

The Yale Law Journal

Volume 84, Number 2, December 1974

Alexander Mordecai Bickel

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First there was courage; courage is always first. If somebody had to be behind a gun directly fronting on a vast massing of power obscenely sworn to Hitler, then of course that person would be young Alex Bickel. He wouldn't have been able to see any reason why it should be anybody else. And when the mightiest enemy of all, the undefeatable Hitler, arrived and set up his siege, out of season, without warning, bitterly as to time and manner, cutting off all hope, Bickel sat and laughed with his friends, or did what work he could. In between the Hitler of Europe and the Hitler of the universe there was never any faltering from courage. Courage is always first.

To an intellectual, courage commands intellectual honesty. There were many times in Bickel's life when the opinions to which his thought led him did not make him popular among the people with whom he would naturally have wished to be popular. Some of these opinions may even have been wrong; he never came close to claiming infallibility. But he had reached them by the best means known to him; they were his best, at least for the time, and he stuck with them until he saw *reason* to change. Of course.

There came a day when a question was asked him, and when a "yes" might, at the very least, have made possible further movement down the road toward what must have been a much-desired (I dare say the most-desired) goal. The question, mark you, was a close one; an honest and competent man might easily have concluded that the right answer was "yes." Alexander Bickel had come, on balance, to the opposite conclusion. He said "no," and a door closed; "no" was not the right answer, not the wanted answer. His name, by low men for low reasons, was doubtless crossed off a list. But it stayed, and stays, on another list—the list of those to whom courage (and therefore honesty) is first. Bickel must have felt rather wry about this, but I don't think there can have been any conflict in his mind. By

that time the habit of honesty ran through the man's whole grain.

Now what of the quality and worth of the thought guarded by this honesty? With much of that thought, I disagreed; as to one matter, I put this disagreement into (quite vigorous) print, even after it was known Bickel was dying, for I would not offer him, above all at such a time, the supreme insult of failing to answer fully and candidly his own thought.

The key to my own evaluation of all his thought is in the phrase (which I quote without remembering the source) that he and I agreed in everything but our opinions. No one in our times, or perhaps in any times, so deeply, so broadly, so imaginatively explored the institutional place of the courts in shaping the world—and, even more widely than that, the place of constitutional law in political life.

All the above (so far as concerns the particular and personal thing I can say) is underpinning to a relation. Bickel and I were *colleagues*. This word is multivocal. It can mean (and often does mean) that the same Assistant Treasurer signs both salary checks. But it can mean something else. It can mean that you come at the same set of questions from very different directions—in his case from the direction of Felix Frankfurter, and in my case from a direction that in 1956 was yet to be fully defined—the direction, generally, that was to be that of the Warren Court. It can mean, then, that through eighteen years of continual discourse, now cool, now heated, you travel over every question, old and new, within the range of this common interest. Many—perhaps most—of the opinions on old questions remained the same in abstract statement—but how newly rounded, how subtly qualified! In eighteen years, too, many new questions arose; on the more important of these, I think, we formed our opinions—by no means always the same opinions—together, in a process of tireless shared thought—and he always shared his thought, tirelessly. I learned much from Bickel. We were colleagues; I speak measuredly when I say that in twenty-eight years of academic life, I think I have never had so deep and satisfying a *colleague-to-colleague* relation. It remains only to add that in this relation, as in any relation of life, love can develop.

So much more could be said, at this time when there is really nothing to say. May Joanne and the girls find consolation. May he be received into peace.

Writings of Alexander M. Bickel

Books

- THE CASELOAD OF THE SUPREME COURT AND WHAT, IF ANYTHING, TO DO ABOUT IT (1973).
REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM (1971).
THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).
THE NEW AGE OF POLITICAL REFORM: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM (1968).
POLITICS AND THE WARREN COURT (1965).
THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1963).
THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957).

Articles

- The Meaning of the Civil Rights Act*, in CIVIL RIGHTS (G. McClellan ed. 1964).
Discrimination in Education, in DISCRIMINATION AND THE LAW (V. Countryman ed. 1965).
Applied Politics and the Science of Law: Writings of the Harvard Period, in FELIX FRANKFURTER: A TRIBUTE (W. Mendelson ed. 1964).
Commentary, in A. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS (1972).
Commentary, in WATERGATE, POLITICS, AND THE LEGAL PROCESS (Am. Enterprise Inst. Round Table 1974).
Citizenship in the American Constitution, 15 ARIZ. L. REV. 369 (1973).
Congress, the President and the Power to Wage War, 48 CHI.-KENT L. REV. 131 (1971).
The Decade of School Desegregation: Progress and Prospects, 64 COLUM. L. REV. 193 (1964).
Watergate and the Legal Order, COMMENTARY, Jan. 1974, at 19.
The "Uninhibited, Robust and Wide-Open" First Amendment: From Sullivan to the Pentagon Papers, COMMENTARY, Nov. 1972, at 60.
The Constitution and the War, COMMENTARY, July 1972, at 49.
Judging the Chicago Trial, COMMENTARY, Jan. 1971, at 31.
Is Electoral Reform the Answer?, COMMENTARY, Dec. 1968, at 41.
Pornography and the Courts, COMMENTARY, Nov. 1968, at 97.
Failure of the Warren Report, COMMENTARY, Oct. 1966, at 31; Apr. 1967, at 23.
Rosenberg Affair, COMMENTARY, Jan. 1966, at 69; June 1966, at 20.
Civil Rights Act of 1964, COMMENTARY, Aug. 1964, at 33.
Reapportionment and Liberal Myths, COMMENTARY, June 1963, at 483; Nov. 1963, at 344.
Doctrine of Forum Non Conveniens As Applied in Federal Courts in Matters of Admiralty, 35 CORNELL L.Q. 12 (1949).
Supreme Court and Political Democracy, 44 F.R.D. 158 (1968).
The Press and Government: Adversaries Without Absolutes, FREEDOM AT ISSUE, May-June 1973, at 5.
Civil Disobedience and the Duty to Obey, 8 GONZ. L. REV. 199 (1973).
Felix Frankfurter, 78 HARV. L. REV. 1527 (1965).
The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 HARV. L. REV. 40 (1961). Also in SELECTED ESSAYS ON CONSTITUTIONAL LAW (Ass'n Am. Law Schools ed. 1963).
Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 HARV. L. REV. (1957) (with H. Wellington).
Strathearn S.S. Co. v. Dillon—An Unpublished Opinion by Mr. Justice Brandeis, 69 HARV. L. REV. 1177 (1956).
The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1 (1955). Also in SELECTED ESSAYS ON CONSTITUTIONAL LAW (Ass'n Am. Law Schools ed. 1963).
Judge and Jury—Inconsistent Verdicts in the Federal Courts, 63 HARV. L. REV. 649 (1950).
Education in a Democracy: The Legal and Practical Aspects of School Busing, 3 HUMAN RIGHTS 53 (1973).
Symposium: Southern Justice: Justice and Compassion, 37 MISS. L.J. 396 (1966) (with W. Ethridge, Jr., J. Patterson, W. Waller, S. Luckett & J. Doyle III).
Should Rodino Go to Court?, NEW REPUBLIC, June 8, 1974, at 11.

- How Might Mr. Nixon Defend Himself?*, NEW REPUBLIC, June 1, 1974, at 11.
Impeachment, NEW REPUBLIC, Nov. 10, 1973, at 9.
What Now?, NEW REPUBLIC, Nov. 3, 1973, at 13.
The Tapes, Cox, Nixon, NEW REPUBLIC, Sept. 29, 1973, at 13.
Reconsideration: Edmund Burke, NEW REPUBLIC, Mar. 17, 1973, at 30.
The Overworked Court: A Reply to Arthur Goldberg, NEW REPUBLIC, Feb. 17, 1973, at 17.
More on Quotas, NEW REPUBLIC, Oct. 28, 1972, at 8.
Untangling the Busing Snarl, NEW REPUBLIC, Sept. 23, 1972, at 21; Sept. 30, 1972, at 21.
Will the Democrats Survive Miami?, NEW REPUBLIC, July 15, 1972, at 17.
Powell's Day, NEW REPUBLIC, June 10, 1972, at 11.
What's Wrong with Nixon's Busing Bills?, NEW REPUBLIC, Apr. 22, 1972, at 19.
The Need for a War-Powers Bill, NEW REPUBLIC, Jan. 22, 1972, at 17.
Sharing Responsibility for War, NEW REPUBLIC, Sept. 25, 1971, at 15.
The Revolution of Unreason, NEW REPUBLIC, Oct. 17, 1970, at 18.
The Tolerance of Violence on the Campus, NEW REPUBLIC, June 13, 1970, at 15.
The Debate over School Desegregation: A Reply, NEW REPUBLIC, Mar. 21, 1970, at 28.
Desegregation: Where Do We Go from Here?, NEW REPUBLIC, Feb. 7, 1970, at 20.
Does It Stand Up?, NEW REPUBLIC, Nov. 1, 1969, at 13.
Student Demands and Academic Freedom, NEW REPUBLIC, Sept. 20, 1969, at 15.
How to Beat Crime, NEW REPUBLIC, Aug. 30, 1969, at 10.
Close of the Warren Era, NEW REPUBLIC, July 12, 1969, at 13.
Mr. Justice Fortas, NEW REPUBLIC, May 17, 1969, at 9.
Wait a Minute!, NEW REPUBLIC, May 10, 1969, at 11.
Fortas, Johnson, and the Senate, NEW REPUBLIC, Sept. 28, 1968, at 21.
The Kennedy Cause, NEW REPUBLIC, July 20, 1968, at 42.
Back to the Attack, NEW REPUBLIC, June 22, 1968, at 28.
Crime, the Courts, and the Old Nixon, NEW REPUBLIC, June 15, 1968, at 8.
Senate Judiciary's Abominable Crime Bill, NEW REPUBLIC, May 25, 1968, at 13.
The Belated Civil Rights Legislation of 1968, NEW REPUBLIC, Mar. 30, 1968, at 11.
Spock-Coffin Case, NEW REPUBLIC, Mar. 2, 1968, at 23.
Frankfurter and Friend, NEW REPUBLIC, Feb. 3, 1968, at 27.
Supreme Court: Internal Security Cases, NEW REPUBLIC, Jan. 6, 1968, at 21.
Return to Dallas, NEW REPUBLIC, Dec. 23, 1967, at 34.
Premature Verdict on Warren, NEW REPUBLIC, Oct. 7, 1967, at 36.
Lawyers and More Lawyers, NEW REPUBLIC, Sept. 23, 1967, at 24.
Death Penalty Litigation, NEW REPUBLIC, Aug. 19, 1967, at 13.
CBS and the Warren Report, NEW REPUBLIC, July 15, 1967, at 29.
Skelly Wright's Sweeping Decision, NEW REPUBLIC, July 8, 1967, at 11.
Obscenity Cases, NEW REPUBLIC, May 27, 1967, at 15.
Antitrust Slowdown?, NEW REPUBLIC, May 20, 1967, at 15.
Law and Prudence in the Powell Case, NEW REPUBLIC, Feb. 25, 1967, at 9.
The Case for the Electoral College, NEW REPUBLIC, Jan. 28, 1967, at 15.
Reexamining the Warren Report, NEW REPUBLIC, Jan. 7, 1967, at 25.
Civil Rights' Dim Prospects, NEW REPUBLIC, Sept. 17, 1966, at 17.
LBJ's Civil Rights Bill, NEW REPUBLIC, May 21, 1966, at 12.
Forcing Desegregation through Title VI, NEW REPUBLIC, Apr. 9, 1966, at 8.
Making the Best Use of the Police Force, NEW REPUBLIC, Mar. 12, 1966, at 8.
After the Arrest: Interrogation and the Right to Counsel, NEW REPUBLIC, Feb. 12, 1966, at 14.
Homosexuality as Crime in North Carolina, NEW REPUBLIC, Dec. 12, 1965, at 5.
Fighting Crime, NEW REPUBLIC, Sept. 18, 1965, at 11.
Impeach Judge Cox, NEW REPUBLIC, Sept. 4, 1965, at 13.
House and Senate Voting Bills, NEW REPUBLIC, July 24, 1965, at 8.
Liberals and John Lindsay, NEW REPUBLIC, July 3, 1965, at 16.
Voting Rights Bill—Third Edition, NEW REPUBLIC, May 22, 1965, at 13.
Speeding Up School Integration, NEW REPUBLIC, May 15, 1965, at 14.
Amending the Voting Rights Bill, NEW REPUBLIC, May 1, 1965, at 10.
Congress and the Poll Tax, NEW REPUBLIC, Apr. 24, 1965, at 11.
The Voting Rights Bill Is Tough, NEW REPUBLIC, Apr. 3, 1965, at 16.
Felix Frankfurter 1882-1965, NEW REPUBLIC, Mar. 6, 1965, at 7.
Registering Negro Voters in the South, NEW REPUBLIC, Feb. 20, 1965, at 9.
What Has Been Done Is Prologue: Carrying Out the Civil Rights Act, NEW REPUBLIC, Jan. 9, 1965, at 16.
Case of New York, NEW REPUBLIC, Dec. 26, 1964, at 11.
Is the Federal Government Helpless?, NEW REPUBLIC, Dec. 26, 1964, at 14.
Justice and the Franchise, NEW REPUBLIC, Oct. 31, 1964, at 17.

Writings of Alexander M. Bickel

- Barry Fights the Court*, NEW REPUBLIC, Oct. 10, 1964, at 9.
Battle over Brandeis, NEW REPUBLIC, Aug. 8, 1964, at 25.
Supreme Court Fissures: Seeds of Discord in the New Majority, NEW REPUBLIC, July 11, 1964, at 15.
Reapportionment and the Courts, NEW REPUBLIC, June 27, 1964, at 7.
Integrated Cohabitation, NEW REPUBLIC, May 30, 1964, at 4.
After a Civil Rights Act, NEW REPUBLIC, May 9, 1964, at 11.
Bobby Baker's Silence: Back to the Fifth, NEW REPUBLIC, Mar. 21, 1964, at 9.
The Court Intervenes, NEW REPUBLIC, Mar. 14, 1964, at 28; Feb. 29, 1964, at 5.
Sleepers in the Civil Rights Bill, NEW REPUBLIC, Feb. 29, 1964, at 14.
Beyond Tokenism, NEW REPUBLIC, Jan. 4, 1964, at 11.
Liberals and Civil Rights, NEW REPUBLIC, Dec. 28, 1963, at 9.
Civil Rights as Amended, NEW REPUBLIC, Nov. 16, 1963, at 7.
Civil Rights and the Congress, NEW REPUBLIC, Aug. 3, 1963, at 14.
Civil Rights Act of 1963, NEW REPUBLIC, July 6, 1963, at 9.
Civil Rights Boil-Up, NEW REPUBLIC, June 8, 1963, at 10.
Crime and Reapportionment, NEW REPUBLIC, Apr. 6, 1963, at 5.
The New Court, NEW REPUBLIC, Mar. 16, 1963, at 15.
Civil Rights: The Kennedy Record, NEW REPUBLIC, Dec. 15, 1962, at 11.
The Great Apportionment Case, NEW REPUBLIC, Apr. 9, 1962, at 13.
Democracy and the Private Citizen, NEW REPUBLIC, Feb. 5, 1962, at 22.
Portrait of Justice Holmes, NEW REPUBLIC, Nov. 6, 1961, at 19.
Integration—The Seven Lean Years, NEW REPUBLIC, Sept. 25, 1961, at 17.
Communist Cases, NEW REPUBLIC, June 19, 1961, at 15.
Philosophy of a Legal Realist, NEW REPUBLIC, Apr. 24, 1961, at 30.
Robert F. Kennedy: The Case against Him for Attorney General, NEW REPUBLIC, Jan. 9, 1961, at 15.
Next President and Civil Rights, NEW REPUBLIC, Oct. 13, 1960, at 17.
What the Founders Believed, NEW REPUBLIC, July 18, 1960, at 15.
Mr. Justice Black, NEW REPUBLIC, Mar. 14, 1960, at 13.
Justices on Display, NEW REPUBLIC, Sept. 14, 1959, at 20.
Court-Curbing Time, NEW REPUBLIC, May 25, 1959, at 10.
Congressional Review of Passport Policy, NEW REPUBLIC, Dec. 29, 1958, at 9.
Law and Reason, NEW REPUBLIC, Nov. 3, 1958, at 18.
Inexplicable Document, NEW REPUBLIC, Sept. 29, 1958, at 9.
Judicial Restraint and the Bill of Rights, NEW REPUBLIC, May 12, 1958, at 16.
Mr. Justice Frankfurter at Seventy-Six, NEW REPUBLIC, Nov. 18, 1957, at 7.
Brownell's Departure, NEW REPUBLIC, Nov. 11, 1957, at 6.
A Communication: "Paths to Desegregation by Prof. Charles L. Black, Jr.," NEW REPUBLIC, Nov. 4, 1957, at 3 (letter).
The Hearts of Man, NEW REPUBLIC, Oct. 7, 1957, at 6.
Eisenhower, Faubus, and the Court, NEW REPUBLIC, Sept. 30, 1957, at 5.
On the Retirement of Justice Reed, NEW REPUBLIC, Mar. 4, 1957, at 6.
Passion and Patience, NEW REPUBLIC, Nov. 12, 1956, at 15.
Integration: The Second Year in Perspective, NEW REPUBLIC, Oct. 8, 1956, at 12.
Ninety-six Congressmen versus the Nine Justices, NEW REPUBLIC, Apr. 23, 1956, at 11.
Chief Justice Warren and the Presidency, NEW REPUBLIC, Jan. 23, 1956, at 8.
On Mr. Jaworski's Quarrel With Mr. Nixon, N.Y. TIMES, May 23, 1974, at 41, col. 1.
The Courts: The Need of Change, N.Y. TIMES, Oct. 22, 1970, at 47, col. 1.
Is the Warren Court Too "Political"?, N.Y. TIMES MAG., Sept. 25, 1966, at 30.
Much More Than Law Is Needed, N.Y. TIMES MAG., Aug. 9, 1964, at 7.
The Court: An Indictment Analyzed, N.Y. TIMES MAG., Apr. 27, 1958, at 16.
On Pornography: Concurring and Dissenting Opinions, PUBLIC INTEREST, Winter 1971, at 25 (with S. Kauffman, W. McWilliams & M. Cohen).
Pornography, Censorship and Common Sense, READER'S DIGEST, Feb. 18, 1974, at 115 (interview).
The Voting Rights Cases, 1966 SUP. CT. REV. 79.
Judicial Review of Police Methods in Law Enforcement: The Role of the Supreme Court of the United States, 44 TEXAS L. REV. 954 (1966).
The New Supreme Court: Prospects and Problems, 45 TUL. L. REV. 229 (1971).
We've Shouted Down Our Sense of Balance, Wash. Post, June 14, 1970, at B2, col. 1.
A Panel: The Proper Role of the United States Supreme Court in Civil Liberties Cases, 10 WAYNE L. REV. 473 (1964) (with D. Dorsen, P. Bator, C. Foote & C. Reich).
What is Happening to Morality Today?, YALE ALUMNI MAG., Nov. 1969, at 53.
Mr. Taft Rehabilitates the Court, 79 YALE L.J. 1 (1969).
The Durability of Colegrove v. Green, 72 YALE L.J. 39 (1962).

Book Reviews

- 63 COLUM. L. REV. 1347 (1963), reviewing B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (1963).
- 70 HARV. L. REV. 1126 (1957), reviewing MR. JUSTICE (A. Dunham & P. Kurland eds. 1956).
- 12 J. LEGAL ED. 287 (1959), reviewing A. MASON, THE SUPREME COURT FROM TAFT TO WARREN (1958).
- 56 LAW LIB. J. 177 (1963), reviewing L. ROSENFELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS (1962).
- 30 NEW ENG. Q. 264 (1957), reviewing S. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS (1956), and E. POLLACK, THE BRANDEIS READER (1956).
- New Haven Register, Apr. 9, 1967, § 4, at 4, col. 6, reviewing W. MANCHESTER, THE DEATH OF A PRESIDENT (1967).
- NEW REPUBLIC, Apr. 18, 1970, at 21, reviewing R. HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER AND FREEDOM IN AMERICA (1970).
- NEW REPUBLIC, June 22, 1968, at 28, reviewing M. LANE, A CITIZEN'S DISSSENT (1968).
- NEW REPUBLIC, Mar. 23, 1968, at 41, reviewing J. SPARROW, AFTER THE ASSASSINATION: A POSITIVE APPRAISAL OF THE WARREN REPORT (1967).
- NEW REPUBLIC, Feb. 3, 1968, at 27, reviewing ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 (M. Freedman ed. 1967).
- NEW REPUBLIC, Dec. 23, 1967, at 34, reviewing J. THOMPSON, SIX SECONDS IN DALLAS (1967), and S. MEAGHER, ACCESSORIES AFTER THE FACT (1967).
- N.Y. TIMES BOOK REV., May 30, 1971, at 3, reviewing G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1971).
- 67 YALE L.J. 519 (1958), reviewing M. COIT, MR. BARUCH (1957).