

Elements of Judicial Strategy. By WALTER F. MURPHY. Chicago: The University of Chicago Press, 1964. Pp. xiii, 249. \$7.50.

The task which Professor Murphy sets for himself in this book is, in his own submission, "to explore the capabilities of the judicial branch of government to influence public policy formulation." He conceives of this as the third aspect of a rounded scholarly inquiry into the workings of the judicial process. The first—the identification and description of the rules emerging from judicial decisions—is one which, in his view, is required to be done primarily by lawyers. The second—the enlargement of knowledge as to how the judicial process actually operates—is an area which he thinks might usefully be shared by the lawyer and the political scientist. But, as to this third phase of the inquiry, it is the political scientist who must assume the major responsibility, with only incidental help at best from the lawyer.

It is interesting to speculate as to just why Professor Murphy feels that this examination of the judge as a policy-maker is peculiarly within the province of a political scientist of parts, as distinct from a lawyer of comparable attainments. It may be that the latter still suffers too much from the inhibitions of a narrowly legal education, with its exiguous concept of a judge as one whose function it is to decide lawsuits as they come to him rather than to range widely as a law-giver in the mode of Moses. It is not, of course, that the legal educators, at least of the modern era, are wholly unsophisticated in this matter of the personal element in judicial decision-making, but the case method of instruction itself is perhaps habit-forming in its constant reminder that our courts are called upon to address themselves to concrete controversies and not to abstractions. And, upon emerging from law school with an intellectual bias of this nature, the fledgling lawyer finds this highly compatible with what he discovers to be his overriding concern with how his client makes out in a particular litigation rather than with the likelihood that pronouncements in the opinion will echo down the corridors of time as guides to the good life.

Thus it is that a political scientist collaborating with a lawyer in a study like this might find his colleague stumbling over such confident asseverations as "clear analysis of judicial ethics is hindered by a widespread tendency to think of Justices [of the Supreme Court] as acting only as arbiters of disputes between individual litigants" and "these judges are inevitably policy-makers, and they have responsibilities in addition to those to the individual parties in a case." To the lawyer reading this last, the words "in addition to" perhaps sound perilously like "greater than," and this would be troubling to him, both in terms of what good old Professor Spelvin used to say back in torts class about the glories of

the adversary system and also of that last case he tried for Corrugated Edison. Moreover, the lawyer-half of this scholarly duo might not feel completely comfortable with the repeated use of the phrase "the policy-oriented Justice," at least to the extent that reiteration tends to suggest the invariable social value of the phenomenon as well as to denote its occasional existence.

It is hard for lawyers, as for the practitioners of other disciplines, to rise above the lessons of their professional education and experience, and Professor Murphy is undoubtedly right in surmising that their utility in a study of this nature would ordinarily be limited. For every one who turned out to be sufficiently emancipated, there would be many more unable to burst their bonds. And you could never really trust the one until the printer's forms had been locked beyond recall, so compelling in their innocent simplicity are the preconceptions which lawyers tend to have about the essential function of the courts.

Political scientists who specialize in the law are, by and large, infinitely freer spirits in this regard. They have learned not to be fooled by what the judge says he is doing as compared with what he is doing. They pioneered in the construction of elaborate predictability tables from which it could be told at a glance how Mr. Justice Wool would decide the next replevin action to come before him. They have refused to take an earth-bound view of litigation as primarily a method of providing citizen-disputants with an alternative to committing mayhem upon each other or upon the assessor and tax-gatherer. They have lifted their eyes to the higher hills of human aspiration, which they assume to be the journey's end of jurisprudence as of other inexact sciences. They are, in a word, policy-oriented.

It is of judges in this image that Professor Murphy writes. His precise inquiry is to discover how a United States Supreme Court Justice of this persuasion may most effectively project his policy preferences, and this resolves itself into an enumeration and examination of the avenues of action open to a Justice who wishes to achieve the maximum effectiveness in this respect. In this survey Professor Murphy has been industrious, informed, and exhaustive in his analytical classifications and doctrinal generalizations. He has frequently been immensely entertaining in the peeps he has permitted us over the judicial transom. Indeed, it is this last aspect of the book which, perhaps unfortunately from the standpoint of the shift in the reader's attention from axiom to anecdote, gives it its greatest interest. The words and deeds of judges when not in public view upon the bench, particularly those as exalted as members of the Supreme Court, have always had their fascination. Shrouded as they usually are in the judicial tradition of secrecy and reserve, any opportunities to look

behind the curtain are always welcomed, and not least by those whose interest in the judicial process transcends the common taste for gossip.

Professor Murphy's plan of attack has been to explore the relationships of the Justices among themselves, with judges lower down in the state and federal hierarchy, and with the Congress and the President. His interest in these relationships is always that of cataloguing the methods by which an individual Justice may make his policies prevail, and of weighing the effectiveness of those methods. His source material has been primarily the private papers of Hughes, Lurton, McReynolds, Stone, Sutherland, Taft, and Murphy. Since these are full of letters and memoranda to and from other Justices, they become to some degree their private papers as well. He finds in them about what one would expect, namely, that Supreme Court Justices vary widely in their capacities to influence their fellows within the court, and in their zeal to shape the world outside.

The art and practice of judicial biography as they have developed in more recent times have made a great amount of this kind of material available before now. Professor Murphy adds some new stories to this stock, especially by reason of the partial access he has had to the papers of Justice Murphy. He confirms his earlier picture of Taft as incorrigibly dabbling in the waters of judicial appointment in his concern for like-minded repositories of the judicial power, and as actively and openly in pursuit of legislative ends in the halls of Congress. He reminds that Stone was not without his White House connections or his close ties with leading law school professors, neither of which languished for lack of cultivation and both of which were useful vehicles for the exertion of influence. He touches upon the ill-defined but apparently persistent radiations from Brandeis to the White House, at least when it was occupied by Wilson and Franklin Roosevelt.

The essential nature of this information, however, is not new. What is new is Professor Murphy's effort to arrange these matters in a systematic fashion, and to establish some doctrinal points of reference between these activities and the framework of principle and custom within which a judge has normally been thought to work. The work of enumerating and classifying is done with perception and thoroughness, but its results do not add greatly to the store of information of anyone reasonably sensitive to the interplay of human relationships. Even a layman is not beyond guessing that one judge can impress—and inevitably influence—another by his intelligence, his industry, and his warmth as a human being; and a Chief Justice who can get the President to appoint his candidates to the bench and to veto the bills he dislikes will obviously cast a longer shadow than he otherwise might.

The more interesting, as it is the more difficult, question always remains as to the lengths to which a judge may properly go to make his policies prevail. This is why one of Professor Murphy's concluding chapters, styled "Ethics and Strategy," becomes one of the most intriguing in the book. In it he wrestles with such questions as how a judge should really be passing his time, and the extent to which a judge should compromise his policy preferences in deference to some possibly greater good, such as preserving his court against crippling legislation emanating from a, temporarily at least, outraged citizenry. Dilemmas of the latter kind offer agonizing difficulties, so Professor Murphy assumes, to "a goal-oriented judge" to whom "judicial power after all . . . [is] only a means, to another end" and for whom the only ethical choice may be "martyrdom" for his court as well as himself.

One cannot help but wonder whether judges like Cardozo and Holmes were perennially conscious of such cataclysmic choices as these and suffered in their presence. We know that they did not take their work lightly or underestimate either its difficulties or its importance. But, seeing judicial power as not simply a means to the end of the effectuation of personal policy preferences, perhaps they were spared the agonies, as they were not beguiled by the temptations, of martyrdom. They would, it seems fair to say, have found this book somewhat puzzling and hardly necessary as a guide to that judicial department likely to cause them to have the greatest degree of extrajudicial impact upon the world. They were not perhaps "policy-oriented," but they were not without influence.

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Church and State in the United States. By ANSON PHELPS STOKES and LEO PFEFFER. New York: Harper & Row, Inc., 1964. Pp. xii, 660. \$12.50.

In 1950 the late Canon Stokes, an Episcopalian churchman and long-time Secretary of Yale University, published a three-volume work on *Church and State in the United States*.¹ The trilogy of 2,777 pages, described by some as "definitive" and "monumental" at the time of its publication, was remarkable with respect to the massiveness of the information it had collated but far less remarkable with regard to the clarity of its assumptions and conclusions. A certain blandness was thought by critics to be due to the gentleness of the late Canon Stokes' personality.

¹ STOKES, CHURCH AND STATE IN THE UNITED STATES (1950).