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Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court

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BOOK REVIEW

The Brethren: Inside the Supreme Court. By Bob Woodward and Scott Armstrong. New York: Simon and Schuster, 1979 Pp. 444.

Earl Warren, the Chief Justice of the United States, hailed the elevator operator as if he were campaigning, stepped in and rode to the basement of the Supreme Court Building, where the Court limousine was waiting. Warren easily guided his bulky 6-foot-1-inch, 220 pound frame into the back seat. Though he was seventy-seven, the Chief still had great stamina and resilience.

Opening paragraph of THE BRETHREN

I. AN AUTOBIOGRAPHICAL MEDITATION

My father is what is known as a "popular historian." He reconstructs events by means of research. He fleshes out characterization and dialogue as necessary, extrapolating from the documentation he has generated. He is therefore both scholar and writer, as concerned with style, structure, tension, mood, and flow as he is with accuracy of detail and fidelity to events. He started out as a journalist, more specifically a sports correspondent for a Hungarian newspaper, eventually becoming a war correspondent, a feature journalist, and a world traveler when the world was substantially larger than it is now. Instead of bedtime stories, I would hear about safaris to Africa, about scorpions in slippers and brushes with malaria, about forays into Ethiopia (nee Abyssinia) and Israel (nee Palestine). The first birthday present I can remember was a toy typewriter. By the time I was five I had a real one; I could type before I could read.

Instead of jokes my father would tell me tales redolent with a newsman's bragadoccio and a Hungarian's affinity for wild hyperbole. The best story, he would vow, is the story that you make up yourself, because it's three stories, not just one: the story, the response, and the retraction. Best of all, it's exclusive.

I care for my father with a passion that matches his own enthusiasm about everything in his life. I was raised to believe, and do believe, in the validity of popular history as a literary form. Telling a good story is as important as telling a true one.

More often than not, the villains of my adolescence were the

stodgy academics who would be called on to review my father's latest work. Whenever a new book would come out, the reviews would come in. *The New York Times*, the only paper that really matters when you come right down to it, would always feel obliged to ask a historian to review my father's books. And if there is anything that professional historians hate, it is popular history.

It is, after all, the popular historians who write the best sellers, who make all the money, who get the glory, and who (it must be admitted) occasionally are responsible for widely held misconceptions and oversimplifications. And it is the serious history scholars who write nitpicking, niggling critical essays inflated with self-importance and a need to demonstrate superior knowledge; essays which, with depressing regularity, include no more than an obligatory paragraph about the *book*—the actual product of the years of effort, research, toil, and love—hidden amid pages of hoo-hah about the reviewer's own particular scholarly interests.

As you can see, it's hard to shake impressions gleaned in childhood.

Quick cut forward. The time is the present. I am, I shudder to say, an academic. I try to maintain my sense of humor about this fact, but sometimes (late at night and on odd occasions) that can be difficult to do. More particularly, I am a lawyer-academic, an administrator of a law school. Like every other lawyer in this country, I am fascinated by the Supreme Court. Like every other lawyer in this country I had an immediate and Pavlovian response to the word that Bob Woodward and Scott Armstrong were turning their attention to the inner workings of that inner sanctum.

The story broke with the fanfare of a Kennedy wedding. *Sixty Minutes*, *Newsweek*, Harry Wellington waxing eloquent on the *Today* show. It became immediately evident that there were no major revelations to be had, but that, almost as good, there were lots of pieces of great judicial gossip.

Now, I am something of a jurisprudential prude. I don't deny a certain gut interest in the gossip, but I worry about the integrity of the institution. I'm part of a generation of lawyers for whom Perry Mason was mother's milk and who were weaned on the daring statesmanship of the Warren Court. I am terrified of the possibility that the man on the street will learn that the justices of the United States Supreme Court have feet, calves, legs (let's be frank here, whole torsos—that's probably why they wear those robes) of clay. I am, in the depths of my cowardly soul, willing to ignore the mediocrity of Warren Burger, indeed beatify him by association

with his judicial brethren, if that is the price that must be paid in order to grant Earl Warren a similar immunity from criticism. I'll let you have yours, if you'll let me have mine.

All of this autobiography has a point. It explains why, when I got set to read and review *The Brethren*, I was primed to dislike it, to take it apart for what it was striving to do, to dismember it in theory, no matter how good it turned out to be in practice. I was all set to write a piece of jurisprudence, to repudiate the vestiges of legal realism that Woodstrong would conjure up. And it explains the cynical sinking epiphany I experienced when I opened the book, read the first paragraph, and realized that they had written a work of popular history and that I was all revved up to play stodgy academic.

Mirabile dictu, it turns out that *The Brethren* is indeed a bit of popular history, but it's a thoroughly shoddy piece of work. It is bad law, worse journalism. It is boring, poorly written, sketchily researched, and ill-conceived. What I thought might be jurisprudential dynamite doesn't even pack the wallop of a cherry bomb. So you will pardon my schizophrenia, and permit me to exorcize some personal demons by explaining why, whatever else it may be in theory, in practice *The Brethren* is a lousy example of popular history. And then (and only then) I'll deliver the academic sermon, whose coda is that we shouldn't know, shouldn't even *want* to know, the details of the personal lives of the justices of the Supreme Court.

II. A CRITICAL EXEGESIS

You are probably not reading this review unless you already know a good bit about Woodstrong's efforts. You know that *The Brethren* is a book about the evolution of the Burger Court. That its authors are investigative journalists from the Washington Post (one of whom was mythologized in the film *All The President's Men*—Woodward is the one played by Robert Redford). That they have spoken with actual Supreme Court justices; that they purport to have had access to the private journal of at least one of them; that they have "sources" from deep within the judicial chambers.

You probably have also heard all the titillating stories: Justice Douglas was incontinent,[1] Chief Justice Burger is a martinet,[2]

1. Not only that, but the other Justices didn't like the way he smelled. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 391-92 (1979).

2. Woodstrong portray him as both humorless and vindictive. They suggest, for example, that he was not at all amused by a Christmas skit that Rehnquist approved

Justice Rehnquist is a clown.[3] And you have probably read some of the extensive criticism of the book that has already appeared, including deftly-wrought hatchet jobs in *The New York Times*,[4] *The New York Review of Books*,[5] and *The New Republic*.[6]

Much of the criticism is dead on target. In fact the only sort of criticism that I have seen thus far with which I would disagree relates to the function of popular history and the nature of a journalist's sources. *The Brethren* is written for a general audience, for non-lawyers as well as attorneys. The Justices speak, they think, they feel. In trying to convey these facts of judicial life, Woodstrong put words in the mouths of the justices, thoughts into their heads.[7] I do not doubt for a moment that all of this reconstruction is precisely that, an attempt to generate a whole portrait by the accretion of individual strokes. The critical test is not whether any one stroke is accurate, indeed none of them need be perfectly right. Rather, it is whether the finished product, taken as a whole, bears a faithful resemblance to the model.

Undoubtedly there are errors in the authors' research. They almost certainly must ascribe thoughts to people who never said them. It may well be that they have even botched some of the chronology of the broad sweep of their story. For those of us concerned with a close reading of a particular decision, these sorts of error may well invalidate the contribution of the book. But *The Brethren* was not written for academics, and it is not fair to judge it, at least initially, as though it were.

The real question is whether Woodstrong do a good, or even a serviceable, job of making a narrow patch of recent history come alive. Does the accumulation of all their little lies add up to a large truth? Do we know the institution, or the men who comprise it, any better when we finish the book than we did when we began it?

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which took the judicial selection process somewhat lightly, and that this resulted in Rehnquist's being denied any significant opinions on the subsequent assignment sheet. *Id.* at 412.

3. Rehnquist is apparently the life of all the Court's parties. *Id.* at 269-70, 412-13.

4. Adler, *Book Review: The Brethren*, N.Y. TIMES, Dec. 16, 1979, § 7, at 1.

5. Lewis, *Supreme Court Confidential*, N.Y. REV. OF BOOKS, Feb. 7, 1980, at 3.

6. Hughes, *Book Review: The Brethren*, THE NEW REPUBLIC, Feb. 23, 1980, at 30.

7. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 7.

These are the terms on which the book may be fairly judged, and it is on these terms that the book, initially, crucially, and ultimately, fails.

There are many reasons why this is so. On the most mechanical level, it is woodenly written and egregiously edited. Woodstrong must bear the responsibility for the first half of that deficiency, one which is highlighted by their regular criticism of the prose style of the various justices.[8] Legal writing, after all, is rarely felicitous. Clarity is the prime desideratum, and it is a sad fact of intellectual life that clarity may often be bought at the expense of grace. Works that emerge from the end of a committee drafting process (such as that used by the Court) are particularly poor samples of an individual's style.

On the other hand, prose technique is at the heart of the popular historian's craft. While I don't care whether a Supreme Court opinion is gripping, it is critically important that a book like *The Brethren* be well wrought. And, sad to say, this book is just the opposite. The language is simplistic and monotonous. There are frequent grammatical lapses, including a remarkable preference for particularly awkward split infinitives.[9] Transitions are often arbitrary, as though the mere addition of a conjunction suffices to yoke two totally distinct events together.[10] Many descriptions are so over-long that they become tedious.[11] All in all, the book reads like an ambitious first draft.[12]

This unfinished quality strongly suggests that the book's editor was asleep at the switch. In general the book evidences an extraordinary lack of care by the publisher. Bad editing has allowed grammatical errors to make their way into print, wordy passages to remain untouched, and the odd transitions to be left in as inexplicable monuments to a lack of concern for the flow of the manuscript. Underscoring all of this is a thoroughly shoddy typesetting job.

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8. Woodstrong manage to criticize a Blackmun dissent as overwritten, in the middle of a paragraph of their own which is virtually incomprehensible. *Id.* at 362.

9. *See, e.g., id.* at 119 ("to never again"), 129 ("[t]o not utter"), 424 ("to effectively withdraw").

10. *See, e.g., id.* at 184 and 362.

11. The Watergate Tapes section is interminable. *Id.* at 285-347.

12. There are also various minor errors of fact that should have been corrected by a copy editor (or, for that matter, any law student). Thus, for example, they refer to the University of California at Berkeley's law school as Boalt Law School, *id.* at 240, and to Yale's law review as the Yale Law School Journal, *id.* at 443.

Admittedly each of these concerns is petty. But they are meant as expressions of a more significant underlying point. Woodward and Armstrong are journalists with little experience at writing the sort of sustained narrative required by a book. The medium for which they regularly write anticipates and expects strong editorial involvement. *The Brethren* suffers for want of that sort of stylistic and organizational help.

But these problems merely mar the surface luster of the book. The more fundamental difficulty lies in the way Woodstrong researched and developed their work. It is not merely the narrator's voice that is monotonous. The characterizations are no less flat and lifeless. Later I will explain why I agree with many of the book's critics that it is tragically wrong to be concerned with the personalities of Supreme Court justices. But for now let us assume that that is an appropriate end, and the one that the authors here are seeking. They miss by a mile. The problem appears to be a combination of simplistic prose style and poor research. Human beings are caricatured, their motivation is rarely illuminated.

Good journalism is not necessarily "objective," but it is never intrusive. Facts, rather than judgments, are presented. If a point is made, a writer's prejudices expressed, these emerge from the selection and organization of the facts, not from an internal polemic. But Woodstrong work the other way. Time and again they judge their own material, draw their own conclusions, insult the intelligence and objectivity of their readers by assuming that the story cannot speak for itself.

Warren Burger, for example, emerges as a stuffy, stupid, self-impressed individual, obsessed with controlling the process of the court even to the exclusion of standing up for his own rigidly conservative principles.[13] It is a portrait drawn with the subtlety and sensitivity of Mister Bluster on the Howdy Doody Show. Woodstrong's Burger is simply not a believable human being. Indeed, none of the justices emerge with plausibly complex identities.[14]

We are assuming that we want to know about the private lives of the justices, that we are interested in their personalities and ec-

13. The authors note several occasions on which he would join an otherwise unanimous majority, in order to appear in control. *See id.* at 53, 136-39, 414-20. They also suggest that he would occasionally withhold his own vote or change his mind in order to control case assignment. *See, e.g., id.* at 178-81, 417-22.

14. This is particularly disappointing with respect to Justice Douglas after his retirement. The Woodstrong account makes him appear to be a pathetic old man, totally without human dignity. *See, e.g., id.* at 433.

centricities. Presumably, then, we are legal realists, intrigued by the justices' breakfast menus as a way of understanding their judicial decisions. But if we really want to *understand*, rather than indignantly criticize, the men who make up the Court, then we need to find authors who are capable of getting beneath the surface of their cast of characters, who can make us understand *why* Warren Burger votes as he does, *why* William Douglas adored the wilderness, *why* William Brennan is a civil libertarian. We will want, if we are to be fair to these men, to understand the subtle shadings of their personalities.

Why don't we get these insights from *The Brethren*? Because the authors are willing to settle for less and because they sought (or were limited to) a peculiarly narrow range of informants. They spoke to the justices, to their recent clerks, to some of the people who work in the Court.[15] They did not speak to wives and children, friends, relatives, rivals, co-workers. Each of the justices they write about had lived full lives before they were appointed to the Court. Even Douglas, appointed when he was younger than any of the rest of the group, was forty when he was tapped. But Woodstrong haven't touched that material, they tell us nothing about the justices' lives.

It may be argued that the authors didn't wish to invade the personal privacy of the men they profiled. But that is hardly tenable in a book which revels in the violation of confidence and the exposure of personal tastes and attitudes. How much worse would it be to reveal some of the Chief Justice's family life, than to detail his hatred for his former colleague David Bazelon?[16]

Well, then, perhaps it may be said that this is not a personal history, but a political one. The idea is not to dramatize the lives of fourteen individuals, but to capture somehow the independent life of an institution. Such a claim is also unsuccessful. The life of the institution may speak for itself, in the voice of its published opinions. Or it may be explicated by a complex understanding of the way in which individual personas contribute to the corporate acts of the group. Either of these would be defensible. But Woodstrong give us neither, presenting instead something in the middle, something wholly unsatisfactory.

They expose the squabbles, assuming that these somehow are an important institutional characteristic. But they seem satisfied to

15. *Id.* at 4.
16. *See, e.g., id.* at 22-23.

reveal them without understanding them. It might well be that judges' decisions depend crucially on their breakfast menus. That would not mean, however, that there would ever be a market for a collection of the daily menus of a particular judge. Whatever insight there is in the "realist" claim, it has little to do with the food, and everything to do with the judge's *attitude towards* the food. So the book of menus would be of little help unless we also had a remarkably detailed and sensitive personal profile of the individual involved.

If we accept this book on its own terms, then, we are forced to believe that Woodstrong should have dug deeper, done more (not less) character reconstruction. The opening paragraph holds out the promise of a book that will do this. The image of Earl Warren, the old campaigner, is a striking and an insightful one. It is, sadly, perhaps the only intriguing personal insight in the book. The strength of popular history is that it makes the events come alive, it makes historical characters seem to be real, fallible, vulnerable, complex. To do this it must take liberties that scholarly history cannot afford, but it also reaps the benefit of a visceral understanding to which scholarly history rarely aspires. Woodward and Armstrong take the risks but relinquish the benefit.

As I have already suggested, I suspect that this problem derives as much from the nature of the sources they were able to generate as it does from the authors' own shortcomings. Woodward and Armstrong seem to have mined a mother lode of Supreme Court clerks. Others have noted that this leads to a peculiarly pro-clerk attitude in their understanding of the court. Clerks' roles loom somewhat larger than life; their influence on the justices seems blown out of proportion.[17] Perhaps the most telling aspect of this is that the clerks never come in for the kind of criticism that the justices do. Clerks are often quoted as ridiculing a justice.[18] Not once is the work of a clerk criticized in the book.[19]

These are certainly serious problems. They suggest not only that Woodstrong are unfortunately accepting of whatever their sources tell them, but that they have a disturbing naivete about the

17. Thus, the clerks are accorded a more impressive understanding of the role of the Court than Justice Blackmun. *Id.* at 120-21. And they are given the credit for virtually all of Justice Marshall's work. *See, e.g., id.* at 258-59.

18. For example, in the thoughts that Woodstrong attribute to one of Blackmun's clerks, one of Blackmun's opinions is "crudely written and poorly organized." *Id.* at 183.

19. Indeed, Justice Douglas is castigated by the authors when he treats a woman clerk brusquely. *Id.* at 240-44.

actual workings of a court. Supreme Court clerks serve for a year. They live in a world populated primarily by research and books and secondarily by interactions with their fellow clerks. Their contact with justices is often slight. It is almost universally highly formalized even at its most recreational. The clerks are, quite simply, the worst possible source of material about the internal psychology of the justices. Of course, there are exceptions to this rule, but they are rare, and for the most part clerks know roughly as much about their judges as artists know about their patrons.

Once again, I acknowledge that this concern may seem a rather small one. Certainly, it is possible that there are limitations to Woodstrong's sources. But there are always limitations to any effort to capture human endeavor in words. Aren't we better off for having this insight into the clerks' point of view than we would have been had the authors left the topic alone? On one level, of course, we are. And a book about the clerks'-eye-view of the Court would be an interesting and a novel one.[20] Such a book would require considerably more attention to the *personae* of the clerks than *The Brethren* offers, however. Indeed, Woodward and Armstrong seem to assume that their sources should function as more or less omnipotent third person narrators. The clerks comment on the action, occasionally participate in it, more frequently report on it and criticize it, but they have no names, no personalities, no preferences, tastes, eccentricities or predilections of their own.

So the clerks are everywhere while remaining themselves invisible. Even this, in itself, is no great crime. But I want to suggest a real difficulty which may be far more disturbing. The treatment of the clerks is only one symptom of it. I'm concerned that the entire organization of the book may be undermined, the view of history it presents distorted, by the skewed research sample available to the authors. Thus, the clerks' perspective is presented as gospel, leading us to wonder whether the big picture for Woodstrong is defined as being whatever picture it is that they have the palette to paint. They had the clerks as sources, so it is only the clerks' story that is put forward as the truth. This suspicion, if supported by other evidence, must undermine our evaluation of the entire enterprise. And there is indeed supporting evidence available, even to a casual reader with little insight into the working of the Court.

Recall that Woodward's own history is rather tightly bound up

20. The closest thing to such a work treads so softly that it provides little if any insight into the workings of the Court. *See* J. WILKINSON, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW (1974).

with Watergate, that he had developed an impressive collection of material on all aspects of that trauma, and that he has an unusually strong interest in it. Given that this is the case, let us ask whether, objectively, the Watergate Tapes case merits roughly fifteen percent of this book's pages.[21] To place that in perspective, the book covers the entire case load of seven years of the Court's work in roughly 420 pages. Sixty-two of these are given over to the single Watergate tapes case. The entire 1974 Term merits thirty-eight pages. Indeed, only two of the six non-Watergate terms merit more pages than that single case, and all the non-Watergate cases of the 1973 Term merit an aggregate of ten pages.

There is still more evidence that the very foundation of the book is lopsided, favoring cases where the authors had material and disfavoring equally important cases where they seem to have little if any. I was particularly interested to see how they treated the *DeFunis* case.[22] Of course, that case was, at least potentially, among the most divisive that the Court heard during the period covered by Woodstrong. Furthermore, since *Bakke*[23] postdates the period of their concern, *DeFunis* was the single case in which the Court addressed reverse discrimination directly. Contemporary events make it evident that the Court has yet to articulate a clear set of holdings in that area, and a reading of the individual justices' attitudes would be particularly helpful.

These, however, are all the concerns of an academic lawyer. I also had a voyeuristic curiosity about the case. The Court had granted certiorari in *DeFunis*,[24] but during the 1973 Term it dismissed the case as moot.[25] This action was bizarre, since the case had already been argued and there was nothing new at the time of the dismissal. Marco DeFunis was in fact well on his way to graduating from the school which had originally rejected him, but that had been true also at the time certiorari was initially granted. Nevertheless, the justices voted to dismiss the case without addressing any of the problems it raised. Only Justice Douglas came to terms with the merits of the case.[26] And, in a highly unusual dissent to this sort of dismissal, four justices pointed out the incongruity of the Court's action.[27]

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21. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 285-347.
22. DeFunis v. Odegaard, 416 U.S. 312 (1974).
23. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
24. 414 U.S. 1038 (1974).
25. 416 U.S. 312 (1974).
26. *Id.* at 320.
27. *Id.* at 348 (Brennan, J., Douglas, J., White, J., and Marshall, J., dissenting).

This is precisely the sort of situation which piques the interest of an outsider looking in. What sorts of internal horsetrading had gone on first to grant certiorari then to deny it? What role did Douglas play? Why did the Court refuse to decide that case, and how was that decision reached? These are the sort of questions that *The Brethren* seems to wallow in. Endless pages are devoted to descriptions of early drafts,[28] vote switching,[29] internal negotiations,[30] and, particularly, the use of a threatened dissent by a single justice as a lever to move the Court to action.[31] But *DeFunis* rates less than a page.[32] The questions it raised are not even identified, much less answered. It is impossible to avoid speculation that Woodstrong simply did not have the goods in this instance, and therefore ignored the importance of the case.

Taken together, these separate symptoms—the over-reliance on clerks as sources, the extended discussion of the Tapes case, and the disturbing avoidance of *DeFunis*—suggest that the book is riddled with a pervasive and dangerous disease. The authors write about the things that they were able to generate material about. History is rewritten on the basis of research coincidence. This lack of perspective, if my speculation is correct, necessarily undermines the book so severely that I wonder whether it merits the term nonfiction at all.

I am sensitive to the charge that I am here lapsing into my academic garb, that this criticism is unfair when applied to a work of popular, rather than scholarly, history. But I must protest. It would certainly be unfair to lodge these complaints against any individual aspect of the book. I suggested at the outset that the criterion to be applied should not ask whether each individual stroke was perfect, but rather should determine whether the overall portrait presents an acceptable likeness. And it is emphatically the overall likeness with which I am concerned. I don't honestly care whether Woodstrong skipped *DeFunis;* they might have many legitimate reasons for doing so. I am, however, fearful that the problems I have identified all suggest a systematic distortion of reality

28. The lengthy Watergate Tapes discussion takes the reader through every incarnation that opinion ever saw. B. WOODWARD & S. ARMSTRONG, *supra* note 1, at 310-47 *passim.*

29. *See, e.g.,* the discussion of the Court's vascillation on the *Donaldson* right-to-treatment case. *Id.* at 372-83.

30. Again, the Watergate Tapes case goes into tremendous detail about the internal wranglings of the justices. *Id.* at 310-47.

31. *See, e.g.,* threats by Black and Brennan. *Id.* at 42-55, 438-42.

32. *Id.* at 282.

to serve the convenience of the authors. And the result, I am very much afraid, may not capture the likeness of the real workings of the Court at all.

III. A JURISPRUDENTIAL HOMILY

I have not thus far discussed what I think is the most telling criticism of *The Brethren*. In addition to being rather badly done, it is, quite simply, boring. This is an idiosyncratic response. Others may find it exciting. There was a time not very long ago when I found law school faculty meetings exciting. I came to my current job directly out of law school, and I brought with me the law student's paranoid belief that faculty consciously conspire in their meetings. I assumed, that is, a uniformity of purpose in the policies that emerged. I suspected that there were unarticulated principles at work, that personal pettiness was rampant, that anti-student sentiment ran deep.

It turns out, of course, that some of my assumptions were correct. But, to my surprise, that doesn't make them interesting. The more you know about the inner manipulations of a deliberative social decision-making mechanism, the less interesting its deliberations beome. And, by now, almost two years after my first taste of the academic apple, I have long since learned that you can become tired of virtually any new flavor after a very short period of time. Indeed, I can think of only one thing that I would find less interesting than participating in a faculty meeting, and that is reading the transcript of one. Which brings me back to the subject at hand.

This is not, I think, a matter of taste, but of jurisprudence. Just as the reliance on clerks as sources was a symptom of the book's distortion of history, the fact of its tedium is a symptom of an important underlying insight. *The Brethren* is boring because the legal realists were wrong. The law is *not* a function of judicial peccadillos, and this is made manifest when we tire of reading about the quirks of Supreme Court justices. The machinations that lead up to judicial opinions fail to illuminate those opinions in precisely the way that legislative history fails to provide any real insight into the principles that make up the foundation of the law.[33] Those principles energize the law in a way that Woodstrong's chronicle of judicial bitchiness never can.

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33. *See* Dworkin, *How to Read the Civil Rights Act*, 26 N.Y. REV. OF BOOKS, Dec. 20, 1979, p. 37 at IV. A concern with principles rather than personalities is generally articulated by Ronald Dworkin. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (*see* especially ch. 4).

The sociology of judicial decision-making has its devotees. It has its insights and its truths. I certainly would not want to claim that the process revealed by Woodward and Armstrong does not in practice generate the law we discuss in theory. But it is a process that looks very much like the deliberation of any group of nine picky persons distanced rather substantially from the impact of their decisions. And if it demonstrates anything about the relation of judicial personality to ultimate outcome, it suggests most strongly that the psychological and interpersonal variables are too numerous ever to be captured before the fact. Furthermore, once a decision is articulated it takes on a life of its own. The important sociological and psychological events are not the ones that relate to the court which reached the decision in the last case. Rather, they are the ones pertaining to the *next* court, the court that will interpret the opinion in the future. Thus, we cannot use our psychological and sociological insights to predict outcomes, and the outcomes have an impact by no means determined by those insights. So why should we be interested in them at all?

My answer is that we should not be interested in them, and indeed we are not interested in them except as novelties. Our major interest is in witnessing the unmasking of the Court as the clock strikes twelve, at looking behind the screen to see what the Wizard really looks like. And perhaps this demythologizing has a salutary effect. But I am very concerned that it does not, that in fact it may undermine the good that the Court actually accomplishes. After all, Frank Baum had the wisdom not to end the *Wizard of Oz* with the unmasking of the Wizard. He had the depth of understanding to know that myth serves important human functions, that the citizens of Oz were better off with their wizard than without, humbug or no. And he gave his characters the compassion and the faith to accept the Wizard's magic as real even after their rude awakening. Because, after all, he did make it possible for the lion to discover his courage, for the woodman to find his heart, and for the scarecrow to become conscious of his brain.

I am more cynical than Baum, and less trusting of the general reader than he was of the children for whom he wrote. I don't know how many of us retain the innocence necessary to breathe life back into our legal fictions even after we have attended their rather gruesome autopsy. And I am particularly troubled by a book such as *The Brethren* which seems to embody the opposite of Baum's theme: Roust the humbugs out! Ridicule them! Don't trust them! Recognize that they are no different from the rest of us, humble, fallible mor-

tals. A message like this makes it difficult for even the most trusting of us ever to accept the authority of the Court again.

The Supreme Court plays a vital part in our lives as lawyers. It is a black box that generates law. We put fact patterns in at one end and we get opinions out the other. The opinions can then be spun back into the seamless web of the law.[34] We need this black box because of the necessary limitations of our legal system. Legislatures can never totally avoid ambiguity, no workable theory of the law can seriously hope to close all of its gaps.[35] Uncertainty of substance is, I think, a necessary, even a welcome, part of the law. But no legal system can tolerate uncertainty of outcome. Whatever the initial substance of the law, mechanisms must exist which derive unambiguous outcomes for every case.[36]

The question necessarily arises, if the substance of the law is uncertain, from where does a court derive its authority? And it is this question that the mystery of the Supreme Court addresses. We can accept the fallibility of the entire judicial system, we can observe its mundane origins and we can decry the human failings of its membership. But we can do so only so long as we accept the ultimate authority of the system. We can do so only so long as we believe that, taken as a whole, it works more justice than injustice, it does more good than harm. And our belief in the system as a whole may be condensed into a belief simply in the authority of the apex of the pyramid. To trust the motives of the judiciary as a whole we need only trust the motives of the court of final review. In this sense, our trust in the authority of law is directly tied to our belief in the wisdom of the Supreme Court.

That belief is of course a fiction. Nevertheless, we do our best to perpetuate it. We do so because it is such an important fiction, so fundamental to our acceptance of all the rest of the social fabric. Our distance from the Court helps us to perpetuate the myth. So do the ritual trappings with which the Court is invested. The Court's tradition of written opinions, and the secrecy in which its deliberations have been cloaked also contribute to our ability to accept the members of the Court as more than judges. They are justices, the personification of fairness itself.

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34. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

35. I try to demonstrate this point in considerably greater detail in Farago, *Intractable Cases*, 55 N.Y.U.L. REV. ___ (1980) (forthcoming). *See also* Farago, *Judicial Cybernetics: The Effects of Self-Reference in Dworkin's Rights Thesis*, 14 VAL. U.L. REV. 371 (1980).

36. Farago, *Intractable Cases*, 55 N.Y.U.L. REV. ___ (1980) (forthcoming).

The mythology of the Court is one aspect of our mutual trust of the legal system, and it is therefore part of the price we pay for our social bond. When that mythology is taken away from us, the bond is weakened and the system may begin to unravel. This might all be regrettably necessary if the knowledge we gained were somehow important or valuable. But that knowledge is useless. It tells us little about how the Court has acted and less about how it will act. Not only does it not help us to understand the political principles on which our law is based, it actually diverts our attention *away* from those principles, and urges us to believe that the law as explicated by the Supreme Court is somehow merely a function of the foibles of nine not very appealing individuals.

The Supreme Court is not like any other part of our legal system. It is not a political mechanism, even though it may act politically and even though its membership may be appointed by politicians. It bears the same relation to the rest of the polity that H.L.A. Hart's "rule of recognition" bears to all other legal rules.[37] It is an ultimate justificatory force, and so must be autonomous and self-validating. We may of course disagree with the Court's holdings and interpretations at any given time. We may criticize its opinions and propose alternatives we feel are better. But we cannot *distrust* the Court without distrusting the entire system, for it is the Court that functions to keep everything else honest; when it is decisively challenged it will take everything else with it. There may come a time when this is necessary, when we will want to look scrupulously into the affairs of the justices and the way in which they make their decisions and exercise their power. But all that Woodward and Armstrong have demonstrated is that that time has not yet come. Their research, if evaluated with a sensitivity for the role of the Court in the society, should have led them inexorably to the conclusion that there was no book to be written here. It is a profound pity that they lacked that sensitivity, a pity which is ironically redeemed in part by the fact that they also lacked the skill to do the job well.

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37. H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961).

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