

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).

In retrospect, however, the blandness may be more attributable to the fact that the contemporary abrasive church-state controversies had hardly commenced when Canon Stokes was finishing his volumes. *Everson* and *McCollum* were decided in 1947 and 1948 after Dr. Stokes had virtually completed the manuscript on which he had worked for over a decade. Canon Stokes inserted a section about *Everson* (in which he disapproved the Court's ban on aid "to all religions") and added another section about *McCollum* (in which he ambiguously questioned whether the Court was correct).

Although Canon Stokes' volumes have been cited in court decisions and elsewhere as "authoritative," knowledgeable reviewers have been critical. Professor Mark DeWolfe Howe, for example, writing in the *Harvard Law Review* in 1950, expressed the view that Stokes' work was seriously defective because of an "instinct to evade critical issues in the complacency of Protestant conviction."² Professor Howe in fact felt that Canon Stokes' "pervasive unwillingness to say anything which will offend the susceptibilities of any group" leads him "frequently to cut off inquiry when he approaches the heart of the problem."³

Leo Pfeffer, general counsel to the American Jewish Congress and author of *Church, State, and Freedom*⁴ writes in his preface to the updated Stokes volume that he has "sought to maintain the *basic viewpoints*, structure, organization, and the style of the original."⁵ In view of this commitment Mr. Pfeffer was confronted with the choice of whose "viewpoints"—Stokes' or Pfeffer's—should be expressed with regard to the vast amount of church-state litigation and literature during the years 1949 through 1963.

It seems to this reviewer that this choice of differing viewpoints was not clearly confronted or made by Mr. Pfeffer and that as a result this volume is never really very clear or very decisive on many of the crucial church-state issues in the post-1949 period. An assumed or attempted or alleged harmonization between the pan-Protestant ambivalence of Canon Stokes and the rigorist "wall of separation" and "no aid to religion" approach of Mr. Pfeffer leaves the reader with a vague feeling that somehow Canon Stokes' approach to church-state problems in America has been made out to be a norm by which virtually all Supreme Court decisions in this area from 1949 to 1964 have been guided.

The merging of Stokes and Pfeffer reaches a climax of confusion when Mr. Pfeffer sets forth without contradiction or even without any clear

² Howe, Book Review, 64 HARV. L. REV. 170, 171 (1950).

³ *Id.* at 173.

⁴ PFEFFER, CHURCH, STATE, AND FREEDOM (1953).

⁵ P. xi (Emphasis supplied.)

qualification Canon Stokes' "general conclusions."⁶ These generalizations, while not free from ambiguity, suggest—along with several other conclusions in Canon Stokes' trilogy—that some of the fundamental premises of Stokes' approach to church-state problems are not consistent with the Supreme Court's recent decisions on the First Amendment.

The most fundamental inconsistency appears to be Mr. Pfeffer's statement that he finds himself in "substantial agreement" with the "general conclusions" which Canon Stokes set forth at the end of his three volumes. These conclusions, included in Stokes-Pfeffer, contain the proposition that "the American people, through their laws, their chaplaincies, their setting apart of Thanksgiving Day, and in other ways recognize the importance of belief in God as Father of all mankind."⁷ This conclusion is dubiously consistent with Mr. Pfeffer's view that the American state should be secular in outlook and that it should neither advance nor hinder religion in any way. This inconsistency, however, never emerges and is indeed virtually unseen by the reader of Stokes-Pfeffer.

To note this is no criticism of Mr. Pfeffer but rather a way of raising the basic question of the feasibility of a successful merger of Stokes and Pfeffer, especially when the latter is, by agreement with the publishers of Stokes' trilogy, restricted to adding factual material without editorial comment.

Those who have followed the writings of Mr. Pfeffer on church-state issues will be disappointed that his role in Stokes-Pfeffer is a limited one. In some ways this role is unfair to Mr. Pfeffer, who has developed an ably articulated and logically consistent jurisprudence regarding the "establishment" and "free exercise" of religion clauses of the First Amendment. One feels that Mr. Pfeffer is to some extent "muted" in his updating of Stokes. He is not at liberty to evaluate church-state developments in the period 1949-1964, according to either his own norms or those enunciated by Canon Stokes. The result is that Stokes-Pfeffer represents a massive gathering of data presented with little over-all critical analysis.

In addition to this difficulty, Mr. Pfeffer faced the problem of recasting the format of Canon Stokes' volumes in order to make the revised work topical and contemporary. This formidable task has been achieved by Mr. Pfeffer in as successful a manner as could probably be expected. Awkward and artificial sub-chapters and linking paragraphs, however, are present and indeed numerous. The ever more complex story of federal aid and church-related schools, for example, is developed in the context of Canon Stokes' comments on this controversy as it existed in the late 1940's; as a result the overwhelmingly significant developments

⁶ Pp. 578-80.

⁷ P. 577.

of 1961 are developed only briefly, so that the material contained in Stokes—now largely obsolete—can be included. Even more sparse is the material on “shared-time,” a concept which in 1965 is being called the key to the solution of the impasse over federal aid and church-related schools.

This example of federal aid raises perhaps the basic question which will come to the mind of a reader of Stokes-Pfeffer: can a 1949 book on church-state law in America serve as a sound basis for a 1964 book on this subject? Many readers of Stokes-Pfeffer will answer that question in the negative.

The almost overwhelming impression which emerges from reading Stokes-Pfeffer is the profound consensus on church-state relations which existed until the recent past, a consensus which Canon Stokes reported and affirmed in his three volumes and which Mr. Pfeffer, because of his limited role as the editor of the abridged Stokes, does not analyze, approve or reject.

Mr. Pfeffer, in his usual perceptive manner, has noted elsewhere, however, the erosion of the consensus on church-state matters as it was complacently and contentedly reflected by Canon Stokes. In his book entitled *Creeds in Competition*⁸ Mr. Pfeffer presents his own viewpoint:

Today the most serious challenge to American cultural patterns and values fixed by a Protestant-Humanist alliance comes from Roman Catholicism. That challenge has really just begun. In all likelihood it will be with us for a long time and will become increasingly stronger as time goes on.⁹

It is indeed unfortunate that this thesis is not articulated or applied in the Stokes-Pfeffer abridgment. On some occasions, however, Mr. Pfeffer, while striving to keep his commitment to maintain the “basic viewpoints” of Canon Stokes, writes of developments that occurred in the period of 1949 to 1964 from the viewpoint noted above—the thesis that Roman Catholicism is today offering “the most serious challenge to American cultural patterns and values . . .”¹⁰ Mr. Pfeffer’s comments along this line may prompt some readers to feel that there has been a deviation in Stokes-Pfeffer from the “basic viewpoints” of Canon Stokes; it would be difficult, however, to make a thoroughly persuasive case on this point.

Many readers of Stokes-Pfeffer will be disappointed at the lack of

⁸ PFEFFER, *CREEDS IN COMPETITION* (1958).

⁹ *Id.* at 168.

¹⁰ *Ibid.*

inner unity in this volume. While it will be valuable as a standard reference source for some years to come, Stokes-Pfeffer as a work of serious scholarship may have been predestined to be still-born.

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