

with Contract, Employment, and other relations. In his first edition, Dean Green considered them important enough to be allotted some six hundred pages. In the present edition, those cases are completely eliminated from the text and merely cited in footnotes to annotate about forty pages of the editor's own analysis of the problems involved. Though one welcome result of this case deletion has been a reduction in the size of the book (the first edition ran well over 1800 pages of small print), its wisdom will surely be questioned. Certainly the editor's explanation is hardly compelling—that the interests involved in the excised cases "are entirely too many, too difficult of treatment and too important to be summarily dealt with." One naturally answers, If they are important, and precisely because they are so difficult, why not rather eliminate some of the cases and materials on topics relatively less important and less difficult? Nor will the editor's suggestion that they be treated, if possible, in a separate course on Torts, as is done at Northwestern, appeal to the many teachers of torts, who, like the present reviewer, are confined by curricular exigencies to one three-hour course for two semesters. With due respect to all the many merits of the present edition, this reviewer must regard the change as a serious obstacle to the more extensive use of the book for class-room purposes.

ISRAEL TREIMAN.†

---

PUNISHMENT AND SOCIAL STRUCTURE. By George Rusche and Otto Kirchheimer. New York: Columbia University Press, 1939. Pp. xiv, 268.

Most of what has been written on the subject of punishment has been concerned with penal theory: the philosophical justification of various theories of retribution, deterrence or reformation. A refreshingly new approach is found in this monograph, which might be described as a study of the history of punishment from the viewpoint of economic determinism. Its thesis is that both crime and punishment are affected mainly by economic developments, and that society at every stage of development has devised methods of punishment which correspond to the current system of production. This reviewer is not inclined to challenge that idea. If others are, they will have a difficult time to rebut the mass of evidence which Messrs. Rusche and Kirchheimer have here assembled.

They trace the development of punishment starting with the early middle ages, when the task of criminal law was primarily to keep the peace between equals, a task which could be performed almost entirely by the imposition of fines. The great increase in population in later medieval times and the resulting increase in poverty led to an increase in crimes against property. Fines were out of the question as punishment for these impoverished criminals, and corporal punishment and the death penalty became increasingly common. No other way seemed to offer itself for society to get rid of dangerous persons. It was a penal system obviously the product of a society in which there was no shortage of labor. As Professor Thorsten Sellin says in his Foreword to this book, "The sanguinary punishments and tortures of old are no evidence of bloodthirstiness or sadism on the part

---

† Associate Professor of Law, Washington University.

of those who used them. They rather testify to the fact that those who designed them could conceive of no better, that is more efficient, way of securing protection for the social values which they treasured."

The extension of trade toward the end of the sixteenth century created an increased demand for labor. Wages rose. The ruling class fought this rise with all the weapons at its command, and did not neglect the use of prison labor. Workhouses were established, in which persons who would not work voluntarily were forced to do so—at a profit to the state or to the private entrepreneurs to whom such workhouses were often farmed out.

From the workhouse grew the modern penitentiary system. Unfortunately, however, imprisonment became the generally accepted form of punishment just as its economic basis, the need for man-power, began to disappear. The new factory system could produce goods more cheaply than the prisons with their handicrafts, and so made prison labor unprofitable.

The authors also credit the industrial revolution rather than humanitarian principles for the amelioration of savage punishments early in the nineteenth century. The abject poverty into which the working class was plunged and the rise of the "reserve industrial army" of the unemployed rendered it unnecessary any longer to use savage punishments to coerce the propertyless class into continuous work. The threat of starvation could be relied upon to provide such coercion. Thus increasing pauperization of the masses was accompanied by more lenient treatment of the poor.

Galley slavery and transportation are also traced by the authors to economic bases. Both were practiced because they were or seemed to be economically wise, and were abandoned not because they were inhumane, but because they were uneconomic. "Once transportation ceased to pay, the colonists realized it was a shameful business unworthy of them."

The historical chapters of the book are primarily the work of Dr. Rusche, and were written in German as a project for the International Institute of Social Research. When his manuscript was submitted in 1934, the Institute had been closed by the German government and had transferred its activities to Columbia University. It was decided to amplify Dr. Rusche's work, and Dr. Kirchheimer was assigned to that task.

Dr. Kirchheimer also added several chapters of his own, dealing with prison reform, the fine in recent penal practice, trends in penal policy under fascism, and penal policy and crime rate. On the last named subject, he reaches the same conclusion which Ferri reached at the turn of the century: that severity or leniency in penal policy seems to have no effect on the prevalence of crime. "The crime rate can really be influenced only if society is in a position to offer its members a certain measure of security and to guarantee a reasonable standard of living." Unfortunately, so long as society is unable to solve its social problems, it will always be ready to take the view that crime is caused by inherent human wickedness, which can be curbed only by more repressive punishments. Increased knowledge has given us greater capacity than ever before to understand and to solve the problem of penal treatment, but—paradoxically—the defects in the social order make the acceptance of such solutions more remote than ever.

It might be objected that the authors try too hard to make out a case;

that their material is too narrowly focused upon one viewpoint. Even if this criticism is valid, it must be admitted that it is a viewpoint which eminently deserves presentation, and that it is here presented in a manner both scholarly and stimulating.

HENRY WEIHOFEN.†

---

RESPONSIBILITY OF STATES FOR ACTS OF UNSUCCESSFUL INSURGENT GOVERNMENTS. By Haig Silvanie. New York: Columbia University Press, 1939. Pp. 223.

Probably because there has been so much evidence of apparent irresponsibility on the part of states in the family of nations in recent decades, the subject of the general responsibility of states under international law has become increasingly prominent in recent writing and discussion. Dr. Silvanie under the direction of Professor Joseph P. Chamberlain of Columbia University has undertaken a study of one phase of the problem and in the volume here under review has reported his results.

The study is based primarily on the decisions and opinions of international arbitration and claims commissions, to which frequent references are made in the footnotes. The principal sources are also listed in a brief bibliography at the end of the volume; but several outstanding recent contributions both on the general field of state responsibility and on the work of particular claims-commissions, especially the recent claims-commissions of the United States and Mexico, are strangely nowhere mentioned.

The value of Dr. Silvanie's treatise is not in the presentation of any new principles, conclusions, or procedures but rather in the assembling, unifying, and further substantiating of what was already pretty generally accepted. In simple and clear style he covers the subjects of Insurgent Loans, Concessions and Alienations, Acts of Government Routine, Taxes and Customs Duties, and Tortious Acts.

The theses stated and supported by the documentation may be briefly summarized:

1. A state is not liable for either private or public foreign loans to unsuccessful insurgents for use in support of the rebellion or insurgency, unless the insurgents have succeeded sufficiently to establish themselves as the *de facto* government at the time when the loan is made.
2. A state is not bound by contracts, concessions, or alienations involving its public domain made by unsuccessful insurgents.
3. In the fixing of liability it is a well established practice to distinguish between the insurgent government and the permanent administrative machinery or civil service; between the acts of the insurgent government in its personal or political character and the acts of government routine; between the acts for carrying on the rebellion and the acts of normal administration. For the one the state has been consistently held not liable; for the other it has as consistently been held liable.
4. When, as a result of compulsion, taxes or duties have been paid to

---

† Associate Professor of Law, University of Colorado.