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Review of “The American Law of Treason: Revolutionary and Early National Origins,” By Bradley Chapin

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BOOK REVIEW

THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS. By Bradley Chapin. Seattle: University of Washington Press, 1964. Pp. viii, 172. \$6.00.

The number of published studies in American legal history has increased during recent years, and so also has the interest of scholars. At least general historians seem to be paying more attention to the role of law in the development of the United States and of American institutions. The idea that legal history as a significant discipline can be limited to constitutional decisions no longer prevails. But the discovery of the lower courts, of the bar, and of the legislative halls presents the problem of how legal material can best be handled in an historical context. This book, by Bradley Chapin, Dean of University College of Buffalo, serves to bring into focus many of the questions which confront us. Much that is right and much that is wrong with the writing of American legal history can be found in Chapin's slim volume.

The very fact that it is slim raises the first of these questions. Perhaps it pertains more to the editing of historical publications than to the writing of history. To the reader, this book appears overedited, for the first thing he asks is whether it is worthwhile to attempt a history of treason from 1763 to the 1807 trial of Aaron Burr in a mere 117 pages. The answer may turn on the degree of technicality desired. Too much technical material can make a study unpalatable to the non-lawyer historian and perhaps even render it meaningless. The historian's training does not prepare him for the lawyer's emphasis on case-by-case detail. Yet law cannot be stripped of most definitions nor can it be treated as theory without the mechanics which make it possible for theory to be translated into practical operation.

Dean Chapin's theme is challenging. Accepting the idea that the American law of treason is an expression of eighteenth-century liberalism grafted onto the words of a fourteenth-century statute, he asks, "By what process did the medieval become modern, the monarchical republican?"¹ In the opening chapter, therefore, he deals with English and colonial backgrounds. Admittedly, the interrelation of law and history are expertly portrayed. But details are so sparse that it is difficult to grasp the author's points. This seems due to the fact that the complex development of constructive treason is compressed into six and one half pages. There is a wealth of material here which seems to have been so ruthlessly edited that it has lost much of its value to any reader not already familiar with the history of treason.

1. P. 3.

When brevity is a determining factor, it seems advisable that the legal historian confine the scope of his study. It might have been better for Chapin to have developed and expanded one of the chapters, as for example British policy during the Colonial and Revolutionary periods.² By limiting his space, he draws no analogies to similar events in English history. Perhaps it is asking too much to compare the attitudes of New York authorities during the riots against the great landlords with the attitudes of royal officials during the copyhold disturbances in England a hundred years earlier. But one does look for comparisons between repressions of the Jacobite leaders and the treatment accorded Ethan Allen who was taken in chains to the mother country. Was the retreat from the intention to make an example of Allen a reversal of state policy or did it follow a pattern consistent with past events? These are the questions which give historical substance to legal scholarship. Without such considerations, legal history becomes a bare survey of rules, statutes, and the disposal of individual cases.

It is true that Dean Chapin goes beyond mere legal records. But he does not always explain why. In one paragraph, he refers to a speech delivered by a Whig army chaplain during the British evacuation of Boston and cites a placard attached to the dummy of a Tory governor hung in effigy, because both contain the word "traitor."³ This may demonstrate what he is after—the evolution of the concept of treason. But Chapin does not define what he means by "treason." At times it seems to be that body of law rooted in the statute of Edward III. Then again it may be some act of hostility deserving the death penalty. The court-martial of Thomas Hickey which ended in Hickey's hanging is called a "decisive step" because it showed that loyalty to George III was interpreted as a "heinous crime."⁴ But was it loyalty to the king or disloyalty to the United Colonies? Prosecution for treason (depending upon what is meant by treason) may constitute the ultimate legal claim to sovereignty.

Dean Chapin's best chapters deal with the Revolutionary War. He makes it clear that state treason statutes were not used as a means of controlling Tories since treason was viewed as an incident of battle.⁵ The authoritative work on the law of treason in the United States prior to this has been Willard Hurst's series of articles published during 1944.⁶ Interestingly, when we consider the school of legal historiography which he has since founded, Professor Hurst in that series placed his emphasis upon statutory enactments.

2. Pp. 10-28.

3. P. 33.

4. P. 35.

5. In New England, for example, the statutes "were all but dead letters." P. 46.

6. Hurst, *The American Law of Treason*, 58 HARV. L. REV. 226, 395, 806 (1944).

Dean Chapin conforms to the pattern of later Hurst writings: he is interested in the law in action and so adds a new dimension to our knowledge. He feels that "historians of loyalism, implying persecution, have left a false impression concerning procedural rights during the Revolution."⁷ Chapin explodes the notion that Tories were ruthlessly suppressed. By going behind the records, he seeks to find the historical lesson in terms of protections and safeguards accorded the accused. "Study of the treason law in action," he concludes, "leads to a revision of the notion that state officials rode roughshod over procedural rights and conducted a reign of terror. The evidence establishes a record of judicial moderation."⁸ Since some of our constitutional principles are based on the theory that the state and national constitutions were drafted by absolutists reacting to the injustice of earlier times, the materials assembled in this part of the book are of legal as well as historical significance. But one may wonder what generalities can safely be drawn from a study of procedural records alone. Were the historians of loyalism talking about treason prosecutions only, or were they citing instances where the law was not observed (and hence no records kept), where Tories fled before they could be brought to trial because they feared juries rather than the courts, and where charges less serious than treason were preferred?

The American Law of Treason has a good index, it is well documented with footnotes printed at the end, and the table of cases is arranged by jurisdiction. The research is indeed impressive, and for this reason Dean Chapin's most valuable contribution may turn out to be his excellent bibliography.

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7. P. 63. Interestingly, the three works which the author cites as establishing the theories he refutes were published before 1910. P. 136 n.1.

8. P. 116.