

BOOK REVIEWS

THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS. By Alexander M. Bickel, with an introduction by Paul A. Freund. Cambridge: The Belknap Press of Harvard University Press, 1957. Pp. xxi, 278. \$6.00.

Is it proper now to publish opinions that Mr. Justice Brandeis decided not to publish?

There is little danger in releasing the opinions themselves. However, since any meaningful publication must disclose secret votes of the Court and private communications among the Justices, does such publication violate the confidence which the Justices assumed and thereby impair the freedom of communication essential for the Court's functioning? A reviewer of a recent biography which, without discussion of the proprieties, drew heavily on such materials expressed a fear that "The justices in the future may write their personal notes more carefully with a view to their effect on posterity."¹

The question is not so simple as Professors Bickel and Freund would make it. The fact that "what we know, we know because Brandeis thought it useful that we know it; else he would not have seen to the preservation of these files" (p. viii) is not decisive even as to the opinions themselves, and still less so as to the votes of the Court and the communications from Brandeis' colleagues. The argument that "if there is danger that free intercourse among present ones [Justices] may be inhibited by 'disclosures' about their predecessors, free intercourse must already be severely inhibited" by publications already made (p. ix), is rather like saying that if the ship is leaking, sink it. Professor Freund's asserted analogies, the ultimate publication of diplomatic correspondence or of the debates of the Constitutional Convention (p. xvi), are a long way from revealing the intimacies of the Supreme Court's conference room. Neither is the case furthered by the "precedent" (p. ix) of the publication, in 117 U.S. of Chief Justice Taney's unpublished opinion in *Gordon v. United States*.² For the serious question relates not so much to the opinions themselves as to the votes and discussions before and after.

The authors are on firmer ground when they suggest that the balance between the conflicting claims of history and privacy is struck when, or a reasonable period after, all participants have left the Court. (p. viii). Certainly it is not struck before this, and perhaps some such restriction ought to be imposed by rule of the Court if the good taste of authors does not produce voluntary observance. Beyond this the authors urge that "the intimacies here described are not aimless or malicious disclosures; they are

1. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956), reviewed by Frederick D. G. Ribble, 57 COLUM. L. REV. 605 (1957).

2. 69 U.S. (2 Wall.) 561 (1865).

relevant to understanding, and so, to use a favorite word of Justice Brandeis, they are instructive." (p. xvi).

Instructive, indeed, they are, with the illuminating preludes and postludes as to the background and the effect of the opinions which Professor Bickel has provided. Perhaps they instruct most of all in disclosing to what degree Brandeis' career on the bench was a continuation of his success at the bar. To Justice Holmes' remark that Brandeis "really was an advocate rather than a Judge,"³ Brandeis would doubtless have responded that one of a bench of nine could not fulfill his duties as a judge unless he was an advocate. Decision came swiftly to him—he knew nothing of Cardozo's anguish or "wrestling with the angel."⁴ But the personal decision, which was the end of the judicial process for Holmes, was only the beginning of it for Brandeis. For him the path of duty was not merely to arrive at the truth but to make it prevail.

What is immensely revealing in this book, especially to those who have come to think of Brandeis primarily as a great dissenter, is how often he did make his views prevail, with a bench that was scarcely hospitable to them. He did this in the traditional manner of the advocate—by putting them in a way acceptable to those he was seeking to convince.

Brandeis' unpublished opinion in the *Arizona Employers' Liability Cases* (pp. 61-76) illustrates this technique. In upholding the workmen's compensation acts of New York and Iowa,⁵ Justice Pitney had stressed the benefit to the employer in being freed from the risk of large verdicts in suits at common law. While this result was unanimous, it could hardly have been enthusiastic. For a Washington statute, differing only in exacting compulsory contributions to a state liability insurance fund, passed muster by a vote of only five to four, with Justice Pitney writing for the majority, and Chief Justice White and Justices McKenna, Van Devanter and McReynolds dissenting without opinion.⁶ Arizona added a new difficulty. Its statutes gave the employee in a hazardous industry an option either to proceed under the workmen's compensation law or to bring an action in which the only defense was proof that the injury was due to the employee's own negligence, with this always a question for the jury. Despite this difference, the five-man majority of the Washington case at first held together and, indeed, gained the adherence of Chief Justice White. The latter assigned the opinion to Justice Holmes, who wrote and circulated the opinion that now appears as a special concurrence of Holmes, Brandeis and Clarke.⁷ Apparently, however, the broad language of Holmes' opinion lost the majority previously attained. Brandeis thereupon prepared an opinion that forsook Holmes' philosophical approach and answered each of the objections to the Arizona statute on a basis which Pitney and Day could accept. Couched initially as a dissent, it led to a reargument and the reconstitution of the five-man majority of the Washington case.

3. Letter to Harold J. Laski, Dec. 11, 1930, cited at p. 222.

4. L. Hand, *Mr. Justice Cardozo*, in *THE SPIRIT OF LIBERTY* 131 (1941).

5. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917).

6. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

7. 250 U.S. 400, 431 (1919).

Taft's accession as Chief Justice at the beginning of the 1921 Term would have posed a problem for lesser men. In the Ballinger hearings of 1910 Brandeis had demonstrated that the then President not only had been somewhat less than candid with the public but had gone along with his Attorney General's predating a memorandum as of the time of a previous oral report.⁸ Six years later Taft was one of the first to sign the statement of former presidents of the American Bar Association advising the Senate of their "painful duty to say to you that in their opinion, taking into view the reputation, character, and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States."⁹ Yet, as biographers of both men have shown, all feelings of hostility, or even of embarrassment, disappeared once they became colleagues on the Court.¹⁰ Professor Bickel's volume reveals that their relationship soon went far beyond judicial camaraderie. Brandeis realized that while Taft might have only "a first rate second rate mind" (p. 203), it was not a closed mind—and that, once persuaded, Taft could do far better than Brandeis in shepherding the brethren. The book shows that two of Taft's most famous opinions, both for unanimous Courts, in *United Mine Workers v. Coronado Coal Co.*,¹¹ and *Sonneborn Bros. v. Cureton*,¹² had their origins in proposed dissenting opinions with which Brandeis persuaded Taft, who then carried the gospel to their colleagues. (pp. 77-118).

In the first of the unpublished opinions (pp. 5-14), that in *Atherton Mills v. Johnston*,¹³ Brandeis is already sounding what was to become one of his favorite themes—"the conviction that the Court must take the utmost pains to avoid precipitate decision of constitutional issues, and that it must above all decide such issues only when it is absolutely unable otherwise to dispose of a case properly before it." (pp. 2-3). A suit testing the constitutionality of the Child Labor Tax Act, should be dismissed as not a "case" within the Federal judicial power, Brandeis wrote, because the child that brought suit against the employer who threatened his discharge was only an employee at will.

Despite Professor Bickel's admiring quotation of Brandeis' epigram, "The most important thing we do is not doing" (p. 17), it may be queried whether this drum deserved all the beating that Brandeis was to give it over the years. Of course, the Court should not decide the constitutionality of a statute without fully hearing those interested in sustaining it. But the United States had appeared in *Atherton* through the Solicitor General as *amicus curiae*, and Congress has now assured such participation from the outset where the constitutionality of federal legislation is in question.¹⁴ Suppose that young Johnston had been hired by Atherton Mills for a term

8. MASON, *BRANDEIS: A FREE MAN'S LIFE* 273-79 (1946); PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 510-14 (1939).

9. *NOMINATION HEARINGS* 1227 (1916).

10. MASON, *op. cit. supra* note 8, 537-39; PRINGLE, *op. cit. supra* note 8, at 970-71.

11. 259 U.S. 344 (1922).

12. 262 U.S. 506 (1923).

13. 259 U.S. 13 (1922).

14. 28 U.S.C. § 2403 (1952).

of years subject to earlier dismissal if his continued employment would result in imposition of a federal tax not otherwise payable. The considerations with respect to the desirability of constitutional adjudication would scarcely seem altered; yet presumably even Brandeis would have had to admit that here a "case" was presented. It is by no means obvious that delay in decision, constitutional or otherwise, is inevitably an advantage. Indeed, Professor Bickel contends, (pp. 16-17), although on somewhat slender evidence, that Brandeis' holding action in *Atherton* led to the dissipation of what was then a majority in favor of the constitutionality of the Child Labor Tax Act. Surely one of the unhappiest chapters of Brandeis' judicial career was when his zeal against the declaratory judgment led him to deliver, in *Willing v. Chicago Auditorium Ass'n*,¹⁵ what Justice Stone declared to be itself a declaratory judgment against the application of this remedy in the federal courts—a dictum which a unanimous Court, including Brandeis, was obliged to ignore nine years later.¹⁶

This volume is eloquent also in illustrating how deeply Brandeis cared about how much. He was incapable of mediocrity. He gave the same zeal, the same passion for thoroughness, and the same skill in the organization of his materials to contending that a municipal ordinance was not "a statute of any state" within the meaning of the Court's jurisdictional statute as he did in urging that the fourth amendment be applied to prevent "subtler and more far-reaching means of invading privacy" than the fathers had known.¹⁷ None of the opinions now published in this volume concerns one of the great issues of Brandeis' constitutional adjudication;¹⁸ yet all of them reveal the concentration of emotion, of intellect, and of hard work that characterize his greatest deliverances.

An appendix, (pp. 239-48), includes brief biographical sketches of Brandeis' colleagues and a useful chart showing the composition of the Court at various dates.

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15. 277 U.S. 274 (1928).

16. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), sustaining the Federal Declaratory Judgment Act, in 28 U.S.C. § 2200 (1952). Actually the *Atherton Mills* opinion itself finds Brandeis violating his own precept. Not satisfied with holding that the suit as filed did not present a "case or controversy," he went on to say that "By no conceivable amendments can it be made to state a good cause of action in equity." (p. 13). In the eve of his career, in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), Justice Brandeis again departed from his policy of avoiding constitutional issues, in an effort, similar to that in *Willing*, to render the decision immune from congressional reversal. See Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine*, 67 *YALE L.J.* 187, 188-89 (1957).

17. Dissenting opinions in *King Mfg. Co. v. Augusta*, 277 U.S. 100, 115 (1928), and *Olmstead v. United States*, 277 U.S. 438, 471, 473 (1928).

18. Perhaps one should except *Stratton v. St. Louis Southwestern Ry.*, (pp. 129-52), where an Illinois \$1000 minimum tax levied on an interstate railway that would have paid only \$135 on an apportioned basis became the occasion for expression of Brandeis' views as to the power of the state legislatures to deal with "bigness," some of which appeared later in *Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933).

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ESSENTIALS OF INSURANCE LAW, SECOND EDITION. By Edwin W. Patterson. New York, Toronto, London: McGraw-Hill Book Company, Inc., 1957. Pp. xiv, 558. \$7.50.

The Second Edition of *Essentials of Insurance Law* is an excellent treatise written by an author with broad knowledge of all branches of insurance law. Since the First Edition was published in 1935 there have been material changes in the law of insurance brought about by judicial decisions and by legislative enactments. This treatise is now thoroughly up to date.

Professor Patterson, Cardozo Professor of Jurisprudence at Columbia University, one of the leading (if not the leading) author on insurance subjects today, is a careful writer and certainly care is needed with any relatively short treatise in which so many statements must necessarily be of a general nature. The broad field of insurance law is exceedingly well covered in a limited number of pages—and this is no easy task. The book is well documented, especially for a book written for use to a considerable degree by persons other than lawyers.

Professor Patterson published the First Edition of this work at just about the time he was commencing his duties as a Deputy Superintendent of Insurance of New York. His particular function there was in connection with the revision of the New York Insurance Law which was completed in 1939. He did the major part of the work and he did it well. This can be said whether or not you agree with the philosophy of the New York Insurance Law which attempts to spell out in detail matters which, perhaps, might best be left to administration and which, in several particulars unrelated to the protection of New York policyholders, attempts to regulate out-of-state insurers on a national basis. His experience with the New York Insurance Department and considerable other insurance work outside of the classroom has given to Professor Patterson a thorough understanding of the practical as well as the theoretical phase of insurance. Some other insurance authors have not been so fortunate.

In arrangement this edition follows the general pattern of the First Edition but there are distinct improvements. The foremost, perhaps, is the fact that in the Second Edition citations are more generous and are placed on the same page as the text which the citations support. He has followed the pattern of the First Edition in summarizing important points at the end of each chapter.

In his *Law Journal* and other writings Professor Patterson has specialized on waiver, estoppel and election. The last chapter of his book covers these points and is exceedingly well done.

Insurance supervisory authorities of the states will be particularly interested in his estimate of the present calibre of state supervision. He is not flattering.

“The chief threat to the continuance of state regulation comes from the low standards of regulation and the lax or inefficient methods of supervision of some states. Especially is this an evil when a state

fails to curb the deception and claim dodging of companies that, organized under its laws, have their principal offices within its territory and practice their wiles by advertising in other states where they are not licensed to do business. These other states have as yet found no effective way to protect their residents against such practices." (p. 6).

This criticism comes from a man who is a recognized authority on insurance regulation. He is the author of an excellent book on the subject, *The Insurance Commissioner in the United States*, which was published in 1927, and he served for four years in one of the leading insurance departments as indicated above.

Professor Patterson may be just a little too pessimistic when he says that states where the insurance company is not licensed have found no effective way to protect their citizens against bad practices of unlicensed companies. Some years ago the National Association of Insurance Commissioners drafted and recommended a uniform act known as the "Unauthorized Insurers Process Act." This is now the law in more than forty of our states. In December of 1957 the United States Supreme Court upheld the California Act.¹ In the case in question suit was permitted in California against a non-admitted insurer where the only business done by the company in California was the issuance of the particular policy by mail from Texas to the insured, who lived in California, and the subsequent collection of premiums by mail. If the citizens of a state are permitted to sue the unlicensed insurer in their own courts, this would seem to give substantial protection to them. This protection they now have in most states.

Professor Patterson has recognized, and correctly, (p. 4), that the law governing insurance contracts is even more strongly dominated by the state law of the location of the risk than was true when he wrote his First Edition. The older United States Supreme Court decisions must be read with this change ever in mind. Many of these cases have not yet been overruled but the authority of these older cases is subject to question.

There is really very little to criticize in this excellent work. Although remarkably free from error, I should like to disagree with a few of his statements. For example, Professor Patterson credits the Hughes' reforms of 1906 to 1907 with the development of standard provisions for life insurance policies. (p. 25). This is not the fact. Mr. Hughes (and the Armstrong Committee) attempted to solve the problem not by *standard provisions* but rather by *standard policies* and the New York law was so drafted and enacted in 1906. Standard provisions for life policies were developed by a committee of three attorneys general and twelve insurance commissioners from the several states, known as the "Committee of Fifteen." New York experimented with standard policies (for domestic companies only) for two

1. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

or three years and then followed the lead of the other states which had adopted standard provisions.

Professor Patterson is also wrong on a few other minor points. He indicates in several places, for example, that the leading case of *Paul v. Virginia*² was decided in 1868 when, in fact, that decision was not handed down until November 1, 1869, although the Term of the Supreme Court was "December, 1868." This is a common error contributed to by the fact that at that time the official reports of the United States Supreme Court did not show the date of decision. He says also that only Rhode Island adheres exclusively to special acts of incorporation for insurance companies. (p. 16). Connecticut definitely is in that category. He indicates that a binding receipt in life insurance makes a temporary contract of insurance subject to the condition of rejection by the company which terminates the coverage. (p. 100). This is not the general effect of conditional or binding receipts and the two cases cited in support of the text represent distinctly the minority view.

These minor points should, perhaps, not even be mentioned in a review of such an excellent treatise as Professor Patterson has written. The book is one in which he should be proud and certainly it is in keeping with the high standards he has set in his numerous previous insurance law writings.

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2. 75 U.S. (8 Wall.) 168 (1869).

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