Notre Dame Law Review

Volume 41 | Issue 4 Article 9

4-1-1966

Book Reviews

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BOOK REVIEWS

RELIGION AND THE PUBLIC ORDER: 1964. Edited by Donald A. Giannella. Chicago: University of Chicago Press, 1965. Pp. 280. $6.00.

This volume, as indicated in its subtitle, is "an annual review of church and state and of religion, law, and society." It was prepared at the Institute of Church and State of the Villanova University School of Law, and was edited by Donald A. Giannella. The second in the series, this volume covers the period from September, 1963, to September, 1964. It includes seven essays on church-state questions, a review of books published during the year dealing with such questions, and a survey of legal developments, including court decisions and legislative activity.

Perhaps the most interesting essay in the book is one by Peter R. Saladin, a lawyer with the Swiss Federal Department of Justice, in which an attempt is made to establish a relative ranking for the preferred freedoms of religion and speech. That is to say, starting with the assumption that both of these freedoms hold a preferred position in American constitutional law, Mr. Saladin tries to prove that freedom of religion is more securely established in our legal system than freedom of speech. Perhaps the use of the phrase "preferred freedoms" is unfortunate, since Justices today do not use it, but no one would want to dispute the fact that the two freedoms of religion and speech hold commanding positions in the hierarchy of American rights today. Furthermore, while the author seeks to describe the American society's toleration factor in terms of the clear and present danger test, he fails to understand that there are at least two major versions of that test, the Holmes-Brandeis test, as enunciated in *Schenck v. United States*,[1] and the test adopted by Justice Sanford in *Gitlow v. New York*.[2] The author makes the point that the clear and present danger test was "refined" by the Court in *Dennis v. United States*,[3] but he neglects to explain that aside from the adoption of some of Judge Hand's rhetoric what the Court actually did was to reassert the *Gitlow* version of that test. This point is important, because the outer limits of society's toleration factor depend upon the basic theory on which decisions are made to rest.

Mr. Saladin is impressed by the Supreme Court's recent decision in *Sherbert v. Verner*,[4] which held that a Sabbatarian was constitutionally entitled to get unemployment compensation benefits in spite of her refusal to accept employment requiring work on the Sabbath. He also believes that the state courts have applied this case in a dramatic way to give wider protection to freedom of religion, citing as examples the holding of the Minnesota Supreme Court that religious objectors must be excused from jury duty,[5] and the ruling of the California Supreme Court that persons who use peyote, a nontoxic hallucinogen, in their religious services must be free from prosecution under a state criminal

1 249 U.S. 47 (1919).
2 268 U.S. 652 (1925).
3 341 U.S. 494 (1951).
4 374 U.S. 398 (1963).
5 *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).

law which forbids the use of such drugs.[6] In fact, the peyote case reappears over and over again in this volume, and seems to have acquired the status of a leading decision.

On the basis of a review of a fairly limited number of cases, Mr. Saladin concludes that "society tolerates more undesirable kinds of conduct in the interest of freedom of religion than it does in the interest of free speech. . . ."[7] In a few instances, he is able to pair up cases which deal with about the same facts, but which came out differently due to the presence or absence of a religious factor. Thus, he notes that in one case the right of Jehovah's Witnesses to distribute handbills and circulars door-to-door was upheld,[8] whereas a few years later, in a case dealing with magazine solicitors,[9] the Court upheld an ordinance which prohibited peddlers from soliciting orders from home dwellers without first obtaining their permission. Although he recognizes that the rationale in the later decision is not entirely clear on the point with which he is concerned, he calls attention to other decisions which were most favorable to Jehovah's Witnesses in cases involving license taxes on religious activities, which the Witnesses almost always won.[10] While he emphasizes the importance of the place of religion in American life which is suggested by the religious exemption from the military draft, he did not anticipate the broad construction which a unanimous Court would give to the definition of religion in *United States v. Seeger*[11] in 1965. For here, the Court ruled that the term "Supreme Being" does not mean the orthodox God, and that "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[12]

Mr. Saladin set for himself a very considerable task, with serious methodological problems, and it is not at all clear that he has established his point, though it is probable that religion fares somewhat better than speech in the courts. I do not believe that the peyote case proves that more socially harmful behavior is tolerated under the banner of religious freedom than under that of freedom of speech. One could cite many cases in which claims to religious freedom have had to yield to other social considerations, as in those dealing with faith healing and fortune-telling, and various health considerations. On the other hand, anyone who put his mind to it could make quite a long list of cases which upheld claims to freedom of speech in situations which posed very serious problems to the communities involved. The author has made an interesting attempt to weigh one series of cases against another, and while he is not entirely persuasive, he has suggested a line of inquiry which one may hope other scholars will undertake to explore.

Mr. Saladin concludes his interesting discussion with the observation that

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6 People v. Woody, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964).
7 Text at 154.
8 Martin v. City of Struthers, 319 U.S. 141 (1943).
9 Breard v. Alexandria, 341 U.S. 622 (1951).
10 *E.g.*, Follett v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).
11 380 U.S. 163 (1965).
12 *Id.* at 176.

since freedom of religion is accorded "the supreme place in the hierarchy of American civil rights," it is necessary that the courts should define the term religion with "clarity and precision," and goes on to assert that "only claims with a transcendental basis" should be recognized.[13] This is contrary to the Supreme Court's decision in the recent *Seeger* case, and it is also contrary to the needs of our highly pluralistic society. Mr. Saladin seems to believe that one type of conscience is entitled to more weight than another; this is a dubious proposition, and American courts do not seem to be moving in his direction.

The other item in the book of major interest relates to shared-time, which seems to be the most promising available expedient for resolving the impasse over state aid to religious schools. An essay by Theodore Powell, consultant to the Connecticut State Department of Education, reviews the steady growth of shared-time programs, and concludes that in 1964 one or more school systems were operating a shared-time program in 35 states. What shared-time amounts to is that parochial school pupils take some of their courses in public schools; in other words, they are part-time public school students. The subjects most frequently offered in shared-time programs are industrial arts, vocational training and home economics, though some are given in instrumental music, physical education, physics, chemistry, driver training, foreign languages, general science and advanced mathematics. After reviewing a number of local shared-time experiments, in East Hartford, South Bend, West Allis, Bennington, Maywood, and Chicago, Mr. Powell concludes that "Catholics who once were popularly regarded as against public education are now pressing for admission of their children into public schools."[14] On the other hand, he observes that "those who once were critical of parochial schools and Catholic isolationism are now trying to raise barriers against a mixing of Catholic and public school pupils."[15] While this may be true in some circles, on the whole the concept of shared-time has found wide acceptance in non-Catholic circles.

Professor Wilbur G. Katz, of the Law School of the University of Wisconsin, contributes a brief note on the constitutionality of shared time. In general, he observes that recent decisions of the Supreme Court have made it clear that the constitutional separation of church and state is not absolute, and he reviews his familiar thesis that what the "no establishment" clause of the Constitution requires is government neutrality with respect to religion. He regards shared-time programs as being valid because they further the principle of neutrality, since they serve a secular purpose in making affirmative provision for the promotion of religious freedom. For when the state provides children who attend parochial schools with education in the physical sciences and related fields, "this is certainly government action with a secular purpose and effect."[16]

Professor Katz could find very little law on this subject. He did locate one decision in Pennsylvania which squarely sustained the admission of parochial

13 Text at 171.
14 Text at 83.
15 *Ibid.*
16 Text at 89.

school students to a manual training program in a public school.[17] Opinions of state officials seem to be divided on the subject. Officials in California, Iowa and New York have ruled that shared-time programs are unlawful, whereas officials in Illinois, Ohio and Oregon have ruled the other way. Quite wisely, Professor Katz does not venture any broad generalization or prophecy as to the future of shared-time in the state appellate courts.

The opening essay in this volume, by Robert G. McCloskey, Professor of Government at Harvard University, makes two points. One is that the Supreme Court is now trying to break the cake of custom rather than preserve it, since the Justices in recent years have regarded themselves as "the chief initiative-supplying agencies in American government."[18] This means that in the religious field the Court has run into serious compliance and backlash problems, a fact which is amply substantiated by other writers in this volume. His other major point is that litigation in this field poses serious questions with respect to standing to sue, since he regards the alleged injuries and dangers put forth in this litigation as being quite negligible, "low on the scale of evils in our imperfect world."[19] Thus he concludes that "a strong case could be made for judicial avoidance of the whole issue of state aid to religion,"[20] and that "this highly ambitious Court" has made itself particularly vulnerable by not limiting itself to religious freedom issues. In other words, the Court has more important things to do, and the alleged evils in most of the religion cases are not very serious.

This is, at best, an arguable position. Who is to say what is serious and what is trivial? Furthermore, what is serious to one man is trivial to another. In the absence of an objective calculus of pleasures and pains, each person must decide for himself. Apparently those who are willing to risk neighborhood hostility and assume the heavy expenses of litigation believe that serious issues are involved. Surely they do not become trivial merely by pronouncing them to be such. In a broader sense, the main business of the Supreme Court in recent years has been in the field of the Bill of Rights. It seems a bit incongruous to advise the Court to go back to its commerce and contract cases and leave these matters of church and state alone. Furthermore, it is worth pointing out that the Court does not solicit its cases; parties start cases, and if parties insist upon litigating issues under the establishment clause of the Bill of Rights, it is difficult to see how the Court can refuse to hear them, since the Justices have an obligation to do equal justice to all. Of course there is a *de minimis* doctrine in the law, but there are very persuasive reasons why it should be used very sparingly.

The well-known English scholar, Norman St. John-Stevas, contributes an essay on the birth control issue. That this is an explosive issue religiously is, of course, well-known, but the author maintains that opinion on the desirability of contraception has changed more than the law on the subject. Unfortunately, this essay was written before the Supreme Court decided the

17 Commonwealth *ex rel.* Wehrle v. School Dist. of Altoona, 241 Pa. 224, 88 Atl. 481 (1913).
18 Text at 21.
19 Text at 27.
20 Text at 28.

Griswold case[21] in which it ruled that the Connecticut legislative ban on contraceptives violated some generalized right of privacy secured to all by various provisions of the Constitution. Certainly the Court did not even appear to consider the point urged by this writer, that birth control statutes are bad because they enforce the doctrines of a particular religious denomination. Mr. St. John-Stevas brings together a great deal of useful information about birth control, and particularly about the pill, and he concludes that where people are so sharply divided in a pluralist society on religious grounds, the issue ought to be left to private conscience, though he also finds that the various religious lines are tending to converge on this subject.

In an essay on religious freedom and social change, Arthur Gilbert, staff consultant and director of the project on religious freedom and public affairs of the National Conference of Christians and Jews, develops the theme that much of the fear and suspicion which have divided America's religious groups in the past are being overcome, and that dialogue among them has emerged. He sketches in brief the history of religious bigotry in the United States and discusses what he calls the era of the Court. Even so, he calls attention to the widespread disobedience to the Court's decisions which are to be found at the grass-roots level. But when Mr. Gilbert asserts that the Founding Fathers never intended that the federal government should exercise control over state actions through the first amendment, he is undoubtedly right; but later Founding Fathers wrote a fourteenth amendment guaranty of liberty into the Constitution which was explicitly intended to apply federal restraints upon the states. Furthermore, after praising judicial restraint, the author expresses the hope that the Court will exercise self-discipline to the end that there will be a minimum of interference with local control of public school policy. Perhaps it ought to be stressed that greater restraint on the part of local authorities will result in fewer occasions for federal intervention. In any event, Mr. Gilbert is delighted that our religious leaders are now talking to each other, and we must all agree that this is a good thing. Likewise, we can all agree with his argument that the settlement of religious differences by means other than litigation is perfectly sound. Litigation has accomplished much, and the Supreme Court has been a powerful educator in this field of human experience, but other methods are better, among them inter-faith dialogue.

Philip Wogaman, Professor of Bible and Social Ethics at the University of the Pacific, discusses the first National Study Conference on Church and State, which was convened by the National Council of Churches in February, 1964. He describes the conference as "a model of ambiguity,"[22] but he also regards it as an important first effort. Among other things, Professor Wogaman believes that the conference demonstrated the fact that anti-Catholicism has clearly lost its power to determine Protestant-Orthodox thinking, and that such thinking is less likely to be based on constitutional grounds than previously. He also believes that Protestant thinking is less committed to rigid separationist positions, and that the conference was characterized by more relativism and a

21 Griswold v. Connecticut, 381 U.S. 479 (1965).
22 Text at 121.

greater awareness of the pluralistic character of American religious life. Nevertheless, he states that the dominant mood of the conference was one of support for recent decisions of the Court which prohibit officially prescribed prayers and devotional Bible readings in the public schools. It is also worth noting that the conference endorsed the shared-time concept as the most creative solution available for the problem of state aid to parochial schools.

Finally, Mother Patricia Barrett, Professor of Political Science at Maryville College of the Sacred Heart in St. Louis, contributes a perceptive summary of books on church-state questions published during the year, and the editor of the volume contributes a splendid summary of the cases and statutes of the year on these subjects.

This annual summary of church-state problems, and especially legal problems, is an invaluable contribution to American scholarship, and it is to be hoped that the series will continue indefinitely. Religion reaches far and wide into all aspects of American life, and the confrontation of the state with the church is so important that it ought be under continuous study on this scale. Church-state relations have long been in a murky state, but the picture is getting brighter all the time, and it is comforting to chart the considerable improvements from which all of us should derive genuine satisfaction.

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ONE-DIMENSIONAL MAN. By Herbert Marcuse.[1] Boston: Beacon Press, 1964. Pp. xvii, 257. $6.00.

Criticism, no matter how cogently expressed, will not assure avoidance of error, but without it disaster would be inevitable. The horrors of nuclear war, the destruction of civilization, even the ending of all life, are ever present threats. Marcuse suggests that the threat of an atomic catastrophe serves to protect the very forces which perpetuate the danger. Advanced industrial society which sustains these forces is subjected to searching criticism in these studies published under the title of *One-Dimensional Man.* Invoking the teachings of philosophers and other thinkers, both ancient and modern, and supplementing their wisdom with many acute insights of his own, the author has provided what may prove to be very salutary indictments of the crimes against humanity committed by all of us. He has focused his attention on tendencies in the most highly developed contemporary societies, and he has offered some challenging hypotheses for further consideration and study. By way of example, Marcuse states that the most telling evidence of the tendencies of advanced industrial civilization can perhaps be obtained "by simply looking at television or listening to the AM radio for one consecutive hour for a couple of days, not shutting off the commercials, and now and then switching the station."[2]

The facts upon which the theoretical discussion is based are those set forth in such books as *The Modern Corporation and Private Property* by Berle and Means, *White Collar* by C. Wright Mills, *The Hidden Persuaders, The Status*

* Vilas Professor of Political Science, University of Wisconsin.

1 Professor of Politics and Philosophy, Brandeis University.
2 Text at xvii.

Seekers, and *The Waste Makers* by Vance Packard, *The Organization Man* by William H. Whyte, and *The Warfare State* by Fred J. Cook. Marcuse has sought to supply the theoretical analysis lacking in these works and in doing so displays great indebtedness to Hegel, Marx, and Freud, and also to Theodor W. Adorno, Serge Mallet, and Francois Perroux.

At the dawn of the industrial age Wordsworth exclaimed: "The world is too much with us." Today it is with us all the time and we cannot escape. There is only one "dimension" for the "totalitarian personality" of our time. One-dimensional reality prevails not only in the common occupations of life, but also in the universities and scientific institutions. One-dimensional thinking is exemplified in the operational interpretation of concepts in physical science as expounded by P. W. Bridgman in *The Logic of Modern Physics,* behaviorism in the social sciences, and the analytical philosophy now dominant in many academic establishments.

Marcuse minimizes the effectiveness of seemingly opposing tendencies:

> The reign of such a one-dimensional reality does not mean that materialism rules, and that the spiritual, metaphysical and bohemian occupations are petering out. On the contrary, there is a great deal of "Worship together this week," "Why not try God," Zen, existentialism, and beat ways of life, etc. But such modes of protest and transcendence are no longer contradictory to the status quo and no longer negative. They are rather the ceremonial part of practical behaviorism, its harmless negation, and are quickly digested by the status quo as part of its healthy diet.[3]

Marcuse emphasizes the similarity of totalitarian tendencies and applications thereof on both sides of the Iron Curtain and maintains that advanced industrial society, despite its rationality of detail, is irrational as a whole.[4] He asks how can the tremendous resources of advanced industrial society "be used for the optimal development and satisfaction of individual needs and faculties with a minimum of toil and misery."[5]

Operationalism, behaviorism and positivism all converge in a managerial mode of thought. The managerial mode of thought and the administered life of each individual in our society are subjects for criticism. The inner limitations and prejudices of scientific method are referred to, but the author disclaims the advocacy of "some sort of 'qualitative physics,' revival of teleological philosophies, etc."[6] What he advocates is critical "negative thinking." Critical philosophic thought, however, can "open a realm of knowledge beyond common sense and formal logic."[7]

Marcuse states:

> The philosopher is not a physician; his job is not to cure individuals but to comprehend the world in which they live—to understand it in terms of what it has done to man, and what it can do to man. For philosophy is (historically, and its history is still valid) the contrary of what Wittgenstein

3 Text at 14.
4 Text at ix.
5 Text at xi.
6 Text at 166.
7 Text at 182.

> made it out to be when he proclaimed it as the renunciation of all theory, as the undertaking that "leaves everything as it is." And philosophy knows of no more useless "discovery" than that which "gives philosophy peace, so that it is no longer tormented by questions which bring *itself* in question." And there is no more unphilosophical motto than Bishop Butler's pronouncement which adorns G. E. Moore's *Principia Ethica:* "Everything is what it is, and not another thing"—unless "is" is understood as referring to the qualitative difference between that which things really are and that which they are made to be.[8]

Marcuse advocates "the pacification of the struggle for existence" and "the emergence of a new idea of Reason." The new idea of Reason is expressed in Whitehead's proposition:

> "The function of Reason is to promote the art of life." In view of this end, Reason is the "direction of the attack on the environment" which derives from the "threefold urge: (1) to *live,* (2) to live well, (3) to live better."[9] (Emphasis added.)

The great vice of advanced industrial society is the employment of men as "things" rather than as rational human beings. This theme is developed throughout the book. Other voices will be encouraged to protest against the sins of our society. The philosopher will hearten those who strive in our courts to safeguard our human freedom.

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8 Text at 183-84.
9 Text at 228.
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