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Book Review. Fellman, D., The Defendant's Rights

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Only recently have political scientists discovered state politics. To be sure, state government texts have traditionally included a chapter on politics, which gives the date of the primary and reveals the number of members on the Republican State Executive Committee. Several serious attempts to lessen our ignorance of state politics have been made in the past ten years, and Politics in the Border States is a laudable contribution to this effort. Dr. Fenton's method combines history, painstaking analysis of election returns, and interviews with practicing politicians in Kentucky, West Virginia, Missouri, and Maryland.

Fenton’s data reinforce the idea that American voters cling tenaciously to party affiliations and do not change parties capriciously from election to election. Party affiliation is largely an hereditary matter in the border states. Voters in the Appalachians and the Ozarks have been Republicans since the Civil War, and since the same date most lowlanders have been Democrats. Even when a county changes its party allegiance, conversion is not always the explanation. Population movement is also important; an influx of persons with the opposite hereditary faith may explain the shift. Yet a significant change in party loyalties came with the New Deal. The growth of unionization changed employees—coal miners and urban workers—who had formerly been receptive to the advice of their Republican employers, into good Democrats; and the solicitude of the Democratic Party toward low-income groups lured the Negroes away from the party of Abraham Lincoln. But the mountaineer, unless he was a coal miner, remained a loyal Republican. The New Deal did nothing to improve the miserable economic situation of these small, independent farmers, who manifest the deep conservatism of the isolated countryman.

The study contributes to our own understanding of the two-party system, a slippery term suggesting two parties competing on relatively equal terms for most state offices. This pure theoretical model is not even approximated in the border states, where, instead, a three-party system prevails. Democrats normally occupy statewide offices, but the real clash is among Bourbon Democrats, New Deal Democrats, and the Republicans. Bourbon Democrats are oriented toward southern traditions and white supremacy; liberal Democrats serve the interests of organized labor and the Negro. This contradictory combination is held together by what is termed the “state organization,” a group of politicians dedicated not to ideology or policy but to the pursuit of patronage and spoils. The organization must bridge the clashing interests of Bourbons and liberals by putting up candidates not unduly repugnant to either element. In the primaries of all four states the organization finds its firmest support in the Republican counties where local Democratic leaders, controlling no county offices and dependent for survival upon state patronage, are steadfast in their loyalty to the organization. These primaries are, in practice, open primaries, in which organization Democrats are free to secure the assistance of local Republicans. This lack of integrity of the primary appears more widespread than elsewhere and of greater importance in the contest for power.

While the foregoing offers little comfort to those who hope for a rational party system based on issues, the book offers them one ray of hope. Fenton finds in all four border states a long-run trend toward the Republicans. He believes that prosperous Bourbon Democrats are becoming restive with the policies of the national Democratic Party and are reluctantly shifting to the party of the ancient enemy.—Donald S. Strong, University of Alabama.


The cue to the following review may be indicated in a somewhat exaggerated paradox. While the reviewer, an academic lawyer, elucidates law from a philosophical and social science viewpoint, Professor Fellman, a political scientist, elucidates law from the viewpoint of most academic lawyers. 212 pages of his book deal with the constitutional law of criminal procedure—the law on arrest, preliminary examination, notice, fair hearing, habeas corpus, trial by jury, right to counsel, search and seiz-
ure, self-incrimination, double jeopardy, and cruel and unusual punishment. The fundamental guarantees of fair criminal procedure need to be clarified and understood; and Professor Fellman's dedication to the extremely important task of enlightenment is well known. He has read the cases carefully and his "briefs" are clear and accurate. For some purposes, perhaps especially for the beginning student, his book will be helpful as an initiation into the relevant legal vocabulary and decisions rendered in important cases concerning criminal procedure and the Bill of Rights.

But for those who seek a vivid, thorough introduction to this law, the book will offer little assistance. The facts of the cases are reported in the barest possible way, the problematical aspects of the Bill of Rights are ignored, and the social and philosophical significance of the procedural guarantees is hardly suggested. This, unfortunately, is true of almost the entire literature on the Bill of Rights. Traditional legal summarization gives an illusion of certainty. It also lacks the persuasiveness of historical reconstruction. The weight of empirical investigation, and the insight of discriminating critiques of the pertinent policies. Several books and essays—the product of American legal scholarship during the past twenty-five years—are available to illustrate the required types of socio-legal analysis.

The other principal comment that needs to be made concerns the last forty-five pages of Professor Fellman's book. In dealing here with Congressional investigations, deportation of aliens, and the issuance of passports (which obviously present quite different problems and procedures), Professor Fellman's contribution is to characterize the persons directly involved as "quasi-defendants." Like the rest of us, he has been impressed by the fact that Congressional committee witnesses have suffered social and economic losses, that deportation is a heavy sanction, and that refusal of a passport is onerous. This is also true of criminal sanctions. What, naturally, troubles Professor Fellman is that while defendants in criminal cases are adequately protected by the Bill of Rights (as he assumes rather than establishes), the so-called "quasi-defendants" have often been treated very unfairly.

But the analogy he employs can provide only a preliminary, crude hypothesis and, unless one is careful, it becomes a very misleading one. So far as appears here, nothing but confusion is generated by designating a witness in a committee hearing a "quasi-defendant" in a previously defined context where "defendant" means a person charged with the commission of a crime. This applies also to the applicants for passports and, although here current legal theory is less helpful, to deportation. No questions are even raised in the book concerning the variety of sanctions employed in modern legal systems and the diverse purposes they implement. Nor would the reader realize that there were any proper problems concerning loyalty (e.g., what are the valid interests of a democratic government vis à vis its employees, can loyalty be precisely defined and determined, and, if not, what are the alternatives?). So, too, as regards deportation and passports. All raise legal problems that need to be critically and significantly elucidated in ways indicated above.—JEROME HALL, Indiana University.


The late Judge Jerome Frank's last book is another valiant attempt to awaken the conscience of the community to the inevitable presence of human error in the operation of the judicial process. Not Guilty describes 36 actual cases of innocent men who were found guilty, imprisoned, and later freed by judicial or administrative action. Like its classic predecessor, Edwin M. Borchard's Convicting the Innocent (1932), Not Guilty uses the dramatic force of these individual cases to make the reader acutely conscious of the tragic effects that may result from our failure to construct a fool-proof system of criminal justice. "Here is not merely an academic problem, or one for lawyers only. It is an intensely human problem that should be everyone's concern. A man in prison when he should not be there is brother to us all . . . ." (p. 38).

Using his extensive experience as lawyer and judge, Frank examines some of the defects in our judicial system which help to produce these miscarriages of justice, such as the misidentification of the accused; the use of perjured evidence; overzealous and at times unscrupulous prosecutors, interested in convictions at any cost; the use of the infamous third degree, particularly to extract confessions; and the inability of many defendants to hire a good lawyer. Although the high cost of obtaining justice severely handicaps the poor man, a less-known defect is the absence in