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Religion, The Courts, and Public Policy

Lawrence X. Cusack

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BOOK REVIEWS

RELIGION, THE COURTS, AND PUBLIC POLICY

by *Robert F. Drinan, S.J.*

McGraw-Hill Book Company, New York, 1963. Pp. 261. \$5.95.

Reviewed by

LAWRENCE X. CUSACK*

This recent examination of the relations between religion and government in American life serves as an excellent illustration of why the study-group approach to controversial public issues continues to thrive, despite its frequent use as merely a device of procrastination. Much as though he were a three-man task force, the Jesuit Dean of the Boston College Law School has studied several of the major areas of friction between Church and State in the United States and reported on them from the triangular viewpoints of lawyer, educator and clergyman. The product of these three disciplines brings to the reader a discussion that is marked by the lawyer's preciseness of reasoning and expression, modified by the broader historical and social perspective of the educator, and tempered by the charity and ecumenism of the clergyman.

Approaching his subject initially as a lawyer, Father Drinan announces that he is limiting his study to fundamental questions which have already been legal and constitutional issues, and that he will not deal with such topics as birth control, obscenity,

the population explosion or similar problems which have not yet "developed into a constitutional and legal question on which the Supreme Court has ruled." His inquiry is confined to what he calls the three great problems that dominate the Church-State scene today—religion in the public school, tax-supported Church-related schools and the so-called Sunday closing laws. In connection with all three of these problems, Father Drinan gives a detailed exposition of the legal and constitutional issues, the leading court decisions and the thinking of legal scholars, all filtered to the reader through his own frankly expressed judgments and prognoses.

The Dean's personal conclusions on legal and constitutional matters are interesting, occasionally provocative. Noting early in his book certain friendly alliances between Church and State, he treats the subject on tax exemption for religious institutions, and despite recent rumblings of secularist discontent, concludes that such exemption has a "profoundly entrenched place" in American law, opposed by only a few "extreme church-state separationists," and supported by a "remarkable consensus" of sentiment,

* A.B., LL.B., Fordham University.

religious and otherwise. In the same vein, he shortly thereafter concludes that draft immunity, tax-supported chaplaincies and government assistance to sectarian social agencies are three other areas of Church-State harmony which are "at least for the present, beyond dispute."

As a legal scholar, Father Drinan takes an unequivocal stand in opposition to the Supreme Court's appraisal of moral and spiritual values in tax-supported schools, urging that the Court "embraced a fundamental error" at the beginning of the series of decisions commencing with the New Jersey school bus case in 1947 and continuing through the New York Regents prayer case in 1962. At the level of the state government, his review of state constitutional provisions and court decisions leads him to conclude that there exists there—but not necessarily at the federal level — an apparent impossibility of Church-related schools obtaining any tax support for educational purposes as such, and that it is for that reason that the private schools have turned their attention to health benefits, public welfare aids and other fringe services which are given by the states to school children. This leads Father Drinan to a brief but comprehensive and most informative discussion of such auxiliary benefits as bus rides and secular text books and the advantages and possible disadvantages of "shared time."

In dealing with the arguments advanced by Catholics who attempt to justify their claim to federal aid, Father Drinan expresses the view that it is the concept of "permeation," that is, the introduction of religious tenets and values into secular educational subjects, which "seems more and more to overshadow and cancel out whatever cogency might exist in the arguments

which Catholics advance for their claim to public support of their schools." At the close of his discussion on the Catholic cause, Father Drinan outlines a "legal-constitutional-educational line of reasoning" designed to support the Catholic claim to some part of federal aid, and concludes with the observation that there is a great "Brandeis brief" which needs to be written to support the case for the Catholic claim.

Intertwined with the essentially legal discussion of the Church-State problems that are the subject of the book are the socially-conscious and farsighted views of Dean Drinan, the educator. Repeatedly, his conclusions as a lawyer are modified by the expression of goals he perceives to be realizable and desirable in contemporary American society. In his first chapter he includes a full discussion of certain areas where government and religion have formed "an untroubled alliance," and explains that he is doing so in order to avoid conveying "a distorted picture of church-state relations." Time and time again he emphasizes that problems of Church-State friction should, and in the long run will, be resolved as social issues on the ground of sound public policy, rather than as legal or constitutional disputes. He says this with regard to the dilemma of the public schools with respect to religious values, expressing the opinion that it can be resolved only by time and the growth of a consensus of opinion. He says it again in his warning that there will be no permanent peace between church groups, religious parents and public education "as long as the public school insists adamantly on teaching *only* the secular to the exclusion of the sacred, sectarian and the supernatural."

Discussing federal aid to Church-related schools, Father Drinan de-emphasizes the

constitutional issue with the observation that the real issue does not center on what the Supreme Court ruled or left open in the New Jersey school bus case, but on the basic public policy question of whether the federal government should encourage or discourage non-public schools in America. He calls that question "the heart of the matter" and says "it seems unlikely that it can be resolved by skirmishes over the exact meaning of the establishment clause." In a closing chapter setting forth his conclusions and recommendations, Father Drinan returns to this theme with the statement that in Church-State controversies "American courts must ultimately base their conclusions on a public policy which is not spelled out in the First Amendment."

To those attuned to the ecumenical spirit of our times, the outstanding feature of Father Drinan's book is his nonpartisan analysis and exposition of the Church-State viewpoints of America's three main religious groups. Throughout his study runs the thought that one of the keys to Church-State accord is the development or maintenance of "areas of mutual concern" in which the major religions have a partnership with the State, and early in his book he observes that it is when one of the major religious groups "secedes from the partnership" that Church-State problems seem to arise. He is conscious of the historical identification of American Protestantism with the public school, and recognizes that "it sometimes appears that criticism of the public school—especially by Catholics—is in effect criticism of the Protestant origin and guardianship of the nation's public schools." When he discusses religion in public education, Father Drinan does so by giving an objective and balanced exposition of the Protestant, Jewish and Catholic positions, and, in later deal-

ing with specifics, by asking whether it would not be helpful if "all religious groups formed a federation for the purpose of improving the treatment of religion and religious values in the textbooks employed by the nation's school children." In his description of the shared-time proposal, Father Drinan enumerates the different views of the three religious faiths. In a chapter on Sunday closing laws, he champions the cause of the Orthodox Jew, expressing regret that the claim of the Sabbatarian for freedom from economic penalty because of the exercise of religion was rejected by the Supreme Court, and makes a plea for an accommodation of interests so that those conscientiously opposed to labor on Saturday may not be unreasonably penalized.

Father Drinan's closing chapter is an outstanding contribution of constructive thinking on Church-State relations. There he addresses separate series of recommendations to all citizens, to Protestants, to Jews, to Catholics, and to nonbelievers. In speaking to the citizens of his own faith, he does not hesitate to warn them against "the omnipresent temptation to oversimplify the issues," against "the temptation to act on the principle that what is good for the Catholic Church is good for America," against being "preoccupied with their own interests," against exhibiting "hysteria" and against acting "in an un-Christian and even uncivil way," and, finally, against the inclination "to assert the Catholic claim as an absolute and dismiss the objections to it as the products of secularistic or bigoted minds."

By helping to shape the informed public policy that hopefully will lead to an accommodated solution of these vexing Church-State problems, Father Drinan has performed a notable public service. All

Americans concerned with or about those problems, whatever their own disciplines or religious convictions, would profit from reading his book.

