

# COMMENT

## LEGAL REALISM, THE NEW JOURNALISM, AND *THE BRETHREN*

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King: Welcome, dear Rosencrantz and Guildenstern.

Moreover that we much did long to see you,

The need we have to use you did provoke

Our hasty sending. . . .

. . . I entreat you both

That, being of so young days brought up with [Hamlet],

And sith so neighbored to his youth and havior,

That you vouchsafe your rest here in our court

Some little time, so by your companies

To draw him on to pleasures, and to gather

So much as from occasion you may glean,

Whether aught to us unknown afflicts him thus,

That opened lies within our remedy.

Shakespeare, *Hamlet, Prince of Denmark*, II, ii, 1-18

### I. *THE BRETHREN* AND JOURNALISTIC IRRESPONSIBILITY

Bob Woodward and Scott Armstrong reported in *The Brethren* some of the things that happened among members of the Supreme Court of the United States during seven terms of that Court, from 1969 to 1976, "the first seven years of Warren E. Burger's tenure as Chief Justice of the United States."<sup>1</sup>

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1. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT 2* (1979) [hereinafter cited as *THE BRETHREN*]. Of the reviews and comments drawn upon in this article, those most favorable to *The Brethren* are: Saphire, *The Value of The Brethren: A Response to Its Critics* (Book Review), 58 TEX. L. REV. 1475 (1980); Dershowitz, *The Ultimate Fraternity* (Book Review), SAT. REV., Mar. 1, 1980, at 37; Hentoff, *The Snarling 'Brethren' and a Brittle Press* (Book Review), VILLAGE VOICE (New York), Jan. 7, 1980, at 20, col. 1; Kaus, *They Were Wrong About The Brethren* (Book Review), WASH. MONTHLY, Mar. 1981, at 32; Sherrill, *Irresponsible Journalism at Its Best* (Book Review), NEW WEST, Jan. 14, 1980, at 57. A review of the book by Bobby Ray Miller, carried on the UPI wires December 23, 1979, concludes with these observations: "For providing us a picture of the internal workings of the Supreme Court in recent history, including the scandals of Watergate, this book is invaluable. That the picture is one of bickering old men deciding great issues with hidden motives, this book is depressing." UPI Wire Service,

The authors indicate the scope of and justification for *The Brethren* in these terms:

Virtually every issue of significance in American society eventually arrives at the Supreme Court. . . . [For] nearly two hundred years, the Court has made its decisions in absolute secrecy, handing down its judgments in formal written opinions. Only these opinions, final and unreviewable, are published. No American institution has so completely controlled the way it is viewed by the public. The Court's deliberative process—its internal debates, the tentative positions taken by the Justices, the preliminary votes, the various drafts of written opinions, the negotiations, confrontations, and compromises—is hidden from public view.

The Court has developed certain traditions and rules, largely unwritten, that are designed to preserve the secrecy of its deliberations. The few previous attempts to describe the Court's internal workings—biographies of particular Justices or histories of individual cases—have been published years, often decades, after the events, or have reflected the viewpoints of only a few Justices.

Much of recent history, notably the period that included the Vietnam war and the multiple scandals known as Watergate, suggests that the detailed steps of decision making, the often hidden motives of the decision makers, can be as important as the eventual decisions themselves. Yet the Court, unlike the Congress and the Presidency, has by and large escaped public scrutiny.<sup>2</sup>

*The Brethren* undertakes to subject "the inner workings of the Supreme Court" to the public scrutiny which, it is argued, the country is both in need of and entitled to.

This unprecedented exposure of the Supreme Court depends, we are informed, upon unprecedented sources. Thus, we are told by Messrs. Woodward and Armstrong:

Most of the information in this book is based on interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court. Chief Justice Warren E. Burger declined to assist us in any way. Virtually all the interviews were conducted "on background," meaning that the identity of the source will be kept confidential. This

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Dec. 23, 1979, 10:42 a.m. E.S.T. (copy on file with author); see also Lerner, *Writing "Hot History,"* SAT. REV., May 29, 1976, at 16.

2. THE BRETHREN, *supra* note 1, at 1. Alexis de Tocqueville noticed the tendency of Americans to convert every "issue of significance" into a judicial question. See A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed. 1969).

The authors make much of the fact that the Supreme Court's "deliberative process is . . . hidden from view." This can be said as well of all, or almost all, of the hundreds of state and federal appellate courts in the United States as well as of the deliberative processes of trial judges and of juries. But, of course, the final products that appellate courts produce—the reasoned opinions upon which their influence ultimately depends—are subject to considerable "public scrutiny," much more so perhaps than is true of the final products of any other branch of our governments. See *infra* note 44.

assurance of confidentiality to our sources was necessary to secure their cooperation.<sup>3</sup>

Without such cooperation *The Brethren* could not have been written. The authors therefore scrupulously refrain from revealing the names of the many sources upon whom they relied. But they do characterize the sources, and what they got from them, in this way:

The sources who helped us were persons of remarkable intelligence. They had unusually precise recall about the handling of cases that came before the Court, particularly the important ones. However, the core documentation for this book came from unpublished material that was made available to us by dozens of sources who had access to the documents. We obtained internal memoranda between Justices, letters, notes taken at conference, case assignment sheets, diaries, unpublished drafts of opinions and, in several instances, drafts that were never circulated even to the other Justices. By the time we had concluded our research, we had filled eight file drawers with thousands of pages of documents from the chambers of eleven of the twelve Justices who served during the period 1969 to 1976.<sup>4</sup>

I anticipate much of what I have to say here by observing that the "Authors' Note" at the front of this book includes an acknowledgement to a named colleague of the authors on the *The Washington Post*, of whom it is said, "A devoted and resourceful assistant, no one could have been more loyal and trusted." No doubt, the authors would condemn the people they rely upon to preserve the confidentiality they require for their work if they were to learn that another investigative reporter had managed to secure access to their "eight file drawers" and to what their associates know about their more than two hundred sources. Yet, are these authors entitled to any more fidelity from their employees and associates than the Justices of the Supreme Court expected from *theirs*? Or, as Macbeth put it, as he contemplated the betrayal of his king in order to secure the throne for himself, "[W]e but teach Bloody instructions, which, being taught, return to Plague th' inventor."<sup>5</sup> Or, as Justice Holmes once said of wiretapping, this is "dirty

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3. THE BRETHREN, *supra* note 1, at 3-4.

4. *Id.* at 4; cf. Meltzer, Book Review, NATION, Feb. 2, 1980, at 117:

I believe Woodward when he says there was no way to get the story except by holding interviews "on background" and checking and cross-checking recollections and documentary evidence. But the reader is treated unfairly, asked to put total trust in the authors and never reminded that their sources might be settling scores, speaking rumor as fact, engaging in self-aggrandizement, or simply not in a position to know. Rarely are we presented with conflicting evidence of the same event.

*Cf. also* Frank, *The Supreme Court: The Muckrakers Return*, 66 A.B.A. J. 161, 162 (1980) ("The resulting product [*The Brethren*] is a witch's brew stirred with a great deal of malice."); *infra* note 23, 36.

5. W. SHAKESPEARE, MACBETH, I, vii, 8-10 (*The Complete Pelican Shakespeare* edition (1969)). Did the Court, too, "teach bloody instruction" by its rulings in the Watergate tapes case? See *United States v. Nixon*, 418 U.S. 683 (1974); see also *infra* sections VI and VII. Does Snapp v.

business."<sup>6</sup> But, then, even wiretapping can be justified on some occasions. If wiretapping can be justified, why should we not condone what these and other journalists do in the interest of helping us become as well informed as a sovereign citizen body should be?

We are obliged, then, to consider what it means to be "well informed" and how one goes about becoming so. Consider, for example, the New Hampshire "debate" among Republican candidates for President that was broadcast February 20, 1980. A half-dozen men spent an hour and a half broadcasting to the electorate a series of one-minute answers to the great questions of the day! How seriously should we take problems that are dealt with thus? How seriously should we take men, or the system of producing and presenting them, that approach important issues thus? That such encounters can be regarded as "debates" reflects the poverty both of our imagination and of our recollections. It should not take much imagination for us to appreciate that much more than this, and something much different from this, is required for serious thinking. And we should recall what we have learned about genuine debates, such as those between Abraham Lincoln and Stephen A. Douglas in Illinois more than a century ago.<sup>7</sup>

Some people would say we can no longer have extended, searching public examinations of the issues of the day. But this is only to say that we are trapped by our technology and by the techniques and way of life

United States, 444 U.S. 507 (1980), represent a perhaps improper attempt to revive the respect for confidentiality undermined in the Watergate tapes case? See Collins, Book Review, *STAN. LAW.*, Winter/Spring 1979-80, at 41; Navasky, Book Review, 89 *YALE L.J.* 1028, 1035 (1980); Worthington, *A CIA Agent Quits and Tells—and Now Pays*, Chi. Tribune, Nov. 10, 1980, § 2, at 1; Sulzberger, *Justice Department Sets Up Rules for Prosecution in Secrecy Break*, N.Y. Times, Dec. 4, 1980, at 12, col. 1; Eisasser, *'Brethren' find lid to cover the truth*, Chi. Tribune, Mar. 10, 1980, § 4, at 4, col. 4.

Several reviewers comment upon the assurances of confidentiality that journalists rely upon. See Neier, Book Review, *Nation*, Feb. 2, 1980, at 120 ("Fummy, isn't it, that many journalists attach great significance to protecting the confidentiality of their sources but think nothing of getting their sources to violate other people's confidences."); *infra* note 30; see also *Private chats, public press*, Chi. Sun-Times, Feb. 22, 1982, at 25, col. 1 (in which editorial reservations are expressed about publication by the *Washington Post* of notes made during staff meetings of the Secretary of State); *infra* note 44.

6. See *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting). Justice Brandeis warned on that occasion, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.* at 479.

It has been reported that Chief Justice Burger "once said that talking to a Justice's clerk was like tapping his phone." *TIME*, Dec. 17, 1979, at 79; see *infra* notes 24 and 29; cf. W. SHAKESPEARE, *KING LEAR*, IV, vi, 252-257 (*The Complete Pelican Shakespeare* edition (1969)).

7. The Lincoln-Douglas debates were organized by the participants. And, of course, those participants were quite capable of putting searching questions to each other without the aid of journalists.

Extended debates, with instructive inquiry into and reflection upon the available evidence, may still be heard from time to time in the closing arguments of counsel to a jury.

generated by that technology. It is also to say that we can no longer appreciate what we are missing: if we did recognize how superficial our public discourse has become, we would surely try to do something about it or, at least, we would be put on notice that whatever is produced by such discourse is probably inadequate.<sup>8</sup>

In any event, we should constantly remind ourselves that our cherished freedom of speech is primarily for the purpose of permitting civic-minded citizens to discuss the issues of the day at length and without fear of governmental reprisal.<sup>9</sup> It is inevitable, human nature being what it is, that this freedom will be abused from time to time. We are obliged to put up with such abuses in order to preserve vigorous public discourse. We should also recognize that much depends upon the good sense and the self-restraint of those who use freedom of speech to bring to our attention things we should know.

The failings of Mr. Woodward and Mr. Armstrong are, in large part, the failings of many intellectuals today, among whom journalists must be numbered. What they have done not only reflects what they have been "taught" by their peers but also caters to what the people who read books have come to expect as their due. Consider, for example, how politics, including the actions of judges, are regarded by these authors. They tend toward the opinion that "reality" is most likely that which has been hidden from view, and that that which *is* hidden from view is likely to have something wrong with it. In a sense, they seem to

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8. Presidential primaries have, in recent years, been too much dependent upon the interests and opinions of journalists. See Anastaplo, *The Obscured Virtues of Smoke-Filled Rooms*, Chi. Tribune, May 19, 1976, § 3, at 4, col. 6.

The single debate between the Democratic and the Republican candidates for President in 1980 was also conducted pursuant to an arrangement that could hardly be expected to promote thoughtfulness:

In the first part, each panelist will put one question to each candidate. Candidates have two minutes to respond. Panelists will ask a follow-up question, which candidates will have one minute to answer. Candidates will have one minute for rebuttal. In the second segment, each candidate again will have two minutes to respond to questions from the panelists. There will be one-minute rebuttals, then each candidate will have one minute to answer his opponent's rebuttal. Each candidate will have three minutes for a closing statement.

Chi. Tribune, Oct. 26, 1980, § 2, at 12, col. 5.

The televised debate of January 15, 1984 among eight major candidates for the Democratic presidential nomination was somewhat better organized than the 1980 debates—even though we still have a long way to go to achieve a genuine discussion of issues on such occasions. See generally *Excerpts from Transcript of Democratic Candidates' Debate*, N.Y. Times, Jan. 16, 1984, at 10, col. 1.

9. See G. ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* 15-16 (1971); *infra* note 55.

say, only the conspiratorial is real; or, at least, it is an exposure of the conspiratorial that is most revealing.<sup>10</sup>

A secret is considered significant because it *is* secret. It is not recognized that certain things may be kept secret precisely because that which is *not* secret (but rather is published for all to see) could not be as good as it should be if all deliberations leading to it were known to be subject to periodic and inevitably selective exposure. Thus, as one constitutional scholar has observed, judges, if they are to do their work responsibly, must have the "freedom to wrangle with each other."<sup>11</sup> To make such wrangling public, or to make it uncertain whether or not it will be made public, would tend to discourage frankness and flexibility. Certainly, it is far from clear that there is anything improper or sinister in conducting judicial deliberations in private—which is, after all, the way that has been generally accepted among us for two hundred years. Anyone who has served on a jury; who has confided in his parent, his spouse, or his child; or who has consulted a priest, a psychiatrist, or a lawyer can appreciate how critical an assurance of enduring confidentiality can be.

The *tendency* of journalists, when they become more interested in hidden motives than in public arguments (which arguments, in the form of opinions, appellate judges are primarily engaged in developing), is to make a great deal of gossip, if only because *that* is something *they* can add to what is routinely provided to the public by courts and legal commentators. This journalistic version of "legal realism" tends to lead to an undue regard for the seamy side of life, to an eager exposure to public view of the things that sensitive people have always been reluctant to publicize. Not only are the quirks of personalities made a good deal of—with the implication that one learns something significant about a man when one learns about his peculiarities—but also the afflictions we are all subject to are feasted upon. The most shocking instance of this in *The Brethren* is the extended account of the effects, both physical and psychological, of a debilitating stroke upon a

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10. Is this indicated also by the title itself, *The Brethren*? See PLATO, LAWS, 908A, 908E-909A, 951C-953D, 961A-962E, 968A. On the status of politics among all too many intellectuals today, see *infra* note 21.

11. Kurland, Book Review, 47 U. CHI. L. REV. 185, 189 (1979) ("Indeed, maintaining the Justices' freedom to wrangle with each other over matters for which easy and unanimous answers should not usually be expected is the real and adequate justification for the privacy of the conference room and the chambers."); see *infra* note 21.

Walter F. Murphy reported, in the course of a panel discussion of *The Brethren* at the American Political Science Association Convention in Washington, D.C., on August 29, 1980, that a Justice of the Supreme Court had told him, "If we were not fighting with each other, we should be impeached." (I attended this panel discussion. Several times in these footnotes I draw upon the notes I made on that public occasion.) See also Henry, Book Review, 47 TENN. L. REV. 495, 498 (1980).

respected Justice who had served long and honorably. The details were not necessary in order to make a legitimate point—that the Court, as it had done before on several occasions, adjusted its mode of operation in the expectation that this Justice would soon be replaced. But much more than this is said, probably because it *had* become available and could be counted upon to appeal to an insensitive curiosity among readers.<sup>12</sup> What is particularly significant here is not that ambitious journalists should want to exploit such material, but that respectable publishers and editors encourage and permit them to do so.

The emphasis that these authors place on the things they relish exposing distorts what they purport to describe: the Supreme Court between 1969 and 1976. What is novel and accurate in their accounts is not likely to be important, and what is important in their accounts is not likely, by and large, to be accurate. Indeed, one can see in their accounts the sorts of things that people who do not understand what *is* important look for or are titillated by. That is, one can see reflected in *The Brethren* the pretensions and limitations of those who are devoted to legal realism.

I have suggested that there is something deeply irresponsible in the way these authors have proceeded. I am afraid that some of my readers, perhaps many of them, do not share the opinions about the failings of intellectuals among us upon which my criticisms rest. That those opinions are not shared is indicated by the considerable rewards, even fortunes, authors such as these can earn. Who but intellectuals are their market? Certainly not the man in the street.<sup>13</sup>

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12. See *THE BRETHERN*, *supra* note 1, at 358, 391. Scott Armstrong, in the course of the panel discussion referred to *supra* note 11, insisted that the unseemly account in *The Brethren* of one Justice's physical breakdown was necessary in order to show how difficult it was for the Justices to work together in one room. Cf. G. ANASTAPLO, *THE CONSTITUTIONALIST* 734 (quoting Immanuel Kant: "The feeling for the sense of humanity has not yet left me.")

A Justice of the Supreme Court of Tennessee made the following observations about *The Brethren*:

There is no justification or excuse for some of the details involving the physical and mental deterioration of [two of the Justices] literally in the last days of their service. The revelation that [one of these Justices], who was all but blind, attempted to sign a document while in a hospital bed, and signed on the bed sheet instead, is cruel and contemptible. The same is true of some of the reported actions of [a third Justice] after his resignation. The truth of these episodes is not the issue. What is involved is the crudity and callousness of the reporting.

Henry, *supra* note 11, at 496.

Another reviewer had this to say about the sheet-signing episode reported in *The Brethren*: "The clerk did not hold the paper securely or adequately direct the dying man's hand, and he wrote on his sheet. What a swine that clerk was if he related the episode, and what a delight these authors take in selling it!" Frank, *The Supreme Court: The Muckrakers Return*, 66 A.B.A. J. 161, 162 (1980).

13. See Anastaplo, *American Constitutionalism and the Virtue of Prudence*, in ABRAHAM LINCOLN, *THE GETTYSBURG ADDRESS, AND AMERICAN CONSTITUTIONALISM* 128-29 (L.P. de Alvarez

Before I turn to further examination of what *is* "deeply irresponsible," I should mention an instance of irresponsible reporting in the book which does *not* require that one share my assessment of the authors' basic approach. The authors charge that Justice Brennan, in order to stay in the good graces of another Justice whose support he wanted in other cases, withheld the critical fifth vote to overturn the murder conviction of a petitioner. That Justices may occasionally trade votes should not surprise us—they do have to work, and virtually live, together. But only the flimsiest of evidence indicates that Justice Brennan did trade votes on this occasion. The charge is considered a serious one by the authors. They report that the "clerks were shocked that such considerations would keep a man in prison."<sup>14</sup> No sources are identified, of course, in support of what is reported. Fortunately, a longtime student of the Court, who has both a reputation to risk and reliable contacts, has shown us, as well as anyone can who does not have all of the authors' sources to examine, that the charge against Justice Brennan in this instance is without ascertainable foundation.<sup>15</sup> One is reminded here and elsewhere in the book of the kind of character assassination indulged in by Senator Joseph McCarthy, justified, as the authors of *The Brethren* have tried to justify their work, by invocations of the right of the people to know.<sup>16</sup>

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ed. 1976)(on intellectuals and their limitations); PLATO, EUTHYDEMUS 305C (on intellectuals as "frontiersmen between philosophy and politics"); *see also infra* note 44.

14. THE BRETHREN, *supra* note 1, at 225. The case was *Moore v. Illinois*, 408 U.S. 786 (1972). I have been told that the public defender in *Moore* considered his client innocent of *this* crime. For another account of the trading of votes among judges, see Anastaplo, *Mr. Justice Black, His Generous Common Sense and the Bar Admission Cases*, 9 SW. U.L. REV. 977, 1008 n.45 (1977).

15. Lewis, Book Review, N.Y. REV. OF BOOKS, Feb. 7, 1980, at 3, *reprinted in* 52 N.Y. ST. B.J. 205 (1980).

The authors of *The Brethren* responded in N.Y. REV. OF BOOKS, June 12, 1980, at 47. They stood by what they had said about Justice Brennan's motives for voting as he did in *Moore*. Mr. Lewis's reply was devastating. N.Y. REV. OF BOOKS, June 12, 1980, at 48. Mr. Lewis does give his sources for what he says. *See* Grossman, Book Review, 1980 WIS. L. REV. 429, 430-31; Beckwith, *Comment*, Leg. Times of Wash., Mar. 10, 1980, at 28.

The least that can be said against the authors of *The Brethren* with respect to their *Moore* account is that they were not justified, on the basis of the evidence they were willing to present, to bring the charge they did against Justice Brennan. The most that can be said against them here is perhaps summed up in the concluding observation by the law clerk who had been interviewed by the authors *on the record* and who may have been the principal source (directly or indirectly) for *The Brethren's* report of the episode:

Woodward published a false story about Justice Brennan, and he cannot back it up. If he has any integrity, he should straightforwardly admit that his story is false and retract it. His continuing failure to do so can only demonstrate the length to which he will go in pursuit of financial gain and personal aggrandizement.

Hoeber, Leg. Times of Wash., Mar. 10, 1980, at 28.

16. *See* Lewis, N.Y. REV. OF BOOKS, June 12, 1980, at 52; *see also* Kurland, Book Review, 47 U. CHI. L. REV. 185, 186 (1979).



We do not need exposés to show us that judges are “human,” especially since such exposés are apt to capitalize upon the questionable. To right the balance, and to confirm that judges *are* human, I will share with my readers still another “inside” story about what judges can be like. This story, too, is about Justice Brennan. A law school teacher of mine, the late Harry Kalven, once told me about a bar association meeting he was to address. When he got to the reception held before he was to speak, he found to his dismay that all of the lawyers there were dressed in formal wear; he alone was in an ordinary business suit. His discomfort grew as he mingled with his audience, for they were indeed dressed most elegantly. As he circulated about the hall he came upon a group that was obviously gathered around someone of importance; he figured that that someone must be the other guest speaker, who was, on that occasion, Justice Brennan. Sure enough, when Mr. Kalven penetrated that crowd, he did find Justice Brennan in the middle—dressed, also, in an ordinary business suit. When the Justice saw the similarly-dressed Professor, his face lit up as he said, “Boy, am I glad to see you!”

## II. *THE BRETHREN* AND LEGAL REALISM

The reservations one can develop about *The Brethren* and contemporary journalism are perhaps even more important for what they suggest about the quite influential “legal realism” movement. Certainly, the courts and the country often need rigorous criticism of what judges say and do.<sup>17</sup> Unfortunately, journalists writing on judicial matters frequently misconceive their subject. For one thing, it is naive to regard closed deliberations as virtual conspiracies. There must be frankness

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17. Consider, for example, Abraham Lincoln’s criticisms of the Supreme Court for its *Dred Scott* decision, *see infra* note 20, and Franklin D. Roosevelt’s criticisms of the Court for its New Deal decisions. *See also* Anastaplo, *One Man’s Brief Against the Bar*, Nat’l L.J., June 18, 1979, at 21, for my own reservations about what the Court has done from time to time; *infra* note 49. Thus, I have had occasion to say about a Justice’s opinion for the Court: “The thing that strikes me most about the Harlan opinion is that it is simply unlawyerlike. He just had the votes and that was it; he didn’t have to have the argument.” Anastaplo, *CHI. LAW.*, April 2, 1979, at 15; *see also* Anastaplo, *supra* note 14, at 992-93 n.23, 1008 n.45; Letter to the Editor, Nat’l L.J., Sept. 12, 1983, at 12.

Consider as well, Fletcher, Book Review, 68 CALIF. L. REV. 168, 171 (1980) (“I do not argue that the Court should be free from criticism—quite the contrary. But criticism that proceeds from ignorance must inevitably be gratuitous.”) Mr. Fletcher notices that a respected fellow journalist was (naturally?) permitted by the authors to deny an alleged impropriety on *his* part. *Id.* at 176; *see THE BRETHREN, supra* note 1, at 148-49.

In any event, *The Brethren* does not contain any allegations of the kind of possible judicial impropriety examined in Danelski, *Brandeis and Frankfurter*, 96 HARV. L. REV. 312 (1982). Indeed, there is in *The Brethren* reassuringly little that is discreditable to the Court (in the ordinarily “newsworthy” sense).

and confidentiality if certain kinds of deliberations *are* to be effective. Important issues are at stake in judicial deliberations, and conscientious men will make all kinds of efforts to persuade one another. They can, and do, say all kinds of things, especially "in the heat of battle," which they and their more mature associates are aware they do not mean, and which they certainly do not mean to have recorded for posterity. Any good novel on this subject can remind us, at least as well as *The Brethren* does, that judges can and should act like human beings. Perhaps one balanced behind-the-scenes account of how the Supreme Court does operate can be useful every quarter-century or so, but a balanced account would be one that recognizes that judges usually have more good things than bad to say about their colleagues. It is the cutting remark about a colleague, however, that the journalist tends to treasure; it is *that* which is "news." Virtually nothing is said in *The Brethren* about the social relations, outside the Court building, among the Justices or between the Justices and their friends.<sup>18</sup> Thus, remarks uttered in the midst of struggle are not balanced by reflective assessments made at the Justices' leisure.

Personal relationships aside, one would have to know much more than these authors do about the final products of the Court's deliberations to be able to describe and assess sensibly how and why the Justices developed their public positions. Reliance upon stray quotations and an occasional early draft of an opinion is likely to be misleading unless one knows a good deal about the context. Similarly, it is difficult, if not impossible, to determine a good teacher's position on a serious question from the things a student may happen to remember about what is said in a lively class discussion. But this is, in effect, what the authors have attempted to do by questioning former law clerks about their conversations with Justices. Certainly, it is difficult to understand a continuing give-and-take process from the outside, as anyone who has tried to counsel others about their family relations knows.

The Court's published opinions are what matter. Most opinions are critical more for what the Court said in them, than for who lined up behind them and how the lineup was achieved. Often, the writer of an opinion does not matter, whatever pride of authorship particular judges may have. Certainly, the opinions themselves, rather than the recollections journalists may happen to piece together about how those opinions came to be, are more important for permitting us to understand what has happened and for giving everyone, including the Justices

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18. The principal exception is what is said about the relations between Justice Black and Justice Harlan. See, e.g., *THE BRETHERN*, *supra* note 1, at 91; see also Anastaplo, *supra* note 14, at 978, 994; *supra* note 17.

themselves, an indication of what to expect. Such reconstructions do not make us more secure in our grasp of what has happened, but rather less secure because they not only promote second-guessing about what the Court intends by the opinions it does issue but they also encourage others to dig up still more gossip and drafts which "oblige" us to revise further the public position we would otherwise rely upon. A kind of anarchy is thereby invited.

Certainly, such undocumented revelations as chance to be in this not uninteresting book are difficult to rely upon as authority for the serious investigator or analyst, if only because the revelations are so fragmentary and intermittent. Those things that *are* useful, such as the observations by the Justices as to the dubiousness of the position taken by counsel for the *New York Times* in the *Pentagon Papers* case, are usually already known by students of the Supreme Court, independent of such revelations.<sup>19</sup> Even the transcripts of records and the briefs filed with the Court are of limited interest and use to students of what the Court does.

Revelations of the sort found in *The Brethren*, however realistic they may seem, do not address the serious questions one might have; indeed, they are likely to distract one from them. Such revelations are like the television news broadcasts that give people the illusion, much more so than do newspaper accounts, that they now know enough to understand what is going on, when in fact the viewers might know far less than they did when "all" they did was read books and journals or simply rely for their opinions upon those who did read.<sup>20</sup>

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19. THE BRETHREN, *supra* note 1, at 144-45. Justice Black is reported to have said privately what Justice Douglas had already indicated publicly. Students of the Court, such as Irving Dillard, have many times expressed their reservations about the position taken by counsel for the *New York Times* in the *Pentagon Papers* argument before the Supreme Court.

The *Pentagon Papers* case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), is described in THE BRETHREN, *supra* note 1, at 138, 139. A comment by J. William Fulbright undermines the position taken by the government in justifying the way the Vietnam War was conducted: "It's possible that civilians don't know something that the President does, but my experience while I was in the Senate was that whatever the President knew (that the public did not), was never very relevant." Univ. of Chi. Maroon, Feb. 22, 1980, at 3; *see also* Anastaplo, *Preliminary Reflections on the Pentagon Papers*, U. CHI. MAG. Jan.-Feb./Mar.-Apr. 1972, at 2, 16, reprinted in 118 CONG. REC. 24,990 (1972).

20. *See* Anastaplo, *Self-Government and the Mass Media: A Practical Man's Guide*, in THE MASS MEDIA AND MODERN DEMOCRACY 161 (H. Clor ed. 1974) (for an argument favoring the abolition of broadcast television in the United States; this article includes as well a discussion of the *Pentagon Papers* case); *see also* Greene, *Nixon and Television*, Chi. Tribune, Oct. 22, 1980, § 3, at 1, 4; Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. U.L. REV. 151, 227 n.164 (1981).

I do not mean to suggest that individual Justices *never* leave their mark on Supreme Court doctrines. Consider, for example, the mischievous effects of Justice Holmes's beguiling "clear and

### III. OLD FASHIONED APPROACHES TO *THE BRETHREN*

No doubt, some critics have overreacted to *The Brethren*, but, then, they do tend to be scholars who have invested a great deal in a respectful study of the Supreme Court.<sup>21</sup> An old-fashioned response, but not an overreaction, was that of a law school teacher of mine, Malcolm P. Sharp, who recently died in his eighty-third year.<sup>22</sup> He considered "dreadful" what the law clerks did in revealing to journalists what

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present danger" test language in *Schenck v. United States*, 249 U.S. 47, 52 (1919). See G. ANASTAPLO, *THE CONSTITUTIONALIST* 812.

Consider, also, the awesome consequences of what Chief Justice Taney had to say in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), about people of African descent not being included in the "created equal" language of the Declaration of Independence. See Address by A. Lincoln at Alton, Illinois (October 13, 1858); H. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 313-29 (1982).

A useful comment on the limitations of any use of "inside information" in assessing judicial opinions (in this case, the *Dred Scott* opinions) may be found in H. JAFFA, *supra*, at 441:

Among the attempts to shift all blame for the coming of the Civil War on the Republicans, especial note is due to the brilliant and highly influential essay by Frank Hodder, *Some Phases of the Dred Scott Case*, published in *THE MISSISSIPPI VALLEY HISTORICAL REVIEW*, Volume XVI, pp. 3-22, June 1929. According to Hodder, the Supreme Court had originally decided only that the decision of the highest court of Missouri was final as to the status of persons within the boundaries of that state. It was not necessary, says Hodder, for the Court to have entered the question of the constitutionality of the Missouri Compromise, and it would not have entered upon it if Justices McLean and Curtis had not announced *their* intention to go over this ground in dissenting opinions. McLean was an active candidate for the Republican presidential nomination, and so he is the chief villain of Hodder's scenario, although he blames Curtis even more for supporting McLean, since Curtis was (according to Hodder) mending fences in anti-slavery New England, whither he intended soon to enter upon a money-making legal practice. McLean was then the ambitious fanatic but Curtis the baser of the two, since he acted rather from avarice. All such speculations concerning motives are pure conjecture and tell us more about Hodder than about the judges.

Similarly, one suspects that contemporary speculations tell us more about legal realists (whether in journalism or elsewhere) than about the judges investigated.

A study of what Chief Justice Taney or Justice Holmes did say and how they were responded to in public should be far more significant than any "inside information" about how or why they happened to say what they did in *Dred Scott* or in *Schenck*. On the other hand, a lively effort to exploit a "pedagogy of persons" may be seen in the work of Professor Paul R. Baier, of the Louisiana State University Law Center.

In any event, far more instructive and entertaining than anything in *The Brethren* is the account of the consequences of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 922-925 (1953).

21. Thus, Mr. Kurland has endorsed the following dictum from Virginia Woolf, "I think politicians and journalists must be the lowest of God's creatures, creeping perpetually in the mud, and biting with one end and stinging with the other." Kurland, *supra* note 16, at 191; see also Kurland, *The Brethren: a hyped-up stunt for "political voyeurs,"* *Chi. Tribune*, Dec. 16, 1979, § 2, at 14 (reprinted in *U. CHI. L. SCH. REC.*, Spring 1980, at 15; cf. *supra* text accompanying note 10; Anastaplo, *Book Review*, *Chi. Sun-Times*, Apr. 30, 1978 (Show/Book Week) at 10.

22. See *N.Y. Times*, Aug. 15, 1980, at D15, col. 5 (obituary for Malcolm P. Sharp); see also Anastaplo, *Malcolm P. Sharp and the Spirit of '76*, *U. CHI. L. ALUMNI J.*, Summer 1975, at 18, reprinted in 121 *CONG. REC.* 40, 241 (1975); Anastaplo, "Gambling with Amity," *BULL. ATOM. SCI.*, May 1981, at 1; Anastaplo, *The Rosenberg Case and the Perils of Indignation*, *CHI. LAW*, July 1979, at 19.

had gone on (less than a decade before, in most cases) in the chambers of the Justices they had served. Other lawyers I have talked with have by and large agreed that the book is inaccurate and unfair and that it should not have been written. They are disturbed by the breach of confidentiality, especially on the part of the Justices' law clerks, the bright youngsters from the best law schools who are chosen to serve, three or four to a Justice, for a year or two at a time. These lawyers recognize that their own professional obligations would be seriously compromised if young lawyers in *their* offices should conduct themselves as did the clerks who served as informants to these journalists. I have already indicated the difficulties journalists and editors would have if their associates and employees should routinely prove to be as unreliable as these law clerks have evidently been.<sup>23</sup>

There should have been no serious question what the generally accepted *standard* of confidentiality is for Supreme Court clerks. The insistence upon anonymity by the law clerks who served as informants suggests that they knew they should not reveal what they did. It is clear throughout the book that the law clerks were aware of the standards to which they were being held. The Court had made clear to all the clerks that candor in deliberation depends on confidentiality.<sup>24</sup> The authors portray the clerks as sometimes dismayed by the Justices' concern about confidentiality and about the prying press. Yet, as we have seen, such confidentiality does not seem significantly different from that which journalists themselves use and rely upon. Any doubts these authors might have had about the importance (at least to the Court) of confidentiality should have been dispelled by their own touching account of Justice Black's insistence on his deathbed that certain of his papers be burned immediately:

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Mr. Sharp's reflections on the doings of the Supreme Court ranged over four decades. *See, e.g.,* Sharp, *Crosskey, Anastaplo and Meiklejohn on the United States Constitution*, 20 U. CHI. L. SCH. REC. 1 (1973); Sharp, *Movement in Supreme Court Adjudication; A Study of Modified and Overruled Decisions*, 46 HARV. L. REV. 361, 592, 795 (1933).

For other responses that draw on old-fashioned attitudes, see *supra* note 12; *cf. infra* note 59.

23. I say "evidently" because we do not *know* that *many* clerks provided information that they should not have. Somebody did, of course, but who they were, how many, and with what understanding they spoke, it is hard to say. *See* Bender, Book Review, 128 U. PA. L. REV. 716, 716 n.2 (1980); Letter of James E. Scaboro, NEWSWEEK, Jan. 7, 1980, at 5; *see also*, Fletcher, Book Review, 68 CALIF. L. REV. 168 (1980); *cf. infra* note 59.

24. *See* THE BRETHREN, *supra* note 1, at 34-35, 100, 149-50, 157, 188, 237-38, 286, 288, 356 (on the importance of confidentiality both for the Justices and for the clerks); *see also infra* notes 29 and 30.

For a discourse on how legitimate confidences should be kept, see A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 20 ("I noted down all such confidences as soon as I heard them, but they will never leave my notebooks; I would rather let my comments suffer than add my name to the list of those travelers who repay generous hospitality with worries and embarrassments.").

Black's major concern, from the moment he entered the hospital, was to make sure that his most private papers, memos and conference notes were burned. Publication would inhibit the free exchange of ideas in the future. He felt that he had been treated unfairly in the late Justice Harold H. Burton's diary, in which Burton had written that Black at first resisted desegregation. Black had also been shattered by the biography of former [Chief] Justice Harlan Fiske Stone, written by Alpheus Thomas Mason. Black had told Burger that when he read Stone's biography [which had drawn upon papers left by Chief Justice Stone, who died unexpectedly, in office], he had discovered for the first time that Stone couldn't stand him.

Black didn't want that kind of use made of his private papers.<sup>25</sup>

The authors were aware of such sentiments, sentiments which suggest that a law clerk should respect confidentiality at the very least during the tenure of his Justice's colleagues. Yet, they went ahead with their exposés. Did they think about what they had written? What did these clerks know that judges like Hugo L. Black, and generations of lawyers, did not know? Or, should we ask, what had they forgotten about the conditions and consequences of civility that their predecessors had respected?

Critical to an understanding of *The Brethren* is a recognition of the authors' animus toward Chief Justice Burger. The book is largely about him and the way he handles, or tries to handle, the Court. I do not believe that the authors appreciate the extent to which the book is subordinated to their attack upon the Chief Justice.

Chief Justice Burger is, no doubt, an easy target. One does not need *The Brethren* and its methods, however, to become aware of the impression he all too often makes on his associates. All one needs to do is to talk to lawyers who have had dealings with him at bar association meetings. The book is, therefore, more a critique of the Burger personality than it is a study of the work of the Court. We see the issues and controversies as they develop around the Chief Justice, who has, besides his own perhaps insecure personality, two other things working against him: he was appointed by Mr. Nixon, whose doings have all become suspect; and he followed a Chief Justice who had the magic political touch.<sup>26</sup>

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25. *THE BRETHREN*, *supra* note 1, at 157; *see also id.* at 60, 157. For an extended account of Justice Black's insistence that certain of his papers be burned, see BLACK, *MY FATHER, A REMEMBRANCE* (1975). *Cf. infra* note 29.

26. Consider the report on Chief Justice Warren by Laurence Berns of St. John's College, upon observing a 1960 oral argument in the Supreme Court:

Despite Justice Frankfurter's occasional displays of bad temper, I was impressed by the great dignity of the Court. The manly bearing of the Chief Justice contributed to this impression. His large size, handsomeness and apparent strength, combined with his kindly, pleasant and almost gentle manners, in addition to his quite plain diction, would

The book makes too much of Chief Justice Burger's interests and desires when, after all, he has but one vote. This misplaced emphasis comes from an attempt to simplify and dramatize. The problem is aggravated by the fact that the authors' more sensational revelations are limited, by and large, to the materials that malcontents of bad faith have chanced to make available to them. This is not to suggest that a Chief Justice is not important. But he, too, has to count votes and all too often it seems that the Chief Justice is not very good at counting.

In any event, it is far from clear why, if the Chief Justice is as bad as the authors regard him to be, the other Justices do not strip him of various critical powers as presiding officer in the Conference. No doubt, custom inhibits them to some extent, although there are indications that the Justices effectively control him when they have to.<sup>27</sup> I suspect that the principal reason the Justices have not done more about the Chief Justice is that he is more an annoyance than he is a threat. Besides, he seems to me to come through, despite the vanity and befuddlement that the authors perhaps correctly report, as a rather decent, good-intentioned chap, not without redeeming social value. For instance, he seems to sense how to treat colleagues who suffer afflictions. (In this he is kinder, as well as more sensible, than the authors of *The Brethren*.) Again and again, I have the impression that the authors do not truly appreciate the critical implications of some of the things they report. Nor do they appreciate that their own highhanded way with confidential materials is far more questionable than anything they report the Chief Justice to have done.<sup>28</sup>

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seem to have the effect of putting those facing the Bench at their ease and at the same time impressing them with the dignity of the Court. I thought him a kind of living argument for democracy.

G. ANASTAPLO, *supra* note 9, at 364 (quoting unpublished report by L. Berns); see R. KLUGER, *SIMPLE JUSTICE* 857 (1976); Kurland, *supra* note 16, at 190 n.15; see also *A Candid Talk With Justice Blackmun*, N.Y. Times, Feb. 20, 1983, § 6 (Magazine), at 28-29 (on Chief Justice Burger).

27. See, e.g., *THE BRETHREN*, *supra* note 1, at 32, 82, 84, 170-71, 179-81, 187-88, 438.

28. [H]ad the authors [of *The Brethren*] delved more into the historic record, they would have deepened their understanding of the Court—and ours. For example, knowing that other chief justices—John Marshall and Charles Evans Hughes provide the most obvious instances—had taken advantage of their office to maneuver themselves into writing opinions or assigning that task to particular justices, might have caused Woodward and Armstrong to interpret somewhat differently Burger's alleged shuffling of his votes.

Murphy, Book Review, Wash. Post (Book World), Dec. 16, 1979, at 11. William W. Crosskey's work is instructive with respect to the maneuvering that Chief Justice Marshall was indeed capable of, maneuvering that makes Chief Justice Burger's efforts seem child's play by comparison. My review of Mr. Crosskey's work is to be published in 15 *LOY. U. CHI. L.J.* (1984). See also Daniels, Book Review, 44 *ALB. L. REV.* 732, 735-36 (1980), Fletcher, *supra* note 23, at 171; Grossman, Book Review, 1980 *WIS. L. REV.* 429, 433-34.

A Justice of the Supreme Court of Tennessee has said of the treatment of Chief Justice Burger in *The Brethren*: "[H]is quite considerable contribution to the administration of justice both in the state and federal systems is virtually ignored. To any knowledgeable and fair-minded reader,

## IV. RELYING UPON THE UNTRUSTWORTHY

Anyone with access to lawyers who have been law clerks in any court can easily learn that it is a clear breach of trust to provide the texts of memoranda and draft opinions, especially those relating to recent cases. So, one must ask, how reliable *are* the informants who betrayed this trust? Clerks who act as these clerks did cannot be relied upon for the moral sensibilities which are needed if one is to understand what went on among the Justices. Would not much of what they report, or choose to report, be tainted by a defective moral sense?<sup>29</sup>

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the treatment accorded the Chief Justice can only be classified as shameful." Henry, *supra* note 11, at 497; see G. ANASTAFLO, *supra* note 9, at 669 (on Chief Justice Burger's concerns about American prisons); see also *Burger warns of prison riots, urges judicial reforms*, Chi. Tribune, Dec. 29, 1980, § 1, at 2, col. 1; *infra* note 62.

The retired Justice [William O. Douglas] has had people read to him the excerpts from [*The Brethren*] that have been appearing this week in the *Washington Post*. "He's taking it with a grain of salt," said his secretary Marty Yopp. "He has one statement about the book—he feels the Chief Justice has grown significantly during the last 10 years on the Court."

Wash. Post, Dec. 9, 1979, at K10, col. 1.

29. Clerks are given access to a considerable amount of restricted material in order to be able to engage in fruitful discussions with their Justices. For a sampling of expressions of disappointment at the violation by certain clerks of the trust they had voluntarily undertaken, see *The Next Reich*, NAT'L L. J., Jan. 21, 1980, at 1, col. 2 (interview by R. Collins of Charles A. Reich); Kilpatrick, *Nothing of Honor*, NAT'L REV., Feb. 8, 1980, at 162; Kurland, Book Review, 47 U. CHI. L. REV. 185, 190 (1979). Consider, also, Murray Kempton's comment:

Woodward and Armstrong frequently cite Burger's distrust of the clerks as one more instance of his persecution complex, but the tone of spite, scorn, and self-importance that infects their [the clerks'] recollections goes far to support Delmore Schwartz's familiar axiom that even paranoids have enemies.

This unwholesome alumni association is now practicing law and, in accordance with the strange ethic of its profession, proving that any gangster with a fee can trust its members with his large secrets after having already proved that no judge they served could trust them with his small ones.

Kempton, Book Review, New York, Feb. 25, 1980, at 71; *cf. infra* note 30.

Justice Douglas's book on his years with the Court has now been published. W.O. DOUGLAS, *THE COURT YEARS: 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* (1980). It is not as revealing as it had been feared in some quarters it would be. Perhaps one good effect of the publication of *The Brethren* and the critical responses to the wholesale breach of faith it evidently relied upon was to persuade Justice Douglas and his advisers to back off somewhat from what had been planned in the way of an exposé.

What duty does a member of the Court owe to his colleagues with respect to publishing accounts of their discussions? See N.Y. Times, Aug. 26, 1980, at B15, col. 1:

[Justice Douglas's] papers relating to his work on the Court, including his records on case conferences and personal correspondence and notes, are being turned over to the Library of Congress, where they will be sealed for five years and then opened to the public. Other papers, up to the year 1958, are already catalogued at the library and were opened to the public upon his death.

See also *supra* note 24.

Consider, further, on the duty the Justices owe one another, the following observation by Mr. Frank:

In an important sense, the die was cast when Alexander Bickel published *The Unpublished Opinions of Mr. Justice Brandeis*, otherwise confidential papers that cast valuable



Furthermore, how reliable are researchers who develop and exploit such betrayals of trust? After all, many of the critical revelations and interpretations found in this book do depend on moral judgments. Thus, the authors assess the moral judgments of the Justices. But does it not require someone who is himself of sound moral judgment to properly assess serious matters?

I have suggested, as have others before me, that *The Brethren* is largely *about* Chief Justice Burger. It is also obvious to many that the book is primarily *from* the perspective of the law clerks. Therefore, what is said is presented from a clerk's-eye view—on the part both of the informants and of the authors themselves.<sup>30</sup> The authors are impressed by the bright, self-important young men and (now) women who receive these coveted appointments. But, it should be remembered, these *are* inexperienced youngsters—usually in their late

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light on how particular cases were decided. Bickel justified his selection of Brandeis material by saying, "There are not trivia here, no casual gossip or malice."

Frank, *The Supreme Court: The Muckrakers Return*, 66 A.B.A. J. 161, 163 (1980); see also Barbash, *New Books Offer Inside Look at Earl Warren's Supreme Court*, Wash. Post, June 15, 1983, at A16, col. 1 (reviewing books by Bernard Schwartz). Consider, as well, this report on warnings issued to Justice Department employees by Attorney General Benjamin R. Civiletti:

"If any department employee leaks confidential information from an investigation, if found, he or she will lose their position," Civiletti said. "If not found, at least that employee will lose honor and self-respect."

He told the employees that leaks jeopardize the investigations the department is conducting; run the risk of harm to informants, witnesses and department employees; jeopardize the right to a fair trial, and sometimes wound innocent people.

He said the blame for leaks could not be placed on news reporters. He said reporters' appeals to department employees for such information are "proper," although those appeals may be based on an effort to capitalize on the employee's fear, pride, envy, anger or patriotism.

Chi. Sun-Times, Mar. 6, 1980, at 22, col. 1; see Fletcher, Book Review, 68 CALIF. L. REV. 168, 169 (1980); see also *infra* note 30.

30. Mr. Armstrong, in the course of the panel discussion referred to in notes 11 and 12, *supra*, insisted that the authors had talked at length with a majority of the Justices—that is, he argued, the book is not written just from a clerk's-eye view. He also said that many documents were relied upon, not just recollections, and that the clerks were used primarily as sources for the Justices' opinions, not for what the clerks themselves thought. Indeed, he reported, the Justices would refer an interviewer to a clerk for more precise information (since the terms rim together for the Justices much more than they do for the transient clerks).

The way Mr. Armstrong presents all this makes it sound rather innocent on the part of the clerks. No doubt, the common good could well call for a breach of faith in some instances—but, in such an instance, any author promoting and profiting from the breach of faith should be able to make a *prima facie* case for the proposition that the common good did, in fact, require a subversion of the tradition of non-disclosure. The old-fashioned approach to these matters may be seen in the account of the lawyer who served as clerk to Justice Black in 1942. His Justice encouraged candor from his clerks and, it seems, he got it. "At the same time," this lawyer recalls, "I was categorically instructed, and obeyed the instructions rigidly, that discussion stopped at the threshold to the office. From the corridor to the world over, there was one spokesman, and that was my justice. I thought that view wise, obeyed it rigidly, and still think so." Frank, *supra* note 29, at 164; see also Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 GONZ. L. REV. 1, 13-14 (1976).

twenties—and what do they really know anyhow? How can such youngsters properly assess the moral and political, as well as the strictly legal and constitutional, issues confronting the Justices? What such youngsters know is, for the most part, what they have just learned in law school. This means, all too often, that they are imbued with the prevailing prejudices of their peers. Journalists do tend to be impressed by such “stars”; but, then, journalists in this country do not tend to be well-educated.

The clerks, as presented in *The Brethren*—in other words, the clerks as they allowed themselves to be quoted and described—come through as presumptuous and arrogant. Hence, they are unable to see or to report serious matters properly. Much of one's interest in this investigation collapses if one is not very much concerned with or impressed by the opinions, dismay, and anger of inexperienced youth. The most vehement moral judgments reported to have been expressed in the Supreme Court Building are, it seems, primarily those of the clerks. The Justices, when they express moral judgments, it also seems, do so primarily upon the prodding of their clerks.<sup>31</sup> One must wonder how Justices get where they are without their clerks to show them the way!

But, then, one must not make too much of law clerks. That should be left to Mr. Woodward and Mr. Armstrong. The decisive comment here may be that of Justice Rehnquist, who had himself been a law clerk in his youth: he called the “bad mouthing” of the Chief Justice that he heard in his own chambers “sport for law clerks.”<sup>32</sup> Several reviewers have been reminded of Hegel's observation that no man is a hero to his valet, not because the master may not be a hero, but because the other *is* a valet.<sup>33</sup>

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31. See, e.g., *THE BRETHREN*, *supra* note 1, at 116, 118, 122, 123, 138, 153, 212, 224, 250, 260, 265, 319, 323, 327, 366; *cf. id.* at 141 (“‘You're only the clerks,’ [the Justice] said gently, ‘and I will have to decide for myself.’”).

32. *Id.* at 413. William H. Rehnquist was a clerk to Justice Jackson.

33. See, e.g., Kempton, *supra* note 29, at 71; Kurland, *supra* note 29, at 191; see also G. ANASTAPLO, *supra* note 9, at 670-71 (on the status of the noble today); Lewis, Book Review, N.Y. REV. OF BOOKS, Feb. 7, 1980, at 8. See generally W. SHAKESPEARE, *TWELFTH NIGHT*, I, ii, 33 (“‘What great ones do, the less will prattle of . . .’”).

Consider, also, the advice given by Leo Strauss:

It is safer to try to understand the low in the light of the high than the high in the light of the low. In doing the latter one necessarily distorts the high, whereas in doing the former one does not deprive the low of the freedom to reveal itself fully as what it is.

L. STRAUSS, *SPINOZA'S CRITIQUE OF RELIGION* 2 (1965). See, in addition, Beseda, *The Peering Lens*, Catholic Worker, Aug. 1981, at 2.

It has been suggested by one law professor that the authors of *The Brethren* “simply do not understand the concept of noble politics.” Fletcher, *supra* note 29, at 179. It is sometimes said that since the Supreme Court exercises considerable political influence these days, it is proper that

## V. JOURNALISM AND THE LAW

I have suggested that a certain moral stature is needed if one is to deal properly with moral questions. Similarly, a certain intellectual competence is needed if one is to deal properly with legal and constitutional questions.

*The Brethren* tells us more that is significant about journalism—its interests, standards, and limitations—than about the Supreme Court. It is often instructive to see how someone understands what and how other people understand.

The limitations of journalists should be evident to the careful reader of the press. They are notoriously inadequate when they report what courts do. This is partly because they usually do not (or cannot) do the homework required, and partly because they deal only with the occasional controversial case, and then only at the last minute when a decision is announced. Journalists do not have a reliable sense of what is routine in the law; nor do they study opinions carefully. Even when they do read the current opinion being reported, they usually do not know much about the critical opinions that preceded the one immediately under consideration.<sup>34</sup>

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its personnel and its deliberations should now be subjected to the same kind of scrutiny to which other political bodies are subject in this country. Of course, the Court has always been somewhat political in its effect. But, putting that aside, is there any reason to believe that the Court will do as well as it can the things that only the judiciary can do, if it is routinely subjected to the kind of prying that *The Brethren* represents? The Court's effectiveness seems to depend, in part, on the respect it enjoys as somewhat above immediate political squabbles—a respect that a certain kind of journalism can thoughtlessly undermine. Furthermore, one must wonder whether the wrong things are all too often investigated about personnel in the other branches of government as well. See *infra* text accompanying note 61; see also *infra* note 35; H. JAFFA, *supra* note 20, at 422 n.9, 444; Denniston, *New Breed of News Hound: The Legal Beagle*, WASH. JOURNALISM REV., Mar. 1983, at 26; Kirp, *The Justices might find a Gag's in Order*, Wall Street Journal, Mar. 23, 1983, at 30, col. 3 (on politics and the Supreme Court).

34. It might help train journalists to be sensible about judicial matters if newspapers would devote a full page to court news every day—if, that is, political journalists were obliged to become as familiar with what does (and does not) happen in and around courts as sports writers are with what does (and does not) happen on and around a baseball field. See *supra* note 28; *infra* note 35. For suggestions about improved reporting of judicial matters, see Hentoff, *The Snarling 'Brethren' and a Brittle Press*, Village Voice, Jan. 7, 1980, at 21, col. 1:

If the press is going to fulfill what Mr. Justice Brennan calls its "partnership" with the Court, the new reporting dimensions will have to come from that part of the press which is printed.

So, I asked Bob Woodward and Scott Armstrong what they thought should be done. For a start, they agree with constitutional lawyers that the kind of narrow reporting necessitated by deadline pressures is woefully inadequate. "There should be more thematic coverage," says Woodward. That is, extensive pieces exploring a basic constitutional issue—abortion, police searches, school library censorship—by connecting cases already decided with those on the way up to the Court. And the reporters should be steeped in the material. You don't need a law degree, from Yale or anywhere else, to be illuminating on these matters. It just takes a lot of reading, interviewing and *clear* writing.

Journalists today appeal to an interest, an all-too-human interest, in what is curious and unusual.<sup>35</sup> They tend to be unreliable: a lawyer or a politician is, I am afraid, more apt to keep a promise than is an editor. This is perhaps, in part, because the journalist is so much surer than a lawyer or a politician is apt to be that he is on the side of the angels. Journalists tend to be unaware of their inadequacies. Thus, a patronizing tone is evident throughout this book.<sup>36</sup> One consequence of these authors' limitations is that they can inadvertently hurt those whom they want to help: in some ways, the Justices who come off worst in this book are (besides Chief Justice Burger) Justices Douglas, Brennan, and Marshall, those whom the authors evidently hold (along with Chief Justice Warren and Justice Black) in the highest esteem. Truly, it can be said of these authors that they know not what they do.<sup>37</sup>

One of the things these authors *do* is jeopardize future relations among the Justices. The authors indicate in their introduction that

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"It's very important," Woodward adds, "for the press to be more than retrospective in its coverage. It should enter the debate before the Justices make up their minds."

"Do they read newspapers much?" I asked.

"Oh boy, do they," Woodward answered. "They all do. And from what we saw, some Justices get through more of their newspapers than they do all the petitions for reviews that come to them. As Brennan said at Rutgers, they need the press to tell them what's going on out there in the nation. Don't forget, we're talking about nine elderly men, five of them over 70. All of them white, except for Marshall, and all of them male. They're isolated. . . ."

"It *is* possible," Bob Woodward claims, "to redirect their attention." And it certainly is possible to influence their clerks with a penetrating, well-researched newspaper story.

Compare *supra* note 17 with *infra* note 61.

35. "Men are over fond of publishing news that is curious and unusual, and of overlooking the familiar and habitual." Abu Bakr Muhammad b. Zakariya al-Razi (Rhazes), *On the Philosophic Life*, 45 ASIATIC REV. 703, 704 (A. Arberry trans. 1949); see, e.g., B. GULLEY & M. REESE, *BREAKING COVER* (1980) (describing titillating revelations about shenanigans in the White House); see also Greene, *Sextra! Sextra! Read all about JFK!*, Chi. Sun-Times, Mar. 25, 1976, at 8, col. 1. Is not this sort of thing written from the perspective of the unfaithful valet? See *supra* text accompanying note 33.

On journalistic revelations about supposed shenanigans in the Roman Catholic Church, see Barbash, *Investigative Journalism Finds There Really May Be a Sacred Cow*, Wash. Post, Oct. 12, 1980, at A19, col. 1; Buursma, *Cardinal Cody Blasts Probe by Sun-Times*, Chi. Tribune, Nov. 2, 1980, § 1, at 1, col. 4; Coleman, *The Church in the World*, 36 THEOLOGY TODAY 544, 545 (1980); Chi. Catholic, Aug. 22, 1980, at 1, col. 3 and at 16, col. 1; *id.*, Aug. 29, 1980, at 1, col. 1 and at 6, col. 1; *id.*, Sept. 5, 1980, at 6, col. 1; *id.*, Oct. 24, 1980, at 7, col. 1; *id.*, Sept. 12, 1980, at 7, col. 1; *id.*, Sept. 26, 1980, at 7, col. 1 and at 6, col. 1; Chi. Tribune, Sept. 27, 1981, § 1, at 1, col. 1.

However all this may be, de Tocqueville observed that a "taste for variety is one of the characteristic passions of democracy." 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 213 (Phillips Bradley ed. 1954), quoted in G. ANASTAPLO, *supra* note 9, at 779.

36. See, e.g., *THE BRETHERN*, *supra* note 1, at 182-83, 250; see also G. ANASTAPLO, *HUMAN BEING AND CITIZEN* 248 n.1, 255 n.39, 268 n.1 (1975) (on the difficulty editors have in printing articles as written).

37. See, e.g., Kurland, *supra* note 29, at 191.

they do not consider current cases, lest they affect their outcome. But they are not as careful about current Justices as they claim to be about current cases. The consequences of public revelations about what the Justices think of each other are evident from the book itself.<sup>38</sup> We should be reminded of the effect upon Justice Black when *he* learned what Chief Justice Stone had “really” thought of him. Yet, the authors do not act on what they report, but rather publish cruel, or at least callous, comments supposedly made by the Justices about one another. Are they *not* aware of what they are doing? Or is it that they have done a lot of work digging up these barbs, filtered for the most part through the psyches *and vocabularies* of unprincipled law clerks, and want to profit from their work?

One can be sure that the Justices soon located the references to themselves in *The Brethren*.<sup>39</sup> Many of the comments by their colleagues were no doubt laughed off. But some of them will rankle. In a few cases, personal and professional relations may be permanently affected.<sup>40</sup> The authors recognize that there is a tradition among the Court of “complimenting the ‘learned Judge’ before ripping him to shreds.” And they recognize also the purpose of this practice: “The tradition help[s] keep disputes on an impersonal plane, or at least maintain[s] the facade that battles [are] legal and not to be taken personally.”<sup>41</sup> Nevertheless, the authors can report that on one occasion a Justice hurriedly left the scene, lest he burst out laughing at the foolishness of a colleague.<sup>42</sup> Both Justices, whose names are given, are still on the Court. Does it serve a useful purpose to have one Justice learn that another found him laughable? This is a mild illustration. Much harsher instances could be cited.<sup>43</sup>

One need not believe that the Court is entitled to extraordinary consideration in order to recognize that there is something dubious about this sort of thing. One does not see *published* such contemporary assessments of members of Congress or of members of the press by

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38. See, e.g., THE BRETHREN, *supra* note 1, at 443; *infra* note 43.

39. See THE BRETHREN, *supra* note 1, at 279-80.

40. It is reported that President Nixon and Chief Justice Warren did not like each other. Yet they, as experienced political men, knew enough to speak civilly to and about each other in public. See *id.* at 10, 14, 26.

41. *Id.* at 215.

42. *Id.* at 269.

43. See, e.g., *id.* at 22, 26, 77, 105, 109, 172, 202-03, 215, 221-22, 231, 258-59, 272, 284, 314-15, 323, 335, 347, 353, 359, 379, 383-84, 405-07, 416, 418, 428, 436, 438, 442.

Mr. Armstrong has been reported as saying, “It’s not going to change the Justices’ relationships. These guys already know what they think about each other.” TIME, Dec. 17, 1979, at 79. This assumes that it does not matter whether another’s private opinion about oneself is published or not.

their colleagues, even though comparable information *is* available, and even though members of Congress or members of the press do not depend as much as the Justices do on being able to work together intimately and for years at a time.

All this reminds us of a question that is vital to our republican regime, and that is whether we can control through social (not legal) institutions the passions we are subject to. Developing such control is a special problem for intellectuals, especially because they have been led by the Enlightenment to believe that the truth cannot do any harm, that exposure of everything that public figures say and do is almost a public duty.<sup>44</sup>

We are told in *The Brethren* of a Justice who withdrew his name from consideration for the position of Chief Justice. Why had he done so? Because, it is reported by the authors, he "had a private matter that might be embarrassing"—not a scandal or anything improper, but a difficulty in his family. His wife had a drinking problem. Would that come out if he were nominated? Was it fair to his family? Would he have to wonder whether his private business might appear in the newspapers, if only in a gossip column?<sup>45</sup> He did not have to worry; it would not appear in a gossip column. Instead, it was put by suppos-

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44. An older approach may be seen in 1 E. GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 61 (New York, 1975):

To resume, in a few words, the system of the Imperial government, as it was instituted by Augustus, and maintained by those princes who understood their own interest and that of the people, it may be defined as an absolute monarchy disguised by the forms of a commonwealth. The masters of the Roman world surrounded their throne with darkness, concealed their irresistible strength, and humbly professed themselves the accountable ministers of the senate, whose supreme decrees they dictated and obeyed.

Consider, also, the observation by Otto von Bismarck: "The less people know about how sausages and laws are made, the better they'll sleep at night." A. Miller, *Throwing the book at the Supreme Court*, Chi. Sun-Times, Views, Dec. 30, 1979, at 3 (quoting Bismarck). For a middle way between this older approach and that of the Enlightenment, see G. ANASTAPLO, *supra* note 9, at 15-16, 237-53; G. ANASTAPLO, *HUMAN BEING AND CITIZEN*, Essay No. 3 (1975); Anastaplo, *The Occasions of Freedom of Speech*, 5 POL. SCI. REVIEWER 383 (1975).

Something of the Enlightenment may be seen in such comments as this: "It is to the credit of Woodward and Armstrong that they were willing—and able—to shatter this conspiracy of silence. It is certainly in the highest tradition of investigative journalism to expose the realities of institutions that affect our lives as greatly as the Supreme Court does." Dershowitz, Book Review, *SAT. REV.*, Mar. 1, 1980, at 37, 42; see also Kirsch, *Publish and Be Damned*, *NEW WEST*, July 2, 1979, at 32.

On the limits of enlightenment, see G. ANASTAPLO, *supra* note 9, at 278-81; Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. U.L. REV. 151 (1981); see also *supra* note 13.

45. *THE BRETHERN*, *supra* note 1, at 16.

edly conscientious authors and publishers in a best seller for the whole country to read!<sup>46</sup>

How does one understand such obtuseness on the part of these authors? How does one assess a profession which can nurture, reward, and cherish such professionals? After all, these men *have* long been associated with one of the finest newspapers in the country. What understanding of things legal, moral, and political do these journalists have, that they can risk sowing devastation as they do? Is not something wrong with their training, with the tastes of their respectable readers, and with the education of the eminently successful young lawyers whom they draw upon as their principal sources? Perhaps we should be grateful that we are hereby again reminded so dramatically of some of the things that are questionable about the brightest and best among us.<sup>47</sup> We are reminded as well—and this may be far more important—of the intellectual limitations and moral pitfalls of legal realism.

## VI. THE BRETHREN ON PARTICULAR CASES

A thorough review of *The Brethren* should include an assessment of what is said about some of the Supreme Court cases which are described at length by the authors. Such an assessment would throw further light on the intellectual equipment and the moral standards of legal scholars and journalists such as these authors.

The book describes cases dealing with busing orders in segregation matters, cases dealing with abortion, and cases dealing with the death penalty.<sup>48</sup> The authors' positions here are the conventional liberal

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46. President Nixon, when he talked with this Justice about the position of Chief Justice, did not seek or receive such information. *Id.* at 17. This Justice has published the following letter:

When I went to see President Richard M. Nixon in April 1969 to ask him not to consider me for Chief Justice, my wife had been a complete teetotaler for more than six years. She still is. My purpose in writing is to make clear that my wife had no "problem" that affected my decision.

NEWSWEEK, Dec. 13, 1979, at 7.

At one point in the panel discussion referred to, *supra* notes 11 and 12, Mr. Armstrong, in commenting upon this episode, spoke of the Justice's "concern for his wife's health." Apparently, Mr. Armstrong knows how to be discreet when he wants to be. Would not such a reference have sufficed in the book, assuming both that there was a basis for it and that it was in the public interest to mention it? (At another point in the panel discussion, however, Mr. Armstrong referred to this episode, as well as to the episode referred to, *supra* text accompanying note 12, with less sensitivity.)

47. See Higgins, *The Brethren's Clerks*, HARPER'S, Mar. 1980, at 96; Zion, *Book Review*, Village Voice, Feb. 4, 1980, at 41 (on who the clerks are). It has been suggested that the breakdown of discipline among the clerks is in part due to the increased number of them in each Justice's chambers. See, e.g., Frank, *The Supreme Court: The Muckrakers Return*, 66 A.B.A. J. 161, 164 (1980); Kurland, *supra* note 29, at 192.

48. See, e.g., THE BRETHREN, *supra* note 1, at 96-98, 101, 106, 108, 111-12, 155-56, 165, 167, 175, 183, 205-06, 229-30, 265, 313, 413, 432-35. It should be evident to any student of the Court

ones. That is, they do not truly appreciate that a reasonable man can find busing destructive of neighborhood schools, that a reasonable man can regard our widespread recourse to abortion as a moral catastrophe, and that a reasonable man can find merit in a community's conscientious use of the death penalty.<sup>49</sup>

Similarly, the authors are always clear about what the correct answer is in obscenity cases.<sup>50</sup> The danger to freedom of speech and to the discussion of political issues, posed at this time by direct suppression, is magnified by them. They do not see that freedom of speech may be undermined if character is corrupted and if permissiveness and lack of discipline should prevail.<sup>51</sup> They are quite self-righteous here, seemingly unaware that citizens dedicated to constitutional government may also want and need a healthy moral community.

Particularly revealing is the assumption that, of course, freedom of speech should permit an entrepreneur to display on an outdoor movie screen, for an entire neighborhood to see, what he chooses to show "inside" to consenting customers, even though the material thus displayed was not so long ago reserved for the most intimate privacy.<sup>52</sup> I say that this is "particularly revealing" because the aggressively intrusive outdoor movie screen is a fitting symbol of what the authors themselves do in this book.

Finally, it would be useful to examine at length the authors' treatment of the Watergate tapes controversy. The authors are so intent on showing how Chief Justice Burger had to be corralled by his colleagues in the disposition of that controversy, that they do not properly notice how well the Justices did work together.<sup>53</sup> Their account of the Water-

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that the authors did little with the many more or less prosaic cases that make up the bulk of the Court's work each term. See *infra* note 55.

49. See, e.g., 125 CONG. REC. 36,365-66 (Dec. 15, 1979) (statement of G. Anastaplo, entitled *One's Character Is One's Fate?*, read into record by Rep. H. Hyde).

50. See THE BRETHREN, *supra* note 1, at 192, 245; see also G. ANASTAPLO, *supra* note 9, at 546-48, 818; G. ANASTAPLO, HUMAN BEING AND CITIZEN, Essay No. 10 (1975); Anastaplo, *Book Review*, forthcoming in 3 WINDSOR Y.B. OF ACCESS OF JUSTICE (1983).

51. See G. ANASTAPLO, HUMAN BEING AND CITIZEN, Essays No. 4, No. 6, No. 7, No. 16 (1975); see also *supra* note 20; *infra* note 55.

On the gentle Scipio as "the corrupter of the Roman militia," see N. MACHIAVELLI, THE PRINCE 102 (L.P. de Alvarez trans. 1980).

52. See THE BRETHREN, *supra* note 1, at 200, 364; cf. G. ANASTAPLO, *supra* note 9, at 546-48.

53. A number of reviewers have commended the collegiality of the Court in dealing with this crisis. "[Leon] Jaworski, who had fallen into a depression and had talked privately of resigning as Special Prosecutor, emerged from the Court to cheers and applause. 'If I had to write it myself,' he said, 'I couldn't have written it any better.'" THE BRETHREN, *supra* note 1, at 347; cf. *supra* note 5; *infra* note 54. On Mr. Jaworski's persuading his grand jury not to indict President Nixon, see Chi. Tribune, June 19, 1982, § 1, at 5, col. 4; see also Chi. Tribune, June 13, 1976, § 1, at 33, col. 4.



gate tapes case should remind us that early drafts and passing comments often mean little with respect to the final product. The authors, in their effort to show Mr. Nixon's privilege fittingly curtailed, fail to notice what there was that was dubious about the insistence upon making public what would once have been considered confidential conversations in the Oval Office.<sup>54</sup>

Space does not permit further discussion of the busing, abortion, death penalty, and obscenity cases dealt with in *The Brethren*. I can only suggest that such cases are more complicated than these authors believe, and that the authors' superficial grasp of the issues makes it difficult for them to see and report properly what the Court did in these cases.<sup>55</sup>

## VII. THE BRETHREN AND THE FINAL DAYS

Nor does space permit an extended discussion of still another problem raised in the book, and that is how the *entire* Watergate controversy (not just the tapes issue) is to be regarded.<sup>56</sup> Was the political trauma we were subjected to for several years good for us? Was it not a nonviolent equivalent of the Kennedy assassination, from which we have yet to recover fully?<sup>57</sup> Would a more responsible press have allowed the Watergate burglary issue to be dealt with by the Justice Department and by Congress in their own ways—which probably would have meant allowing a chastened Richard Nixon to serve out his second term?<sup>58</sup> If Mr. Woodward brought to his Watergate books<sup>59</sup> the

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54. It remains to be seen whether the cause of liberty and constitutional government gained more than it lost by the determined effort to topple Mr. Nixon. See G. ANASTAPLO, *HUMAN BEING AND CITIZEN, Impeachment and Statesmanship*, Essay No. 14 (1975); see also *supra* note 5.

55. See L. STRAUSS, *NATURAL RIGHT AND HISTORY* ch. II (1953); see also Anastaplo, *Human Nature and the First Amendment*, 40 U. PITT. L. REV. 661, 730 (1979) (these observations on Shakespeare's tragedies are included in G. ANASTAPLO, *THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE* 15-28 (1983)).

The technical legal issues dealt with in the cases commented upon in *The Brethren* are often beyond the competence of the authors—and reviewers have pointed out numerous errors. See, e.g., Grossman, Book Review, 1980 WIS. L. REV. 429, 431; Murphy, Book Review, Wash. Post, Dec. 16, 1979 (Book World) at 1, col. 1; *supra* notes 28, 48.

56. The Watergate tapes controversy takes up the greatest amount of space devoted to any case in the book. See THE BRETHREN, *supra* note 1, at 287-347. Mr. Woodward has argued that the Watergate tapes should not be routinely subpoenaed for Senate confirmation hearings. See Wash. Post, Jan. 15, 1981, at A19, col. 5.

57. See Anastaplo, *Human Nature and the First Amendment*, 40 U. PITT. L. REV. 661, 702-05 (1979).

58. *Id.* at 707-08; see also *supra* note 54. Certainly, nothing that was attempted at the Watergate could have affected the outcome of the 1972 presidential election, once Senator McGovern and Senator Eagleton were nominated.

59. C. BERNSTEIN & B. WOODWARD, *THE FINAL DAYS* (1976); C. BERNSTEIN & B. WOOD-

limited moral sensitivity and dubious intellectual standards he exhibits in *The Brethren*, then the fashionable case against Mr. Nixon may be in need of some revision.<sup>60</sup>

Some of my sentiments on this occasion were anticipated in a memorandum I prepared on the publication in the press, in 1976, of the more sensational passages in the Bob Woodward and Carl Bernstein book, *The Final Days*.<sup>61</sup> The full text of my 1976 *Final Days* memorandum, entitled *More Bad News From Mr. Nixon*, follows:

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WARD, ALL THE PRESIDENT'S MEN (1974). Consider this editorial comment in (the hardly objective) World Student Times, May 1, 1981, at 8, col. 2:

There is Homeric tragedy in the mess at *The Washington Post*. The newspaper that led in the exposure of the Watergate scandal wears a black armband these days.

The *Post* has returned a Pulitzer Prize awarded to a young reporter who wrote a story about an eight-year-old heroin junkie and now has admitted it was fiction.

Some feeble effort was put forth to say that her story was a composite. That seems even more unnerving to some of us who have always suspected that "Deep Throat," the same newspaper's informant in the Watergate scandal, was a composite source.

Did not this now disgraced reporter try to live out the fantasy of what an enterprising young Washington Post reporter should do? In any event, what she did seems to me trivial compared to what Mr. Woodward (one of *her* editors) and some of his colleagues have done to execute *their* journalistic coups. See Peretz, *False Distinction*, NEW REPUBLIC, May 14, 1983, at 10; Wall St. J., May 14, 1981, at 1, col. 1; *id.*, Apr. 23, 1981, at 27, col. 6; *id.*, Apr. 20, 1981, at 4, col. 2; *id.*, Apr. 17, 1981, at 1, col. 1. At times it does seem that there are, on the *Washington Post*, both excessive competition for bylines and far more concern with being influential than with being good. And this can be corrupting.

Still, I should note for the record that I have been told by one quite respectable law professor, who was himself a clerk to a Justice more than a decade ago, that he had found *The Brethren* reliable and interesting, with only a few small errors. And, he said, most former clerks *he* had talked with had been similarly impressed. He added that the Justices work quite hard, that they still do more of their own work than do most top-level people in other parts of the government. It should also be noted that this professor (whose standards are in effect called into question in this article) is concerned about the "elitism" of the critics of *The Brethren*. *But see supra* text accompanying notes 11, 19, 22, 29, 31, 33. (My informant probably would endorse most of what is said in Kaus, "They were wrong about *The Brethren*," Wash. Monthly, Mar. 1981, at 32).

60. Walter F. Murphy, in the panel discussion referred to, *supra* notes 11 and 12, observed that Mr. Woodward had earned a national reputation by writing about a burglary; then he himself made use of a burglary for his next book. That is, Mr. Murphy explained, Justice Brennan had shown him signs of a burglary of his office at the Court from which papers had been stolen. Mr. Armstrong responded that every person who had given them documents had had authorized access to them. (How could he *know* this? Does he not depend here on the integrity of his informants?) He observed that Mr. Woodward and he were not aware of any burgled document having been made available to them.

61. C. BERNSTEIN & B. WOODWARD, *THE FINAL DAYS* (1976). An abridged version of my *Final Days* memorandum was published in the Chi. Sun-Times, April 12, 1976, at 38, col. 3. It was commented upon in an editorial, *Nixon Book A Valuable History*, Chi. Sun-Times, April 12, 1976, at 39, col. 1. (Mr. Armstrong, it should be noticed, helped prepare *The Final Days*). Cf. Sneed & Lavin Inc., Chi. Tribune, Aug. 4, 1983, § 1, at 20, col. 1 (on the understandable distaste of a muckraker for his own medicine). See the Chekhov short story, "At sea," on the corruption and intimacy one should not see.

It should be evident from my *Final Days* memorandum that many of the criticisms I have made of *The Brethren* in this article apply as well to journalism which has nothing to do with the judicial process. See *supra* note 59; *infra* note 63.

The recent publication in the press of substantial excerpts from a dramatic book on "the final days" of the Nixon Administration should remind us how much Richard M. Nixon has contributed to the corruption of the American people, so much so that it has become virtually impossible for us to deal fairly with him. The passions he shamelessly exploited and aroused have evidently made it impossible for us to maintain a sense of proportion with respect to him. There is something about the man which does bring out the worst in us.

We should have been, for his good as well as ours, far more critical of Mr. Nixon on his way up—and far more compassionate toward him on his way down. I myself particularly regret that some of those who have enjoyed their hot pursuit of Mr. Nixon in recent years were not available to help us "contain" him and his allies a generation ago—at a time when constitutional government in the United States was truly threatened.

The measure of our corruption may be seen not only in the extent and brutality of the public probing into the psyches and intimate relations of Mr. Nixon and those around him but also in the general assumption that the press is entitled (if not even obliged) to expose to immediate view the various episodes we have had thrust upon us. Conscientious publishers and editors now seem trapped by practices and expectations which permit, if they do not even demand, more and more uninhibited delving into what would once have been thought to be strictly private matters. At the same time, the harassment of Daniel Schorr for his handling (as a reporter) of classified documents is inadequately challenged by the press.

There has been for me personally, in the recent sensationalized exposures of Mr. Nixon and his associates, something of the shock I experienced in 1969 as a spectator during those grim days of the Chicago Conspiracy Trial when a self-righteous judge was permitted to bind and gag a defendant before our very eyes. In such matters, the aberrations of a particular man (whether a judge or an author or an editor) are not as significant as the fact that he is allowed by a careless community to behave as he does.

The self-governing community grounded in decency and a sense of fair play is one which lets it be known, in an authoritative manner, "We cannot have *that!*" The principal safeguard to be relied upon in keeping the press in line is *not* official censorship or prosecution but

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It should also be evident from what has been said in this article that *part* of the trouble with *The Brethren* is that Mr. Woodward and Mr. Armstrong were simply "taken in" by some immature but plausible law clerks. One consequence of an indulgence by journalists and their readers in "personalities" is that substantive issues tend to be neglected, those issues which one cannot help but be primarily concerned with when there are only the Court's published opinions to be studied. *See supra* notes 2, 17. Richard Strout, the venerable journalist, has counseled that the "press isn't what it should be. I think we tend to deal with sensations and accidents and trivialities." R. Brownstein & N. Easton, *Permanent Washington*, *ESQUIRE*, Sept. 1983, at 45, 54; See also the report on David Broder, *id.* at 51, where he is quoted as distinguishing between "newsy items" that "may be the gist of political talk at New York cocktail parties" and analyses which explain "how elections really work."

rather the guidance of an informed and firm public opinion, that vigilant guidance which in turn depends upon the sensitivity and prudence of those who shape and monitor public opinion.

It would, on the other hand, be foolish to insist that there is nothing useful to be learned from "inside" accounts of the last days of the Nixon Administration, even when those accounts have been distorted for commercial exploitation. One can confirm, for example, that the power of a President is severely limited by the men upon whom he necessarily depends, so much so that things are seldom as bad (or, for that matter, as good) as they may seem from the outside.

But, the problem remains, what price have we had to pay for whatever useful information we have received? For one thing, we have had ratified for us by the recent revelations still another set of unprecedented infringements upon personal privacy, and in such a way as to whet the public appetite for much more of the same. The vindictive probings and destructive redbaiting of the House UnAmerican Activities Committee, which Mr. Nixon encouraged and profited from a generation ago, *sometimes* seem rather tame by comparison with that which has been done to him and his associates in recent years. Certainly, the domestic Communist conspiracy seemed to me as exaggerated then as the threat to constitutional government and civil liberties now said to have been posed by the Nixon Administration.

However that may be, human anguish and a sense of helplessness, as well as a pervasive vulgarity, all too often result from the kind of callous journalism to which we have become accustomed. We will, unless we make deliberate efforts to reconsider our principles and to retrain our appetites, deteriorate even further in these respects—and we run the risk as well of an eventual unthinking reaction which takes the form of a dangerous suppression of freedom of the press.

No doubt, the common good may occasionally call for such painful exposures as we have recently seen. But does not our current addiction to the political gossip which we reward so lavishly deprive us of serious political discourse? Such gossip—an indulgence in political pornography—is an unhealthy diversion from that vital discussion of public issues for which our freedom of the press is primarily intended.

This diversion has meant, among other things, that the genuine accomplishments, as well as the inevitable failures, of the Nixon Administration are not likely to be properly appreciated for another generation. Thus, our growing concern with trivia, including the trivia of Mr. Nixon's complex psyche and of the mechanics of the ouster of a President, has prevented us from making the sensible assessment we require and are entitled to make if we are to understand and (if need be) to correct what really happened during that unfortunate Presidency.

I have discussed elsewhere the reservations I have had about the way the ruthless campaign for Mr. Nixon's impeachment was con-

ducted. The genuine impeachable offenses of the past decade or so have had to do with our involvement in and the conduct of the Indo-Chinese War. Whether it would have been prudent for Congress to pursue *those* offenses by impeachment is, of course, another question. (Would such a pursuit have torn the country apart, and perhaps too late to affect the conduct of *that* war? The War Powers Act may be a sensible compromise between such an impeachment and doing nothing.)

I believe, if only because *we* do know better, that our ungenerous treatment of President Nixon has been shabbier than his actual treatment of his domestic "enemies." I also believe that there is considerable merit in the observation reportedly made by young David Eisenhower to his desperate father-in-law (on the eve of his resignation), "It's been my feeling that we're not as innocent as we said, or as guilty as they said."

It has been heartening to notice in recent weeks that many people who never liked Richard Nixon at all are nevertheless deeply troubled by the presumptuous liberties now being taken with him and hence with our sense of fair play. It is salutary, it seems to me, to assure such people that their instincts are sound and their sentiments healthy.<sup>62</sup>

I return in closing to a theme I have already touched upon both in this review of *The Brethren* and in my 1976 memorandum on *The Final Days*. The exploitation of the private and confidential has as one of its consequences the subversion of the public—that very public in whose interest such unprecedented exposures are justified.<sup>63</sup> The worst tastes

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62. My memorandum on *The Final Days* is relevant here not only because of the sentiments I express there which bear on my reading of *The Brethren* but also because both books are in large part fueled by considerable animus against Mr. Nixon. Chief Justice Burger, as the principal target in *The Brethren*, seems to have been treated as he was, in large part, because he was perceived by the authors as Mr. Nixon's man. This is not to deny that the Chief Justice does have a knack for alienating both colleagues and the bar. See *supra* text accompanying note 26. But, I have argued, the authors do not seem to recognize that the Chief Justice generally means well and that he has done little, if any, harm. He may even have done some good, as for example in his publicized concern about American prisons. See *supra* note 28; see also Kirsch, Book Review, L.A. Times Apr. 11, 1976, at 10 (making the following observation about *The Final Days* which can be extended, with appropriate modifications, to *The Brethren*: "So much of the detail seems gratuitously punitive, against people like the Nixon daughters and their husbands, detailing their difficulties, . . . that the reader begins to wonder whether this fury against Nixon is altogether rational.").

63. See Anastaplo, *The Public Interest in Privacy: On Becoming and Being Human*, 26 DE PAUL L. REV. 767 (1977). Also troublesome are the sorts of things done by the glamorous Italian journalist Oriana Fallaci. Much of what she says, for instance, about the Greek colonels' 1967 coup and its aftermath in her "novel," *A Man*, is distorted. Cf. G. ANASTAPLO, HUMAN BEING AND CITIZEN, Essay No. 1 (1975).

David Broder has written on a reporter's duty. See Broder, *Faulting reporters*, Chi. Sun-Times, Mar. 26, 1981, at 62, col. 3 ("Stephen Hess's *The Washington Reporters* is a reminder to those of us in the business that with the increasing editorial freedom and journalistic autonomy we have gained in our reporting jobs, we have a commensurate burden of responsibility.").

of the community are thereby catered to. I am reminded of the Athenian multitude which shouted, whenever they were deprived of anything by customs and laws, that it would be terrible if the people should not be permitted to do whatever they wished.<sup>64</sup>

It is well, in this connection, to be reminded of what was said in 1979 at a St. John's College memorial service for a prudent refugee to this country:

[H]e was concerned for the land of his refuge. What troubled him has been called many things: pseudo-sophistication, permissiveness, moral decline. His own way of putting it was much simpler, barbarism and, most dangerous of all for America, hedonism. What seemed to bother him was the fact that when people cease to observe and impose limits on themselves, it becomes natural to think more about having limits imposed by others from above.<sup>65</sup>

We can be grateful to our not uninteresting authors that they have reminded us of the constant need we Americans have to impose limits upon ourselves, and especially to curb *by the moral force of an informed public opinion* those who would cater to our baser desires. We should take care, in our responses to the opinion-makers of our day, that we not permit a cheap realism to be substituted for a noble awareness.

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64. See PLATO, APOLOGY OF SOCRATES 62 n.93 (T. West trans. 1979); see also PLATO, REPUBLIC 563C-564A; G. ANASTAPLO, *supra* note 9, at 89.

65. L. Berns, *Simon Kaplan*, THE COLLEGE (The St. John's Review) (Annapolis, Md.), Jan. 1980, at 67. Similar sentiments may be found in the eulogy delivered by Harvey Flaumenhaft on the same occasion and published in the same issue of *The College*. See *supra* note 33.