those like Reid who view it as a question of rival interpretations of the British Constitution.

Indeed, it is the relative novelty and zeal of the Reid thesis which causes him to dominate this volume and give what little unity exists in the collected essays. Reid, in his two essays on Hutchinson and *The Irrelevance of the Declaration*, pursues with the passion of a kind of Whig dominated missionary Menchen to debunk and displace the coventional wisdom of the natural law origins of the American Revolution with his own *ideé fixé* that the Revolution was a product of English customary law not natural law, and the revolutionary godhead, if any, was Lord Coke not John Locke. Like another person afflicted with strong fixed ideas, the great French composer Hector Berlioz, Reid aided and abetted by the reviews of Presser on Horwitz, Hartog on Reid, and Teachout on Reid, brilliantly orchestrates a fantastic and giant symphony to spread *the idea*.

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[9] B. MANN, *A Great Case Makes Law and Not Revolution*, in Hartog, *supra* note 7, at 16.

[10] In a learned aside Reid points out that the 18th century meaning of "constitutional law" and "fundamental law" was not always necessarily the same. While they were sometimes used interchangeably, at bottom, the difference was that constitutional law was not always immutable, in that a valid precedent could change the law. However, a principle of "fundamental law" was always unchanging and not susceptible to new precedents. Thus, even if the Crown were to abolish Parliament for 50 years, no precedent for its abolition would be established since to do so would violate a principle of "fundamental law." *See* Hartog, *supra* note 7, at 88 n.185.

It is an idea which runs through his entire corpus of writing. It reaches a principle of distillation in *The Irrelevance of the Declaration,* which attempts in forty-three brief pages, written with tight lawyer-like arguments, to demolish the conventional wisdom that seeks to place the Declaration as the fountainhead of American natural law theory. Equally suspect in Reid's view is the related argument of the notion regarding the alleged pervasive influence of John Locke on the document wherein the struggle to break away from the Crown and English law is subsumed under the emerging banner of enlightenment. Reid takes the reader back in a legal time machine into the 18th century legal milieu. His purpose is to make us understand that the Declaration's use of such crucial terminology as "contract," was not meant to refer to the lockean social contract. According to Reid, the Declaration was talking about "contract" in terms of British constitutional law. Reid's best evidence for this interpretation beyond his learned analysis of eighteenth century law is the unmistakeable proof of the document itself. Beyond the rhetorical flourish of the opening, the form and structure of the Declaration is a common law bill of indictment. Furthermore, Reid takes us step by step through each count of the indictment to demonstrate how each grievance of the colonists is rooted in the past, specifically in the petition of rights against James II.

Many of the same arguments were advanced by an earlier generation of English Whigs against the Stuart monarchy. Most obviously falling into this category was the call for civilian control of military actions, no taxation without consent of representatives, no standing armies, and freedom from "arbitrary" government. These rights Reid tells us did not belong to the ages:

> [T]hey belonged only to those who had customarily possessed them from time immemorial. Only the British could make that claim, for they were constitutional principles, sanctioned by English constitutional history, and guaranteed by English common law. Far from being a statement of abstract, natural principles, the Declaration is a document of peculiar English constitutional dogmas.[11]

Reid hints that the almost universal historical myopia he sees existing regarding the understanding of the true nature of the Declaration of Independence and the American Revolution, is both the historians' anachronistic definition of the word "law" itself. Trained in a society where law is defined in the Austinian sense, as the "command"

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[11] J. Reid, *The Irrelevance of the Declaration,* in Hartog, *supra* note 7, at 87.

or "will" of the central sovereignty, they fail to realize that the eighteenth century legal universe was much different. The coercive power of the central state had not yet made its full force felt. For Reid when Whigs and Tories in pre-Revolutionary America spoke of "law" the term connoted "custom" and "community consensus" more than sovereign command.[12]

Reid's evidence for this theory is contained in the second work under review, *The Briefs of the American Revolution.* In many ways *The Briefs of the American Revolution,* which Reid as editor has assembled for the first time for the modern reader, is a more crucial document than the Declaration of Independence for understanding the American Revolution.

The series of constitutional arguments in 1773 between Governor Thomas Hutchinson and the Massachusetts Council and House of Representatives were occasioned by Hutchinson's decision to reply to the Boston Declaration of November 1772. This Declaration, instigated by Samuel Adams, was a direct result of the decision of the English government to pay the salaries of the judges of the superior court. This was seen as a threat to colonial judicial independence, since the former policy had been that the colonial legislature paid for judges' salaries. It was also seen as a break in precedent and a threat to the custom of the community. It was later to be a grievance listed in the Declaration of Independence. In order to publicize the supposed errors and misapplication of constitutional principles contained in the Boston Declaration, Hutchinson called a town meeting to prove to the colonial legislatures the error of their legal ways. His stated purpose was to prove to the colonials that the principles enunciated in the Boston Declaration "'could not be supported,'" that is to "'shew the unwarrantableness of the proceedings by laying before them the true principles of their Constitution in as simple concise a manner as I could.'"[13]

Hutchinson's purpose was not only to educate Americans in the true nature of the Constitution, but also to offer them an opportunity to reply. They accepted his offer, and the exchange of legal arguments between the Governor and the House of Representatives and the Council forms a neat seven document unit which mirrors the forms of the common law on that of pleading, the address of the Governor, the Answer of the Council, the Answer of the House, the Replication of the Governor, the Rejoinder of the Council, the Rejoinder of the House, and the Surrejoinder of the Governor.

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[12] *Id.* at 60.

[13] THE BRIEFS OF THE AMERICAN REVOLUTION 4 (J. Reid ed. 1981).

These collective documents in dramatic fashion illustrate Reid's central concept of the understanding of the 18th century legal world, the theory of the "Two Constitutions." Reid goes beyond his concise critique of the natural law theorists and takes us into the "hearts and minds" of eighteenth century legal philosophy. In a legal world without a supreme judicial tribunal, this was the only forum for legal debate, the court of informed public opinion.

Hutchinson stood for the "Imperial" or "Tory" Constitution. This theory of constitutionalism looking forward, rather than backwards, believed that Britain had reached a point where sovereignty had and should be placed institutionally in the hands of the supreme legislature of Parliament. Sovereignty would no longer be diffused but would be individual. This theory was grounded in the notion that there was no fear of arbitrary government since the King had been only a titular head of state. Hutchinson saw no problem in an Imperial constitution which centered ultimate authority in a Parliament whose members acted as representatives of the people. With the additional modification of a more popular form of sovereignty in the form of a more democratic system of representation, it is not dissimilar to the Jeffersonian philosophy of government, which at least in a theoretical plane, is content to rest sovereignty in the legislature. The Imperial constitutional theory called for centralized authority which anticipated the wave of the future. However, Hutchinson, in advocating this position, seriously ignored the pull of the past. He failed to grasp the depth and force of the Whig legal culture which had grown to full maturity in America. John Adams and others in drafting the colonial Whig replications evoked a legal culture gone from the contemporary British scene. They drew constitutional life from the arguments of Lord Coke that the common law and custom rose above institutional concepts of sovereignty. They rejected the notion that Parliament had superseded the force of the common law and custom. For the colonial Whigs the fear of "arbitrary" government was potentially just as real from a faraway Parliament, as it had been in England from a Stuart monarchy. In their answer to Hutchinson the American Whigs employed a different theory of constitutionalism, born nearly 150 years earlier.

The English were quite familiar with the names and historical allusions but were not convinced of their current applicability to the debate. Reid suggests that the colonial Whigs dealt with the same questions and same theory of constitutionalism that Sir Edward Coke, John Hampden, and John Pym embraced against Stuart absolutism, an ancient theory of constitutionalism which was grounded in the historical problem of what were the limitations on government. Thus, when the Whigs were citing the petition of right, the Magna Carta,

and other old statutes of England, they were arguing that "the constitutional principles that had sent Charles I to his death and toppled James II from his throne were still viable."[14] These were immutable principles of law.

Hutchinson, for his part, refused to recognize them as such, thus, under the Hutchinsonian constitution nothing was immutable. Even though both cultures spoke the same language and shared the same history, at the same time they also shared a mutual gap of misunderstanding. Like the characters in Kurosawa's *Rashoman*, the same events were given different interpretations as seen from the respective perspectives of the two legal cultures. Thus, in seventeenth century England, the great threat to freedom came from the Crown, and the institution to guarantee those ancient rights was the sovereign Parliament. But from the English view the interpretation of "Magna Carta, no longer held the legal mystique of Cokean liberty."[15]

The colonial Whigs were stung by Hutchinson's and Parliament's casual disregard for the past. They feared the "innovations" of Parliament. Of course Hutchinson was perplexed by the American unwillingness to accept what he saw as the logical historical and legal evolution of the events culminating in the Glorious Revolution. At bottom the two groups saw post-Glorious Revolution events quite differently. Americans failed to heed the call of institutional protection and finality which became the English model.

> The guarantor of rights at home became the threat to freedom in North America. Parliament became for colonial Whigs what the Crown had been for Puritans, common lawyers and parliamentarians in early Stuart England, and the colonial Whigs were invoking the constitutional tradition of 17th century Puritans, common lawyers, and parliamentarians. Thomas Hutchinson understood that constitutional history but missed its application to his own times.[16]

As was said earlier, of course no supreme tribunal existed to adjudicate these two steadfast and thorny constitutional questions. American constitutional scholars of both the lawyer class and others have largely ignored this series of debates. The lack of a judicial mechanism to settle the dispute was understandably influential in tracing the origins of judicial review in America and the creation of the Supreme Court. It would seem likely that the recent memory of the institutional problems engendered by not having a Supreme Court

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[14] *Id.* at 28.
[15] *Id.* at 29.
[16] *Id.* at 163.

to decide constitutional questions must have influenced the framers of the Constitution. Furthermore, Reid's evidence implies that certainly part of the impetus to create a written constitution, as opposed to the unwritten British Constitution, was a direct result of the frustration the colonial Whigs experienced in arguing a constitution based upon cumulative precedent and custom. Thus, *The Briefs of the American Revolution* opens a fruitful area for the constitutional lawyer and historian. Equally interesting is the link between the Federalist-Hamiltonian perspective and the philosophy of Coke. In a sense the linkage seems tied up in the common philosophical notion that the law reigns supreme even above any institutional force which reflects the popular will. Perhaps having broken away from England and the yoke of parliamentary sovereignty, Americans made sure that the same institutional crisis over law and sovereignty would not be repeated in America and an oracular court to authoritatively interpret constitutional principles was the resultant vision of the Federalists. These are but a sampling of some provocative ideas Reid's work offers to constitutional teachers in an effort to bridge the gap between history and law.

Of course whether Reid's ideas about the two constitutions are ultimately validated waits for another book—one which would trace the trans-Atlantic intellectual crossing of the ideas of Coke transformed into the colonial Whig legal heritage. But that is another task. What Reid has done in this book is to present us with a convincing and persuasive brief that the American Revolution was truly a constitutional revolution, a revolution based on ideas about the nature of law. Both lawyers and historians as respondents must reckon with the force and power of his arguments in appealing to the appellate court of informed scholarly opinion.

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