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Book Reviews

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THE DEFENDANT'S RIGHTS. By David Fellman. New York: Rinehart & Company, Inc., 1958. Pp. xvi, 356. $5.00

This small sized but valuable book, authored by a political science scholar, was according to himself "not written for professional people, but rather for lay readers."[1] It is, however, interesting and useful to lawyers too, especially because of the numerous citations which make an excellent starting point for further research on any of the topics covered. In the main it summarizes the legal principles and rules of law which in their aggregate constitute the procedural guarantees of a person who is suspected of a crime and prosecuted therefor. It also contains, however, several chapters on what the author calls "quasi-defendants", which he subdivides into "loyalty defendants", "investigating committee defendants", "alien defendants", and "passport defendants". It is principally written in a modestly reporting manner, as a bird's eye view of the field of public law to which it is devoted, but is not devoid of critical comments and reform ideas. For instance, in discussing a matter which has become of hot actuality in recent years, the author says: "There is some due process of law in security cases; there ought to be a lot more."[2] In a prior part of the same discussion he alleges: "In short, in security cases the suspect does not enjoy the protection of the presumption of innocence, but rather, after being accused, carries the burden of clearing himself. If anything, the presumption is that of guilt."[3] A very fine general observation on the need to sacrifice the goal of efficiency of prosecution for the sake of fairness in the methods applied is the following: "The fact is that it is possible to pay too high a price for efficiency. There can be no possible doubt that without the restraints which the law insists upon the police could catch and prosecutors could convict [*sic*] far more lawbreakers than they do now. But deterring criminals is not the only objective of our penal system. There are other equally important objectives, such as maintaining a decent respect for man's dignity and preserving an atmosphere of freedom."[4] The reviewer enjoyed also reading this sentence: "A defendant needs a lawyer as urgently as a sick man needs a doctor, and in many instances even more urgently, for while nature often heals the sick without outside aid, it seems to have little concern for the plight of the accused."[5] And the following observation should receive thoughtful attention by those who may be able to change the respective situation: "since loyalty hearings are not regarded as criminal trials, and charges of subersiveness [not] as criminal accusations, the principle of double jeopardy has no application. Thus, in the recent case of Dr.

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1. FELLMAN, THE DEFENDANT'S RIGHTS vii (1958) [hereinafter cited as FELLMAN].
2. FELLMAN 233.
3. FELLMAN 224.
4. FELLMAN 8.
5. FELLMAN 112.

Peters, the same charges were aired formally three times, and the accused was dismissed after having been cleared twice. In the civil service it appears that a new doctrine of perpetual jeopardy has taken the place of the old legal principle which forbids double jeopardy. In one instance a high State Department official was dismissed after being cleared eight times."[6] As in the foregoing passages, so also on numerous other occasions the author's point of view is presented in a highly refreshing way, in plain yet not banal language.

That part of the book which is concerned with the rights of a defendant proper deals with arrests, preliminary examination, the defendant's right to notice, his right to a fair hearing, the writ of habeas corpus, trial by jury, right to counsel, searches and seizures, self-incrimination, double jeopardy, and the prohibition of cruel and unusual punishments. The very good chapter on the last mentioned topic was written before Chief Justice Warren's opinion in a recent case[7] created a new and highly remarkable precedent for that interpretation of the constitutional clause involved according to which it controls not only the mode of punishment, but, in Professor Fellman's words, also sets "judicially enforceable limits to the severity of the punishment in respect to the seriousness of the crime."[8] The recent confirmation, by Alabama's supreme court, of a death sentence imposed on a Negro farmhand for a $1.95 robbery, has created world-wide concern, according to a letter written by Secretary of State, John Foster Dulles, to Governor James E. Folsom. It is therefore interesting to read that, while the eighth amendment as such does not limit the states, there are implications in two cases cited by Professor Fellman which, according to him, make it "clear that the Supreme Court holds to the view that the infliction of a cruel and unusual punishment by a state would violate the due process clause of the Fourteenth Amendment, although it has not ruled adversely to a state on such a ground as yet."[9]

There is little in the book with which the reviewer would take issue. One of those few instances is the following statement: "The double jeopardy concept of our criminal law is found in all modern legal systems, and has its counterpart, in the civil law, in the doctrine of *res judicata*."[10] This generalization ignores the essential difference between the Anglo-American jeopardy conception and the ubiquitous doctrine of res judicata.[11]

To reach an adequate compromise between the protection of one who is merely suspected or accused, but not yet convicted of a crime, and effectiveness in prosecution of criminals, is one of the most difficult problems of government in a democratic society. The discriminating reader of this book will notice with satisfaction that very much has been done in this country in consideration of the following: that one merely

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6. FELLMAN 188, 189.
7. Trop v. Dulles, 356 U.S. 86 (1958).
8. FELLMAN 204.
9. FELLMAN 208.
10. FELLMAN 186.
11. Kossler, *The Ilse Koch Senate Investigation and Its Legal Problems With Observations on Double Jeopardy and Res Judicata*, 23 MO. L. REV. 1, 10-14 (1958).

charged with a crime is entitled to the presumption of innocence, that the prosecution instituted against him may result in his acquittal, that the methods of crime investigation should not be such as to cast a cloud on its results, and that restraints imposed on a person not yet found guilty should be limited to that minimum which is indispensable to perpetrators of criminal offenses. Such reader, however, will not be able to find that we have achieved "a paradise for criminals," which quoted words appear in the title of a law review article.[12] The reviewer who has been trained and has had practical experience both under the civil law system and the American law is inclined to believe that while in some very important respects a defendant in this country is in a more favorable position than, for instance, a defendant in France, there are certain aspects of the French criminal procedure which are more advantageous to the accused.

Thus, while nothing comparable to what we call the "third degree" seems to exist in France, the Wickersham Committee, as the result of a penetrating investigation conducted in 1930-1931, included the following sentence in its conclusions: "The third degree—the inflicting of pain, physical or mental, to extract confessions or statements—is widespread throughout the country."[13] In his opinion in the famous *McNabb* case,[14] Justice Frankfurther refers to "those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." And in a posthumously published book of the late Jerome Frank we read that no one really knows how common third degree practices are, since they are applied in secret and "an accused officer will almost always deny that he indulged in them," but that it is nevertheless "common knowledge that the third degree, in recent years, has been applied in almost every state of the Union."[15] In the same book we are told that the British "to our shame, call the third degree the 'American method'."[16] It should in this connection be mentioned that according to Professor Fellman, the police in England "may not question suspects after arrest at all, on the theory that police interrogation is inherently coercive."[17]

There are other things which could be mentioned for the purpose of showing

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12. Gustafson, *Have We Created a Paradise for Criminals?*, 30 So. CALIF. L. REV. 1 (1956). But see the following observation in HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY 222 (1958):

> ". . . there is the fallacy of arguing that because the accused had so few rights in the 16th and 17th centuries, therefore he has too many rights now. This view is not novel, and Stephen writing in 1863 noted that 'one of the commonest arguments against allowing prisoners to be defended by counsel always was, that rogues had too many chances of escape already.' . . . It may be wise to place certain restrictions on the present mode of criminal defense but it is obviously fallacious to pretend that the necessity or wisdom results because the pendulum has swung too far already in favor of the accused. We know that under present safeguards, innocent persons are convicted, and . . . that their number is not negligible. . . ."

13. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 228 (1954).
14. McNabb v. United States, 318 U.S. 332, 344 (1943).
15. JEROME AND BARBARA FRANK, NOT GUILTY 181 (1957).
16. *Id.* at 184.
17. FELLMAN 184.

that while we in this country are in certain respects nearer, we are in other respects less near to a "paradise for criminals." There are, undeniably, certain defects in our system of crime investigation and crime adjudication, although we have gone a long way toward recognizing the human individual in the person of one suspected of crime, and are constantly on guard against "conduct that shocks the conscience"[18] in the administration of criminal justice. To bring the true facts of our system, as it stands on the books and as it works in reality, to the knowledge of a larger segment of the population than the legally trained people, and thus to increase the awareness of the need for certain changes, is one, and not the smallest merit, of Professor Fellman's candid presentation.

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AN INTRODUCTION TO INTERNATIONAL LAW. By Wesley L. Gould. New York: Harper & Brothers, 1957. Pp. xx, 809. $7.50.

We may start the review of this interesting book with a quotation not contained therein, but apt to characterize its subject. Speaking on the historical occasion of the Trent affair,[1] John Bright, the famous British orator and statesman, made this comment on the nature of international law: "The law is very unsettled, and, for the most part, I believe it to be exceedingly bad."[2] While this statement was made at the time of our Civil War, it has not lost its validity in view of the present situation of international law, as appears from its realistic presentation by the political scientist with profound jurisprudential erudition who wrote this unorthodox, but highly refreshing book. Yet, international law is of paramount importance for the existence of a civilized world. Or, as Professor Gould says in the last sentence of his book: "Whatever men do to better or damage themselves in their international relations, they will do it with the aid of what they regard as law, be it international or supranational."

The book is recommended by the publishers for undergraduate courses in international law and according to its title is destined to serve the purpose of introduction into the field covered by it. It would seem, however, paradoxical as this may sound, that it contains both too little and too much for a mere introduction. Too little, because it does not cover exhaustively what may be considered the fundamentals of international law, but deals only with certain selected topics. Too much, because the text is only to a small extent concerned with elementary things, whereas it mostly consists of profound marginal observations, as it were, on a high scholarly level. This is not changed by the fact that the book is written in a political science rather than legalistic manner and with an obvious, sometimes overdone, effort to

18. Words appearing in Justice Frankfurter's opinion in Rochin v. California, 342 U.S. 165, 172 (1952).

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1. Discussed in 3 HYDE, INTERNATIONAL LAW 2165-67 (2d ed. 1947).

2. 9 REED, MODERN ELOQUENCE 247 (1923).

achieve a plain rather than scholarly style. But while it appears questionable whether the book is apt for the purpose to which it seems to be devoted, there cannot be any doubt but that it is a valuable contribution to the literature on international law and that a reader with some pre-existing familiarity with and interest in its subject will gain much information and intellectual inspiration from this up-to-date bird's eye view of the field. By his kind of approach, Professor Gould shows international law against the background of a study of foreign relations, rather than as a body of self-sufficient rules and practices. He pays much attention to the dynamic aspects of the field. He considers the historical development without neglecting to look into the future too. And he thoroughly analyzes the jurisprudential nature of international law, for this purpose even penetrating into the essence of law in general. In explaining why he chose this manner of presentation of international law, which is certainly not the traditional one, he writes that "knowledge of legal categories and formulations should not be allowed to dominate as in the past" since "such domination has rendered the subject of international law so dull and . . . so far from the world that students who might be inclined to explore in new and more mundane directions have turned to other fields." His is indeed a "mundane" book, full of colorful references to most recent actualities and developments. It does not lose thereby in scholarly value, especially since it is richly beset with footnotes citing authorities. And its usefulness for handy reference purposes is increased by appendices presenting the full texts of the Charter of the United Nations, the important Resolution A of the United Nations General Assembly (November 3, 1950), the Statute of the International Court of Justice and the rules of that court, as well as by a not complete, but well selected bibliography.

To give a general orientation on the contents of the main body of the book, we shall list the titles of its main chapters. They are: The Nature of Law; From Jus Gentium To International Law; Since Vienna; Some Features Of The International Community; Law In A Society Of States; International Persons; Recognition Of States; Recognition Of Governments; State And International Agents; International Agreements (I. Forms And Formulations, II. Validity, Effects, And Termination); Territory: Title And Boundaries; Jurisdiction Over Territory; Succession; Jurisdiction Over Persons And Property; International Transportation And Communication; International Responsibilities; Pacific Settlement of International Disputes; Force And International Retribution; War, Aggression, and Neutrality; Hostilities And War Crimes. The degree of analytical and critical penetration is not the same throughout the book. For instance, while the presentation of the subject of international agents is hardly more than descriptive, and perhaps overloaded with details, the modern doctrine of "The Continental Shelf," which is in the making rather than settled, so far, and substantially challenges the time-honored doctrines of freedom of the seas and the three mile limit, is given a very profound treatment. Throughout the book runs, however, the author's attempt to look at his subject from a pragmatic rather than dogmatic viewpoint, from a fresh, though not iconoclastic, rather than conservative angle, by way of "living law" and sociological rather than static and purely jural approach. Writing for the United States Supreme Court, Justice Frankfurter recently coined the following ingenious sentence: "The versatility of cir-

cumstances often mocks a natural desire for definitiveness."[3] Since this applies particularly to international law, Professor Gould's flexible manner of dealing with his subject would seem to be very felicitous, although his book can only supplement but not substitute such standard books on international law as those authored by the late Professor Charles Cheney Hyde and by Professor Lauterpacht as successor of Oppenheim.

After having said all the foregoing we cannot conceal that the book under review has also quite a few shortcomings. But to mention them in detail would exceed the reasonable space limits of this writing. Suffice to say that the highlights of the book are overwhelming as against its deficiencies.

In conclusion, the following may be quoted from a speech delivered by Charles E. Hughes, then Secretary of State, before the Canadian Bar Association (September 4, 1923): "If we are to live in a world of order and peace the foundations of international law must be secured, its postulates reasserted, and there must be expert attention to its development in dealing with the unsettled questions of a legal nature which have arisen in international intercourse."[4]

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3. Wiener v. United States, 357 U.S. 349, 352 (1958).
4. HICKS, FAMOUS SPEECHES BY EMINENT AMERICAN STATESMEN 686 (1929).
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