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Book Review

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THE BRETHREN: INSIDE THE SUPREME COURT. BY B. WOODWARD & S. ARMSTRONG, *Simon and Schuster,* 1979. Pp. 467. $13.95.

*Reviewed by William L. Reynolds**

By this time the legal community knows well the scope and general content of *The Brethren.*[1] The book has been the subject of a great deal of controversy in our profession. Given its contents, the storm over the book is hardly surprising, for there is much in *The Brethren* to titillate,[2] anger, or even educate the reader. At the same time its appeal palls rapidly. There is so much detail in the book — although much of it is fascinating — that the reader finds his attention wandering. Nevertheless, the book is easily readable, one perhaps to be dipped into rather than consumed whole.

It purports to tell many inside stories: the hammering out of the unanimous opinion in the *Watergate Tapes* case;[3] Justice Blackmun's search for truth (and the sterile fruit of that quest) in *Roe v. Wade;*[4] the unusual way in which Muhammed Ali escaped the clutches of General Hershey.[5] Certainly there is much here for even the most jaded judicial *voyeur.* This review will not examine any of those stories;[6] instead, I will comment on several topics suggested by a reading of the book.

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1. B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979) [hereinafter cited as THE BRETHREN]. For those who are not familiar with the book, it focuses on the practice of the Supreme Court during the first years of the Burger Court. The authors describe the manner in which the Court works, its many methods of reaching a decision, and the personalities of the denizens of the Court. The material for the book comes from public sources; from written material prepared by the Justices and not generally available; from interviews with the Brethren, their clerks, and others; and perhaps from other sources as well.

2. Titillation is, of course, much in demand by lawyers. The gossip-proneness of my professional colleagues has long amazed me; its investigation by sociologists is long overdue.

3. U.S. v. Nixon, 418 U.S. 683 (1974).

4. 410 U.S. 113 (1973). "Sterile" in the sense that the concept of privacy, the basis of the opinion, has not really been used by the Court. *See* Posner, *The Uncertain Protection of Privacy By The Supreme Court,* 1979 SUP. CT. REV. 173. Whatever one may think of abortion or the impact of the Constitution on the issue, Blackmun's opinion for the Court is dreadful.

5. Clay v. United States, 403 U.S. 698 (1971).

6. Perhaps, however, three small stories will whet the appetite. Burger, while still a circuit judge, recommended the soon-to-be infamous G. Harrold Carswell for promotion. THE BRETHREN at 13. While preparing the baseball antitrust opinion, Flood v. Kuhn, 407 U.S. 258 (1972), Blackmun gave a reasoned response to Marshall's request to add Carmillo Pascual to the list of 87 great baseball players which — incredibly — Blackmun started his opinion. THE BRETHREN at 190. Early in Burger's tenure Justice Harlan asked Burger what part of the Constitution the latter would cite to support a decision; "Burger said he preferred to avoid specifying any grounds." *Id.* at 60.

1. *Piercing the Veil.* Woodward and Armstrong claim to have interviewed 200 persons (including "more than 170 former law clerks") in their research.[7] In addition, they quote often from draft opinions, notes circulated among the Justices, and other material generally kept from public view. No one, of course, is supposed to pierce the Supreme Court's veil,[8] for by long tradition its inner workings are inviolate.[9] Secrecy cloaks the Court's deliberations for several good reasons.[10] First, the Justices, like all judges, *must* be able to rely on the discretion of their clerks. Judging is a lonely job; the clerk serves as *confidante* and sounding board. Among the mischief wrought by *The Brethren* is a diminution in the confidentiality of that relation.

Judicial deliberations also need to be kept secret in order to protect a judge's search for understanding. Premature exposure of tentative thoughts must naturally tend to weaken the willingness of the judge to set them down and thereby expose them to collegial criticism. Yet doing so may be an indispensable tool for the jurist seeking to isolate truth from many conflicting arguments.

Finally, public knowledge of pre-decision deliberations may distort the messages delivered by the oracles of the law. It is hard enough to read the entrails under the current practice of reporting an opinion of the Court; consider the difficulty if they had to be examined in the light of an "adjudicative" history.[11]

So the need for secrecy is strong. Is there any strong reason for disclosure to set off against that need? The lame apology provided by the authors merely states that "hidden motives . . . can be as important as the eventual decisions themselves."[12] That, of course, in the absence of corruption (and the book makes no such allegation), is not a reason but an excuse. Let me suggest, however, an alternative reason for breaking secrecy: the deliberate exposure of judicial infirmities (including sloth). Justices are designedly not accountable to anyone, but humiliation due to public revelation of ineptness may make them mend

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7. THE BRETHREN at 3.

8. Woodward and Armstrong relate Burger's fury at leaks, a rage that included a proposal to give lie detector tests to all the law clerks. *Id.* at 150, 237.

9. A somewhat scholarly debate on the subject can be found in Symposium, *Judicial Secrecy,* 22 BUFF. L. REV. 799 (1973).

10. I do not think it appropriate to preserve judicial secrecy in order to maintain a mystique about the Court's decision-making processes. By now, at least, the legal community has mastered the teachings of Realism and recognizes the deeply judgmental factors present in many decisions.

11. The use of adjudicative history would be similar to the use of legislative history. Legislative history often plays a useful role in statutory interpretation (although often the game is not worth the candle). The difference between a statute and a judicial opinion is that the latter is, or should be, a statement of a decision backed by a discussion of policy illuminated by facts and related to precedent. A statute, however, need only state some rules, thus occasionally it is necessary to resort to history to flesh out the bare bones of the enactment.

12. THE BRETHREN at 1. Naturally, the authors refer to Watergate at this point.

errant ways[13] and perhaps might encourage more careful Senate consideration of nominees to the Court. I believe that to be a real benefit derived from exposure such as that found in *The Brethren*.[14] Casting an intuitive balance, it seems to me that the price paid in terms of harm to personal and institutional relations far outweighs possible gains. Mere publication of this book may already have caused such harm.

2. *Honor Among Clerks.* It is difficult to believe that law clerks would betray confidences in the manner that many interviewed by the authors quite obviously did. Perhaps no explicit ethical considerations were involved,[15] but surely, widely held standards of confidentiality were offended.[16] Disclosure of confidential information — especially thoughts of the Justice — should not be countenenced. No wonder the authors maintained the anonymity of their sources; it would have been interesting to follow the legal career of those who talked.[17]

Why did they talk? A number of hypotheses can be advanced, but two related causes seem important to me. The events detailed in *The Brethren* involved clerks who had been in law school in the late 60's and early 70's. That generation (mine), strongly resistant to authority and many accepted norms of conduct, would be attracted to expose the workings of an establishment institution for the sake of exposure alone, especially when asked to do so by the heroes of Watergate. In addition, clerks from that period would likely be out of tune "politically" with the decisions of the Burger Court.[18] Dissatisfaction with substantive results, combined with a disrespect for authority and tradition, would make some loyalties quite transient.[19]

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13. This is a version of the non-publication problem. *See* W. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 34–37, 57–62 (1980).

14. The Chief Justice, joined by some other judges, constantly criticizes the competency of counsel and has fervently advocate various forms of proficiency certification for attorneys. That is a judicial officer's prerogative. Perhaps we at the bar should demand proof of judicial competency.

15. The amount of apparent disclosure from Justice to clerk on collegial matters was also astonishing; perhaps a teller of tales should have a lesser expectation that his confidence will be respected.

16. THE BRETHREN reports other instances of questionable activity; one example occurred when clerk knew a petitioner and "drum[med] up sympathy" for him with other clerks. *Id.* at 370. It would be interesting to know whether the clerk's boss (Justice Powell) knew of the personal involvement and whether it was of such a nature as to require a recusall among quasi-judicial personnel.

17. Naturally, those who related personal or confidential information compromised those who did not. The informant's shield of anonymity turns into a sword when it insures that another's protestations of innocence cannot be proven. Several former clerks have expressed resentment over this.

18. There are a large number of examples in the book of clerks pushing (or trying to push) their Justices to more activist/liberal positions. Thus, Powell's clerks are said to "believe" a landmark attack on "snob" zoning "had less to do with fine legal definitions of standing [as Powell believed] than with something more basic." *Id.* at 366.

19. Woodward and Armstrong's astute journalism might be a third way to explain why some clerks spoke. It would be difficult not to protect one's Justice when told that others had painted him in a bad light.

3. *Sloth.* Jeremiads about the work of Supreme Court Justices have been heard almost from its founding. The complaints have been very loud in recent years, and with justification. The Court has a staggering workload — staggering, that is, if approached responsibly and honestly.[20] That, of course, is the kicker. One of the more disheartening themes in *The Brethren* is the lack of attention given their job by several of the Justices. Douglas, for example, constantly was travelling to Goose Prairie, Washington. While we all must have time to refresh our energies, what can possibly explain the fact that eleven days before the *Watergate Tapes* decision (a Saturday), only three Justices were in the Supreme Court building?[21] How can this be explained in light of the fact that the Court was not close to agreement on an opinion in the case, and a nation anxiously awaited the resolution of the conflict between President and Special Prosecutor? Although this was the most striking incident of judicial inattention to duties recounted in *The Brethren,* it is by no means the only one. If believed, a picture is drawn of a court whose members have varied degrees of devotion to their tasks.

Does the public suffer from judicial inattention? Perhaps not. All Justices have three clerks, almost all of whom are former law review editors, most of whom have clerked for other judges, many of whom are quite capable of turning out high-quality opinions — perhaps "better" opinions than their bosses can do with the same material.[22] The problem, however, here is that the clerks were not nominated by the President and confirmed by the Senate. The individual qualities for which the Justices were appointed, such as legal merit, experienc,e and representation of particular points of view, are lost when the members of the Court do not take seriously their role. Unfortunately, *The Brethren* provides ample support for rumor that Court members occasionally are not attending to their judicial duties with requisite diligence.

4. *Decision Making on the Burger Court.* If we may accept *The Brethren* as presenting a reasonably representative view of what occurs at the Court (a subject discussed in the next section), there are grounds for both approval and dismay at the manner in which the Court proceeds to dispose of its cases. Let me examine the happier side first.

Much discussion has focused on whether an appellate court acts as a truly collegial body whose members influence each other and whose opinions reflect

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20. A comparison of the statistics for the work of the Supreme Court and the Court of Appeals of Maryland, for example, suggests that the former disposes of perhaps 15-20% more cases after plenary hearing with perhaps each Justice writing about twice as many opinions (including dissents) than their counterparts on our Court of Appeals. *Compare* 39 MD. L. REV. 646–47 (1980), *with* 94 HARV. L. REV. 289–91 (1980). Of course comparisons between two cases are difficult to draw fairly. Supreme Court Justices, for example, have three clerks to one each for Court of Appeals judges. The latter, on the other hand, have a less demanding caseload in terms of complexity of issues up for decision.

21. THE BRETHREN at 322.

22. "Better" in the sense of more literate, clearer, and with a keener appreciation of precedent. It shouldbe clear to anyone who reads a number of opinions that the style of one or two Justices changes markedly from one effort to the next, apparently under the influence of various clerks.

the increasing understanding of a subject that comes with continued effort and study.[23] *The Brethren* assures us that both phenomena happen, and frequently so. Indeed, one of the strongest impressions from the book is the high level of interaction among the Justices, a process often producing change of position and even change of decision. That should come as no surprise to anyone who has studied the history of the Court, for its annals are replete with such examples.[24] But it is refreshing and heartening to learn that the practice continues.[25]

Woodward and Armstrong, however, report a negative aspect. Interaction among the Justices on the content of opinions, I believe, should be "on the merits" — that is, in terms of the constitutional or other legal questions implicated in the case at bar.[26] *The Brethren,* unfortunately, reveals that such is often not the case. Instead we see, for example, Justice Black browbeating his colleagues into changing their positions,[27] or holding up a decision over the summer recess.[28] We see Burger holding up his vote to see how the Court will line up, so that he will not appear alone in dissent (a "leader" can't do that), and so that he can assign the majority opinion.[29]

Such antics should come as no surprise to the bar. Tales of judicial horse-trading are all too common; in fact, I have a problem convicing students in upper level courses that some judges do act in a principled fashion.[30] *The Brethren* provides a good deal of ammunition for that view; it is likely, however, that the book will be more noted for the aid and comfort it gives the other side.

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23. The classic debate in this area was between the founder of the Legal Process school, Henry Hart, in *Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84 (1959); and a leading Realist, Thurman Arnold, in *Professor Hart's Theology,* 73 HARV. L. REV. 1298 (1960). My own views on proper judicial decision-making practices are set forth in W. REYNOLDS, *supra* note 13.

24. One of the most striking is a recent analysis of the decision-making in Brown v. Board of Education, 347 U.S. 483 (1954). *See* Hutchinson, *Unanimity and Desegregation: Decision-Making in the Supreme Court,* 1948-1958, 68 GEO. L.J. 1 (1979).

25. It was perhaps not as refreshing to Woodward and Armstrong, for they often seem to think worth remarking that a Justice changed his mind after reading draft opinions or comments circulated by his colleagues. I regard such changes as a mark of strength and honesty. We all should be able to learn from constructive criticism; and may we be preserved from jurists so smug that they cannot change their position when a better argument is offered.

26. THE BRETHREN gives numerous examples. Thus, in Coleman v. Alabama, 399 U.S. 1 (1970), Justice Brennan assigned preliminarily to write a majority opinion upholding a conviction, found himself so convinced by a Harlan draft dissent that Brennan and the others of the preliminary majority switched sides. THE BRETHREN, at 69–71.

27. *Id.* at 49, 52. (Black threatened to break the tradition of unanimity of decision in desegregation cases).

28. *Id.* at 91.

29. *See, e.g. id.* at 418.

30. Among post-war Justices, I believe John Marshall Harlan stands head-and-shoulders above the rest in principled decision-making. His faithful description of precedent, his honest fact recitation, and his strong sense of search for truth — no matter where it might lead him — mark him as a great Justice.

5. *Credibility.* What *The Brethen* reports is interesting; I have no reason to doubt that it is at least reasonably accurate in reporting events as perceived by the authors' sources. The question remains, however, of the accuracy of the portrait drawn. Unfortunately, there are substantial reasons for doubt.

Selectivity comes to mind first. Apart from randomly inserted anecdotes, only a few cases from each Term are discussed. Do those cases represent a fair sample of what the Court does? Or were the illustrations selected for their shock value, representing only the pathological in the Court's work? Without knowing the answer, it is impossible to evaluate fairly the work of the Court based upon the book's material.

The source of the material is more important. Much of the material obviously comes from law clerks, but which ones? Were they of one ideological bent? Were these statements confirmed by other clerks of the same Justices? Woodward and Armstrong do not tell us. By failing to do so, they make it almost impossible to evaluate their work. A different aspect of this problem concerns the authors' use of hearsay. Necessarily, much of what is attributed to the Justices has been filtered through another source. Yet the reader is rarely given that source.[31] Without that data, the reader is forced to discount virtually everything in the book, when, in fact, some of the oral evidence may have been reasonably reliable.[32]

Part-and-parcel with the preceding problems is anonymity. Hearsay could be evaluated to some extent if we know who was doing the repeating. Because we lack that information, and for the other reasons sketched above, *The Brethren*'s credibility is suspect. That problem is not helped by some obvious errors found in the book.[33] The authors could have used the services of a good law review editor, but settled for journalism.[34]

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31. Especially irritating is the use of quotations to resurrect long-dead conversations. *See, e.g.* THE BRETHEREN at 190, 321. Readers of the *Review* will know how unrealiable that is.

32. Of course some of it is inherently unreliable. Thus, there is a story of a conversation between Burger and Justice Harlan, *id.* at 60, but Harlan was dead before interviewing began and Berger refused to speak with the authors. *Id.* at 3. Obviously, the story had to come from the memory of a stranger to the conversation but the authors fail to tell this to the reader.

33. Some examples can be found in Adler, *The Justices and the Journalists,* N.Y. Times, Dec. 16, 1979, at 25 Murphy, *Spilling the Secrets of the Supreme Court,* Wash. Post Dec. 16, 1979, (Book World) at 11.

Curiously, one of the book's errors is a fairly common one: that Douglas' opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), was a plurality opinion. It was, rather, a majority opinion.

34. A word is in order about journalism, for the book is heavily influenced by the authors' "profession" — one where good taste and public feelings have little value. An example is the unnecessary recounting of the sad last days of William Douglas.

The *nouveau,* self-congratulatory demeanor of *Washington-Post* writers is also worth remarking. The book begins with the statement that "[n]o other newspaper . . . would have been as willing to assume the risks inherent [in this study]." THE BRETHREN, Acknowledgements. Did the authors fear retaliation from the Court, or was the only "risk" how much money the book would make?

That is too bad. *The Brethren* has much that is interesting. Its account of the evolution of the *Watergate Tapes* case, if it could be credited, could help us understand that momentous decision; similarly, the discussion of the problems of a divided Court with only seven members could have been most instructive. Yet, because there is no way to verify the information purveyed, the book remains little more than gossip, tedious at times, but generally capable of titillation and even intellectual stimulation. But always read it with a salt shaker handy.