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Book Review

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BOOK REVIEW

THE BRETHREN. By Bob Woodward and Scott Armstrong. New York: Simon and Schuster, 1979. Pp. 467 (including index). $13.95.

*Reviewed by Fernand N. Dutile**

Because of the substantial media attention accompanying the publication of *The Brethren,* one approaches the book with a feeling of ambivalence. Fortunately, the sensationalism highlighted by the media constitutes a relatively small part of the book and detracts from what is in many respects a valuable treatment of the Supreme Court's decision-making process.

Part of the reader's ambivalence likely stems from doubt about the book's credibility. According to Woodward and Armstrong, their sources included several Justices, more than one hundred and seventy former law clerks, and other former employees of the Court.[1] Furthermore, the authors claim access to "unpublished material" that provides the "core documentation."[2] (Woodward and Armstrong's claim that Chief Justice Burger in no way cooperated with the venture is evident from even a cursory inspection of the book.)

Specificity, an index of reliability the authors ignore, is a criterion of which the Court itself approves. Discussing the reliability of an informer's tip, Justice Harlan once observed that the detail provided by an informant can provide a suitable measure of reliability. Justice Harlan concluded that a "magistrate, when confronted with [substantial] detail could reasonably infer that the informant [has] gained his information in a reliable way."[3] The specificity in *The Brethren,* including quotes from private conversations and internal memoranda, is dazzling. Thus, specificity, the Court's own index of reliability, gives dramatic support to the credibility of much of *The Brethren.*

The book is perhaps least credible, however, when purporting to describe the thought processes of various individuals. For example, the book alleges that during the Nixon tapes controversy:

> Burger knew that he faced a tough choice. There was no "give" in Stewart's posture, and Stewart seemed to have lined up all the others. Burger read through the alternative drafts. They were really two different ways of saying the same thing. . . . Burger was sure his version was better, but the others thought differently. . . . What was the big deal? . . . Did the difference have any substance? Burger could find none. It would all seem silly in a few weeks. . . . The main thing was to get the opinion delivered. He wanted it unanimous.[4]

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1 B. WOODWARD & S. ARMSTRONG, THE BRETHREN 3 (1979).

2 *Id.* at 4.

3 Spinelli v. United States, 393 U.S. 410, 416-17 (1969).

4 B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 341.

As with many similar passages in the book, the reader is led to believe he is privy to the actual thought processes of the principal. Such a device lends an unjustified authenticity to the passage. Actually, the reader is getting a Justice's recollection of what he thought or, more likely, others' recollections of what he thought. Because the specific sources for the particular thought process passages are not disclosed, the reliability of such passages is doubtful at best.

The Brethren also creates a fair amount of ambivalence in the reader because of the alleged perfidy of those clerks "leaking" to the authors information on the workings of the Court. Although there were doubtless serious violations of professional confidentiality, several points must be borne in mind. First, the confidentiality involved was not one specifically protected by the Code of Professional Responsibility whose mandates refer only to the lawyer-client context. This is not to say, however, that there is no professional confidentiality between a Justice and his clerk. A professional expectation of confidence could arise in either of two ways. First, absent matters of conscience, a clerk should consider himself bound not to reveal what the clerk-Justice relationship impliedly makes confidential. Confidentiality is a prerequisite to allowing a Justice to work out his views in hard debate with his clerk without fearing that the Justice's tentative judgments will appear in the evening newspaper. Second, a Justice and his clerk should be free to agree, again absent issues of conscience, that matters relating to their professional performance shall be confidential as long as the agreement is not otherwise overbearing or unconscionable. Further agreements would depend on the "ethics of friendship" rather than on any professional ethical requirement. In short, there are some things a good friend would not reveal regardless of any professional expectation of confidentiality. Thus, the material which has caused the greatest turmoil may well be the least "protected" under any reasonable expectation of professional confidentiality. Ironically, the most legitimately confidential materials "leaked" by the clerks, the memoranda and conversations concerning the issues involved in actual cases, have created the least controversy. On the other hand, a Justice presumably is free to discuss many things his clerk should refuse to disclose. Certainly a Justice is free to discuss his own views on issues. His relationship with the Court, however, might create a reasonable expectation of confidentiality with regard to, for example, discussion of pending cases at conference and elsewhere. Also, although an individual Justice might relieve his own clerks of the requirements of confidentiality concerning the Justice's views on certain issues not before the Court, certain confidentiality would be beyond an individual Justice's capacity to waive. For example, one Justice could not unilaterally waive the confidentiality of a private discussion with other Justices on cases before the Court or the votes of individual Justices at conference.

Whether or not they are reliable or composed from information which was ethically revealed, the portrayals in the book are, if not sensational, the stuff of novels and movies. Consider the following partial cast of characters:

CHIEF JUSTICE WARREN BURGER

Formal to the point of comedy, it is Burger who sends a memo to the clerks

reminding them to wear jackets in the Court's halls. It is Burger who worries until the last minute that Justice Harlan would, in announcing the opinion of the Court in a free speech case, use the offending word itself from the bench. Indeed, Burger is alleged to have told Harlan that use of the word " 'would be the end of the Court.' "[5]

The book's rendition of Justice Burger is the harshest. Burger is pictured as intellectually dishonest, shifting positions and votes so as to be able to assign the opinions, insensitive to *in forma pauperis* petitions, sometimes ignorant of basic constitutional law, belligerent, political and vain. At one point Burger wanted to turn the conference room into his ceremonial office for greeting dignitaries such as foreign heads of state. The book reports that although he was often late with votes in certain cases and rarely read briefs or records prior to oral argument, Burger often found time to spend two hours in Justice Powell's office, interruptions which Powell found annoying. As successor to Chief Justice Earl Warren, Burger evidently felt the need to assert leadership. As a result, he attempted to assign as many unanimous cases to himself as possible and sought to enforce uniformity in even the type of chair used by the Justices during oral argument. Reacting to the Watergate controversy, Burger is quoted as saying, " 'Apart from the morality . . . I don't see what they did wrong.' "[6]

If the view is jaundiced, however, it may well be due to the source of the material upon which it is based rather than to the authors. Woodward and Armstrong take pains to avoid any direct judgmental assessment and merely set down the evidence provided them, evidence marshalled, to be sure, according to the authors' will. Indeed, the book lists several positive attributes such as Burger's kindness to Justice William Douglas following his stroke; Burger's cleverness in putting his thoughts into a concurrence, rather than into a dissent, to increase their influence; his administrative ability in dealing with many needed improvements at the Court; and his proposal, despite his own conservatism, to President Nixon that Judge Frank Johnson of Alabama, a liberal with a strong civil rights record, be appointed to the Court. Ironically, rather than making the portrayal a favorable one, these positive matters only make the more numerous negative matters more credible.[7]

Despite the strong suggestion of his manipulation and intellectual dishonesty, perhaps the most pervasive characteristic of the Chief Justice discernible in *The Brethren* is a lack of judicial temperament. Justice Burger seems to have neither the mind nor the personality called for in any independent judicial person. His inordinate fear of being alone in dissent reflects this. Burger emerges as more political than judicial, one who might be more comfortable as a Congressional leader than as Chief Justice.

JUSTICE WILLIAM DOUGLAS

Douglas is pictured as the Court maverick, ferocious in both his defense of

5 *Id.* at 133.
6 *Id.* at 287.
7 The credibility is also increased by the fact that previous Chief Justice Earl Warren himself does not emerge untarnished.

civil rights and in his relationship with the clerks. Douglas refers to Burger as "this Chief" to distinguish him from Earl Warren ("the Chief"). Douglas informs his clerks that he was suicidal when Nixon informed Douglas that it was his speech at Duke Law School that inspired Nixon's political career. Nixon later had Douglas investigated in an attempt to oust Douglas in favor of a Nixon appointee. Unquestionably bright, Douglas is reported to have been "so prolific that once when former Justice Charles E. Whittaker was unable to draft a majority opinion, Douglas finished his dissent and then wrote Whittaker's majority for him."[8] Douglas can be humorous. When asked, following his stroke, how he could participate in the Court's business although unable to read, Douglas shot back, "I'll listen and see how the Chief votes and vote the other way."[9] Nevertheless, the book's most poignant moments involve Douglas's stroke, his retirement from the Court and his sad attempt to remain a full member of the Court even after his retirement.

JUSTICE WILLIAM BRENNAN

Brennan is drawn as a gentle person and civil libertarian of the first order who, nonetheless, fires an activist clerk whose hiring had become a public issue. Although known for his pronouncements in the free speech area, he is pictured as sexually naive and paranoid about the press. After a triumphant period on the Warren Court, Brennan became increasingly forced into a dissenting and isolated posture on the Burger Court. His frustration led to increasingly bitter opinions that, because of their bitterness, tended to be counterproductive.

JUSTICE THURGOOD MARSHALL

The Brethren portrays him as the least productive member of the Court who, nonetheless, gets brilliant work out of his clerks. Marshall apparently delights in making Burger uncomfortable, sometimes greeting him with "what's shakin', Chiefy baby?"[10] despite the suggestion that Burger "genuinely likes" Marshall.[11]

JUSTICE WILLIAM REHNQUIST

Called "Renchburg" by President Nixon, who had difficulty remembering his name, Rehnquist brings cold logic to his task but emerges, many readers will be surprised to learn, as the most likeable member of the Court. Rehnquist is pictured as affable to all Court personnel, calling even the lowliest by name. Much of any sense of humor reflected among Court members belongs to Rehnquist, who chuckles at an extreme example of Burger's formality, brings a sexually explicit *National Lampoon* cartoon about the Court to

8 B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 63.
9 *Id.* at 391. He was presumably referring to Burger despite the use of the phrase "the Chief."
10 *Id.* at 59.
11 *Id.*

the conference room and even dares to attend a conference in a "Court softball team T-shirt."[12]

The authors justify their foray into the internal doings of the Court by noting that the Court, unlike Congress and the President, is not subject to the electoral process and has generally escaped public scrutiny.[13] This justification itself deserves some scrutiny. The public has no electoral power over the Court's membership except in the election of the appointing President and the confirming Senate. On the other hand, perhaps no other part of the government is as publicly accountable as is the Court since every significant "input" to the Court—*i.e.,* the briefs and oral arguments—is available to the public. Furthermore, the Court's actions are embodied in its opinions and other decisions which are fully exposed to public scrutiny. Although the Court's decision-making process is not routinely exposed to public view, almost total accountability is provided by the public's knowing which cases and arguments are put before the Court and precisely how the Court dealt with each one.[14]

The picture painted by the authors of the Court's internal workings will leave many people shocked by some of the pettiness, bitterness and even crudity displayed by the Justices and others. Perhaps, however, this de-mystification of the Court will serve a salutary purpose. The Court's personnel are, after all, human beings. It is naive to assume that Justices spend twenty-four hours a day in black robes, intoning such phrases as "all deliberate speed," "prior restraint" and "*de minimis.*" It should come as no shock that these people, dealing with society's most important, emotional and controversial issues, should on occasion get angry, bitter or frustrated. Perhaps it would be more disappointing to learn that such issues are discussed and decided in total calm and detachment, pursuant solely to logic and precedent. Although, ideally, the aggressive give-and-take between Justices would occur without their losing respect for each other, *The Brethren* impresses upon the reader the fact that despite their surprisingly human foibles, the Justices care deeply about the matters brought before them. It is reassuring to read, for example, that Justices Stewart and Powell literally lost sleep over the death penalty cases;[15] that countless hours of additional work are done exploring the implications of cases, despite the fact that decision could be based solely on the material provided by the parties; that Justice Powell insisted on hiring liberal clerks to keep his natural conservatism honest; and that even Justices Douglas and Burger could become allies as required by certain issues. Ultimately, it is evident that much of the bitterness and friction among the Justices results from the intensity of feelings and the diversity of perspectives brought to each issue. For example, at one point Brennan complains that Rehnquist "often twist[s] the meaning of prior cases, or baldly ignore[s] them when they support the other side."[16] On

12 *Id.* at 413.
13 *Id.* at 1.
14 The least is known, perhaps, about the reasons for denials of *certiorari* petitions, but the effective decision in such cases is made not by the United States Supreme Court but by the Court from which the case came.
15 The authors report that the day the Court upheld the constitutionality of the death penalty Marshall, "[d]rained and discouraged . . . went home early. That night he had a mild heart attack." B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 441.
16 *Id.* at 405.

another occasion, Rehnquist complains of Brennan's bending of the facts or law for his own ends.[17]

Significantly, despite the thorough examination given the Court in connection with the publication of *The Brethren,* no dramatic incident of corruption or other influence is even suggested. On the occasions when outsiders made inappropriate attempts to influence a Justice, the outsiders were quickly sent away. Furthermore, the members of the Court have consistently removed themselves from cases in which their participation might create even the appearance of conflict of interest.

The Brethren does suggest areas of serious concern. The extent to which exchange among the Justices takes place on paper rather than in conference is surprising. At one point, Justice Stevens is pictured as concerned "that the Justices communicate[d] only on paper; there [is] not enough informal discussion."[18] Apparently, the conference is more a forum for voting and stating positions than for arguing issues. This is not to say that the memorandum method of decision is inadequate. It is perhaps superior in providing time for reflection. Although the Justices use the parties' oral argument for speaking to each other through questions and observations put to counsel, more intensive oral debate of the delicate issues facing the Court might be valuable.

The Brethren also underlines the need for a Constitutional amendment mandating retirement at a certain age. The argument that many good things have been done by Justices at a very advanced age is not persuasive. Such good things are at least as likely to come from younger (under seventy, for example) Justices.

The effect of young law clerks on the Court's decision-making process may be a revelation to some readers. Clerks have an obvious impact on the Justice for whom they work. Further, clerks influence other Justices indirectly through exchanges with their clerks. To some extent, in fact, the Court is like a federation of nine discrete units, each made up of one Justice and his entourage. The clerks serve as emissaries to the other units, exchanging views, negotiating, forming coalitions and the like. Often, of course, two or more Justices themselves meet, in what could be called summit meetings. In any event, the enormously bright young men and women who serve as clerks clearly bring an intellectual contribution to the Court that is substantial. Individual Justices can, moreover, be relied upon to temper any potential abuse of power on the clerkship level. Since an individual Justice's and the Court's work is known generally through opinions signed by individual Justices, professional pride on the part of both individual Justices and the Court as a whole provides a continuing incentive to prevent any potential abuse of power on the clerkship level.

Perhaps the gravest threat posed by *The Brethren* sensationalism is that it may distract from the most valuable contribution made by the book, namely, its laborious and detailed account of the decision-making process. The authors avoid giving any personal analysis of or judgment on either the merits of the cases or the methodology of their resolution. The decision-making process is

17 *Id.* at 411.
18 *Id.* at 429.

rendered through the memoranda, thoughts, and observations of the participants. The reader, like the viewer at *cinema-verite,* is allowed to draw his own conclusions. Cases on racial desegregation, the death penalty, the Nixon tapes and many others are revealed precisely through the collection of detail. Although nonlawyers as well as many lawyers may occasionally find the going tiresome, the result is a fascinating account of decision-making at the highest level.

A major benefit of *The Brethren* for the nonlawyer is the effective description, in nontechnical language, of various Court decisions. For example, in describing *Harris v. New York,*[19] in which the Court held that statements secured from an individual in violation of his *Miranda* rights,[20] at least if not otherwise coerced, could be used as impeachment evidence though not in the government's case-in-chief, the authors state eloquently:

> In the pending case, a lower court had made an exception to the strict commands of *Miranda* when the defendant, in testifying at his trial, had contradicted what he had first told police. The prosecutor claimed that the earlier statements had to be admitted in court in order to challenge the defendant's new testimony.[21]

Other difficult cases, such as *Mapp v. Ohio,*[22] are also well explained in layman's language.

Although not ideal, the book's organization is serviceable. Following an Introduction and Prologue, the book discusses seven consecutive Terms of Court, beginning with the 1969 Term (Burger's first), in seven consecutive chapters. Some disjointedness and repetition might have been avoided by more cross-Term discussion. The writing is fast-moving and interesting, although occasionally the language is confusing, awkward or sloppy. These occasional lapses are more than offset by effective description of a difficult and complex process.

In conclusion, the United States Supreme Court will survive *The Brethren.*[23] Indeed, much of the book reinforces the positive image of the Court cherished by the American public. The book may have some impact in the short run on the extent to which clerks are taken into the Justices' confidence. Ultimately and inevitably, however, the Justices and their clerks will resume trusting one another to the extent permissible within the limits of their individual personalities. Ironically, there is no guarantee that distrust and excessive caution on the part of Justices in their relations with their clerks will preclude the type of unflattering exposure provided by *The Brethren.* Significantly, Justice Burger, apparently the most distrustful and cautious of the Justices, was accorded *The Brethren*'s harshest treatment. Indeed, that very distrust and caution may have caused some of the "leaks."

Even if some restraint among participants in the Supreme Court process

19 401 U.S. 222 (1971).
20 Miranda v. Arizona, 384 U.S. 436 (1966).
21 B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 113.
22 367 U.S. 643 (1961).
23 As it will survive the forthcoming memoirs of Mr. Justice Douglas, which may well provide a still harsher and more authoritative jolt. *See* TIME, Mar. 10, 1980, at 48.

ensues, the effectiveness of that process should not be significantly impaired, since the most embarrassing disclosures in the book are unrelated to statements or events vital to the process of deciding cases. If *The Brethren* causes a Justice to forego using harsh epithets about another Justice before a clerk or if *The Brethren* prevents a Justice from sitting in another Justice's office wasting time, little has been lost.

In the final analysis, the most serious harm has been done to the individuals involved. Much of the book's sensationalism was not vital to a description of the Court's decision-making process. Some statements, evidently taken out of context, put the speaker in a worse light than the original context might have warranted. Many of the sensational items in the book should have been subjected to a balancing test, weighing the item's public importance against potential harm to individuals. For example, when one of the Justices takes a certain action because of the personal problem of a member of his family, it was unnecessary to name the specific problem. The family member is *not* a public servant and did not sign on for public exposure. Even some items involving public figures would have been excised had the authors shown more sensitivity. In this regard *The Brethren* often tells us more about the authors than it tells us about the Court.

BOOKS RECEIVED

THE ADMINISTRATION'S 1979 WELFARE PROPOSAL. Washington, D.C.: American Enterprise Institute for Public Policy Research. 1979. Pp. 61. $3.00.

Janice R. Bellace and Alan D. Berkowitz: THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS. Philadelphia: The Wharton School, University of Pennsylvania. 1979. Pp. iii, v, 363. $15.00.

Doris M. Bieber: DICTIONARY OF LEGAL ABBREVIATIONS USED IN AMERICAN LAW BOOKS. Buffalo, New York: William S. Hein & Co. 1979. Pp. 337.

Timothy J. Boyce: FAIR REPRESENTATION, THE NLRB AND THE COURTS. Philadelphia: Industrial Research Unit, The Wharton School, University of Pennsylvania. 1978. Pp. iii, v, 121. Paper, $8.95.

Walter Bromberg: THE USES OF PSYCHIATRY IN THE LAW: A CLINICAL VIEW OF FORENSIC PSYCHIATRY. Westport, Connecticut: Quorum Books. 1979. Pp. x, 442. $25.00.

George P. Bush and Robert H. Dreyfuss, editors. TECHNOLOGY & COPYRIGHT. Mt. Airy, Maryland: Lomond Publications, Inc. 1979. Pp. 552. $22.50.

David Butler and Austin Ranney, editors: REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY. Washington, D.C.: American Enterprise Institute for Public Policy Research. 1978. Pp. 250. Paper, $4.75.

Philip E. Devine: THE ETHICS OF HOMICIDE. Ithaca, N.Y.: Cornell University Press. 1978. Pp. 248. $12.95.

Graham Douthwaite: UNMARRIED COUPLES AND THE LAW. Indianapolis: The Allen Smith Company. 1979. Pp. v, ix, 665. $25.00.

Laurence H. Eldridge: THE LAW OF DEFAMATION. Indianapolis: Bobbs-Merrill. 1978. Pp. xviii, 711. $36.00.

T. O. Elins: NEW HORIZONS IN INTERNATIONAL LAW. Dobbs Ferry, New York: Oceana Publications. 1979. Pp. v, xxii, 260. $20.00.

John Hart Ely: DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW. Cambridge: Harvard University Press. 1980. Pp. vii, 268. $15.00.

Bruce E. Fein: SIGNIFICANT DECISIONS OF THE SUPREME COURT, 1977-1978 TERM. Washington, D.C.: American Enterprise Institute for Public Policy Research. 1979. Pp. 162. $6.25.

Owen M. Fiss: THE CIVIL RIGHTS INJUNCTION. Bloomington: Indiana University Press. 1978. Pp. vi, 117. $10.95.

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Hyman Gross: A THEORY OF CRIMINAL JUSTICE. New York: Oxford University Press. 1979. Pp. xv, xviii, 490. Cloth, $17.50, Paperback, $6.00.

Friedrich A. Hayek: THE CONSTITUTION OF LIBERTY. Chicago: University of Chicago Press. 1960 (Phoenix ed. 1978). Pp. viii, 568. Paperback, $7.95.

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William E. Knepper: LIABILITY OF CORPORATE OFFICERS AND DIRECTORS, 3rd Ed. Indiana: The Allen Smith Company. 1978. Pp. 802. $45.00.

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Martha Pomroy: WHAT EVERY WOMAN NEEDS TO KNOW ABOUT THE LAW. New York: Doubleday & Company. 1980. Pp. 432. $14.95.

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PROPOSALS TO REFORM DRUG REGULATION LAWS. Washington, D.C.: American Enterprise Institute for Public Policy Research. 1979. Pp. 50. $3.00.

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TELECOMMUNICATIONS LAW REFORM. Washington, D.C.: American Enterprise Institute for Public Policy Research. 1980. Pp. 64. $3.00.

Richard A. Wasserstron: PHILOSOPHY AND SOCIAL ISSUES: FIVE STUDIES. Notre Dame, Indiana: University of Notre Dame Press. 1980. Pp. ix, x, 187. $15.95.

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