

1950

## Book Reviews

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Book Reviews, 40 J. Crim. L. & Criminology 494 (1949-1950)

This Book Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## BOOK REVIEWS

A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750. THE MOVEMENT FOR REFORM, 1750-1833. By *Leon Radzinowicz*. The Macmillan Co. 1948, pp. xxiv, 853. \$15.00.

The year 1750 was the middle point of the century of the Illumination, for England quite as much as for the Continent of Europe. But both in England and the Continent, the Illumination was that of a relatively small group of the intellectual elite. In France, and from France throughout Western Europe, men turned their newly found light on what seemed the political barbarism of their state organization. In England, whose political system had just been declared by the ingenious M. de Montesquieu to be a model for the world, that light was turned—at any rate, the attempt was made to turn it—on what was undoubtedly the bloodiest and most savage penal statute-book any civilized nation ever possessed, even if we take the half legendary Draconian code as a basis of comparison.

It took three generations to humanize the English penal law and it is the history of these three generations that Dr. Radzinowicz presents in this admirable and substantial volume. It is a history not merely of a changing law but of a changing society and it will be indispensable for the students of both. Perhaps it will underline the fact, still imperfectly understood, that the two cannot be studied separately.

Dr. Radzinowicz divides his book into five parts; I, "Capital Punishment in Eighteenth Century Criminal Law; II, Administration of Statutes Imposing Capital Punishment During the Eighteenth Century; III, Leading Currents of Thought in the Principles of Punishment in the Eighteenth Century; IV, The Beginnings of the Movement for the Reform of the Criminal Law; and V, The Growth of the Movement for the Reform of the Criminal Law. There are four appendices, listing and classifying the capital statutes of the eighteenth century and illustrating their interpretation, to which are added one on views of foreign observers and on some leading petitions for reform and a table of the fourteen capital statutes still in force at the end of the period covered by the book. Fourteen may seem to be a formidable enough number, if we forget the original number which certainly exceeded two hundred.

While we are in general familiar with the difference between law on the books and law in practice, the account Dr. Radzinowicz gives of the extraordinary gap between the two, is none the less surprising. The death penalty was threatened for the most trivial offenses but, in fact what with reprieves by the court, pardons and commutations by the Crown, only a fraction of those convicted actually were executed. In the fifty years between 1709 and 1759, the fraction was once as high as 90% but once as low as less than 10%. The average was just over 50% and the relaxation of punishment continued progressively after 1800.

The point has been often made that the astounding severity of the English law—however modified in practice—was not a relic of medieval barbarism, but was a deliberate policy which began with Henry VIII and caused the multiplication of non-clergyable offenses

which still gives us a shudder. Dr. Radzinowicz shows this with a fullness and wealth of documentation never equalled before and enables us to see in the history of the "Waltham Black Act" of 1722—which was not finally repealed until 1823—how perilously easy it is to begin with a real danger, to exaggerate it, and then to whip any occasion of apprehension into an excuse for new severities.

The great value of the book—besides the enormous mass of almost inaccessible information on the subject—lies in the complete presentation and analysis of the ideas than animated those who sought reform and those who resisted it. Besides minor persons, such notable figures as Fielding, Paley, Madan, Eden, Romilly and Bentham have never before been so vividly depicted in their relation to the history of criminal law. In addition, in a brief chapter on developments on the Continent (pp. 268-301) we find a thorough examination of the epochal figure of Beccaria.

Almost every modern problem of penal law, most of which are admittedly still unsolved, was discussed by those engaged in the many controversies of the period examined. Such things as the indeterminate sentence, the economic background of crime, the effectiveness of punishment as deterrence, the persistence of the popular attitude of expiation and vindictiveness, the rehabilitation of criminals, all these questions were raised and legislation was enacted on the basis of one or another theory, with no more satisfactory result than can be shown today. One may say that the only modern approach to the problem that was not actually attempted, was the psychiatric one.

The commonest qualification which capital punishment received was based less on any theory of punishment than on a general sense of human charity which felt a distinct shock when boys and girls too young to make valid contracts, or wretchedly poor persons were hanged for the theft of a few shillings. Both prosecutors and juries, with "Pious perjury", found that articles were below the value of the amount necessary to constitute a felony, or exerted themselves to secure a pardon. And it is well to remember that hanging a man for theft unaccompanied with violence shocked not only Thomas More in the sixteenth century but even Edward Coke in the seventeenth. It is consequently more than passing strange that Christian gentlemen in the eighteenth and nineteenth centuries should have stormily denounced any relaxation of the penal laws. Indeed greater severity was demanded in the name of security. It comes as a surprise that the moralist Paley desired no change in the law but merely more vigorous enforcement and that the humanitarian Beccaria would abolish the prerogative of pardon altogether. We may remember that Kant also believed that execution must follow condemnation as part of a single abstract concept.

The Statistics of convictions, executions and "alternative" punishments give a particularly realistic color to the chapter on "Capital Statutes in Operation" (pp. 138-164). The figures themselves, especially with Dr. Radzinowicz's interpretation, tell their own story. One element is, however, lacking. So far as the actual incidence of crime is concerned, the statistics of this chapter would be made even more significant, if reference had been more frequently made to the population. For example, on p. 148, Dr. Radzinowicz points out that 97

persons were put to death in 1785 in London and Middlesex alone. Using the rough multiple of 20 this would make about 2,000 throughout England, or if this figure is arbitrarily halved, 1,000. When this is contrasted with the 22 who were executed in 1938 in all England and Wales, the difference is made more striking if we note that England and Wales had more than five times as many people in 1938 as in 1785. Similar relation to population figures would be helpful throughout.

Dr. Radzinowicz rarely mentions procedure—though he does sometimes. But as a matter of fact, the movement for reform which he so fully describes, had as an important incident, the creation of a complete right of representation for an accused person. Without this and without the rights of seeing the indictment before pleading or the right of taking the stand—not acquired even at the end of our period—the presumption of innocence was of qualified value. Indeed, the author's attention should be directed to the discussions on the presumption by Thayer and the study of C. K. Allen.

Since the entire history of criminal law is announced in the title, another omission must be noted which some of us may be forgiven for regarding as important. A good deal is inevitably said about treason and the piecemeal abolition of the ritual savagery which accompanied its punishment. A little space ought to have been found for the device of "constructive treason" (p. 225, n. 90) by which frightened Tories sought to shut out from England any breath of revolution. Similarly the laws against blasphemy were, if anything, more enforced in the later part of this period than before, and the pious Wilberforce whose general humanitarianism cannot be questioned, was willing to let a man or woman who sold Tom Paine's "Age of Reason", die in a filthy jail.

In so large and useful a book minor corrections have the character of brief annotations. The Babington executed in 1586 (p. 222) was named "Anthony", not "Edward". The statement on p. 224 seems to make Coke a contemporary of Jeffreys, which is certainly not the author's meaning. Again it is only by implication in the notes (p. 209, n. 12) that we learn that petty treason included the murder of a master by a servant as well as that of a husband by his wife. As a slight addition to Note 88 on p. 188, it might be said of the hangman, Edward Dennis, if he did not attain mention in the Dictionary of National Biography (p. 190, Note 90) that he did achieve a greater distinction by becoming a vividly described character in Dickens' Barnaby Rudge. Perhaps Filangieri deserves more than the single mention of him, in the chapter on the movements on the Continent. Besides, there was a translation of his work within the period specified.

It need scarcely be added that no one interested in the development of the criminal law can afford to be without access to this book which adds so much to our knowledge of the subject and corrects so many current misconceptions.

Duke University Law School  
Durham, North Carolina

MAX RADIN