

THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS. By Alexander M. Bickel. Cambridge: Belknap Press of Harvard University Press, 1957. Pp. xxi, 278. \$6.00.

PROFESSOR Bickel's scholarly book on the unpublished opinions of Mr. Justice Brandeis is an extremely interesting study of the judicial process as seen through the eyes of one of the greatest Justices to serve on the Supreme Court. At the outset, a reader might be inclined to question why a book should be written about the unpublished opinions of a Justice, even so great a one as Brandeis.

The study of why these opinions were not published gives the reader an interesting insight into the judicial process, entailing as it does interchange of ideas and accommodation of points of view, often among Justices of quite different outlook. Normally, the privacy necessarily surrounding the deliberations of the Court hides this interchange from view, and Professor Bickel's study is therefore particularly welcome. Many considerations are involved in a decision not to publish a draft opinion but, in general, they fall into two important categories. The first is covered by Professor Bickel's description of the choice facing a Justice in deciding whether to file a dissent:

"Thus the dilemma. To remain silent, not drawing attention to a possibly nascent doctrine which one deems pernicious, not assisting, despite oneself, in its birth; or to speak out. Silence under such circumstances is a gamble taken in the hope of a stillbirth. The risk is that if the birth is successful, silence will handicap one's future opposition. For one is then chargeable with parenthood."<sup>1</sup>

Professor Bickel shows that the consideration which might lead a Justice to be silent rather than to file a dissent is not merely a hope that a poor decision may be quickly forgotten if no dissent is filed. After reading the unpublished opinion in *St. Louis, I.M. & So. Ry. v. Starbird*,<sup>2</sup> one must agree that the author has phrased the consideration happily in his statement that "dissent may serve only to delineate clearly what the majority was diffident itself to say."<sup>3</sup> The book sets forth Justice Brandeis's two-way solution of this dilemma; both when he resolved it by being silent, and when he felt it his duty to expose in a published dissent the implications of a majority opinion, whether or not the majority was prepared to face up to them.

Not all the unpublished opinions of Justice Brandeis discussed in this book would have been dissents had they been published. Probably the most interesting of the eleven cases discussed are those in which an opinion, starting out as a dissent or even a memorandum which did not purport to be an opinion at all, won the day by capturing the votes of a majority of the Court. Here, the considerations are not unlike those involved in deciding whether to file a dissent. The draft dissent in the *Arizona Employers' Liability Cases*<sup>4</sup> is an

---

1. P. 30.

2. 243 U.S. 592 (1917).

3. P. 30.

4. 250 U.S. 400 (1919).

illustration. This opinion was unpublished because a majority was rallied to accept Justice Brandeis's conclusion even though it did not follow the precise reasoning. The result, as Professor Bickel points out, was a rather unsatisfactory opinion by Justice Pitney upholding workmen's compensation laws. One can hardly disagree that this is a preferable alternative to a majority opinion reaching the opposite result accompanied by a brilliant dissent. Clearly, Justice Brandeis thought so, and the author shows us why.

The book is interesting also for the light it throws upon Justice Brandeis himself. Here are portrayed his scrupulous devotion to the judicial process and the intensity of the research which went into these opinions. We are given also an interesting view of Brandeis's relationship with Chief Justice Taft in a chapter with the explanatory title "Things Go Happily With Taft," which shows how the common ground of devotion to the Court and its work brought into a close working relationship Justice Brandeis and the man who had opposed his confirmation to the bench. The chapter which deals with Justice Brandeis's relationship with Justice Holmes needs no such explanatory title, and is both sensitively written and fascinating to read.

The opinion in *UMW v. Coronado Coal Co.*<sup>5</sup> deserves special comment. Because Justice Brandeis had no typist, he relied on the Court printer for preliminary drafts a great deal more than would otherwise have been the case. As a result, many early drafts of opinions tended to look much more official than they actually were. In some cases, they may well have been memoranda prepared by the Justice's law clerk and sent to the printer so that Brandeis might read them more easily. The opinion set forth in the chapter on the *Coronado* case is not really an unpublished opinion. It is a draft opinion prepared for Brandeis's consideration by his clerk, Dean Acheson and, as the book shows, much was to be done on it before the Justice was to make it his own. Still, it affords an insight into the interaction between the mind of the Justice and that of his soon-to-be-distinguished clerk, and the opinion was desirably treated on this basis.

In the introduction to this book, Professor Freund of the Harvard Law School points out that a due respect for the privacy essential to the consultative phase of the Court's work prevents any analysis or publication of the more recent working papers of Justice Brandeis. Indeed, the most recent opinion analyzed in the book was written in 1930. No one can reasonably disagree with the considerations of taste which lead to this decision. One must note with regret, however, that it leaves the door closed, temporarily at least, to such interesting subjects as Justice Brandeis's relationships with Chief Justice Hughes and his participation in the work of the Court during the turbulent Thirties. Nevertheless, a reader can take comfort in the fact that the door is closed only temporarily and can hope that, when sufficient time has passed, Professor Bickel will bring out a second book on this subject as well written as the first.

ADRIAN S. FISHER†

---

5. 259 U.S. 344 (1922).

†Member of the District of Columbia Bar.