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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.

It is said that "[l]ike frankfurters, laws cease to inspire respect in proportion as we know how they are made."¹ What that statement ignores is that some factors inherent in *judicial* lawmaking are not readily discernible,² and especially so absent legal training. In a recent book gaining nationwide attention, Bob Woodward and Scott Armstrong attempt to show how law is made by the United States Supreme Court. The book is not written by lawyers³ or for lawyers; most of the information came to these reporters from former law clerks of past and present Justices.⁴ By recounting isolated details of the resolution of a number of cases⁵ from the 1969 Term through the 1975 Term, the writers purport to expose the "decision-making" of an institution which has managed to "escape public scrutiny."⁶ Thus, packaged as a sort of political consumer's fact-finding expedition, the text begins with a quote from Chief Justice Burger that the high Court, because its decisions are "unreviewable," needs "careful scrutiny."⁷ Unfortunately, what the authors have given the Court is not that, and what they have written is likely to create public disrespect for the legal system.

1. E. ESAR, *COMIC DICTIONARY* 158 (1943). Indiana legislators are fond of quipping, "The making of law, like the making of sausage, should not be witnessed." Of course, having seen sausage made, we may choose never to eat it again; we have no choice but to be consumers of law.

2. See generally B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

3. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 3 (1979). Nowhere is this more apparent than at page 184, where, after stating that earlier cases, presumably including *Griswold v. Connecticut*, 381 U.S. 479 (1965), were based on the ninth amendment, the authors paraphrase the *tenth* amendment. One Justice's "very expansive view" of "due process" is explained in twenty-one words at page 403.

4. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 3. One hundred seventy law clerks were interviewed. For purposes of this review, the information is treated as fact.

5. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *United States v. Nixon*, 418 U.S. 683 (1974); *Keyes v. School Dist.*, 413 U.S. 189 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Furman v. Georgia*, 408 U.S. 238 (1972); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*Pentagon Papers* case); *Cohen v. California*, 403 U.S. 15 (1971); *Evans v. Abney*, 396 U.S. 435 (1970).

6. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 1.

7. *Id.* at 5.

Unlike the book, this review is written for lawyers; like the book, it incorporates a law clerk's perspective. It concentrates on two questions: What does the book reveal? and does the revelation matter?

Some words of caution, though, before we begin. Virtually nothing in this book would be admissible in a court of law. It is mainly double, triple, even quadruple hearsay. Even more disconcerting is the authors' imputation of thoughts to characters whenever the authors deemed it appropriate;⁸ naturally, they did not deem it appropriate to tell exactly where this occurs. The reader is left to his own imagination to determine what is merely hearsay and what is complete fiction, although the attribution is sometimes so outrageous it is not difficult to distinguish.⁹ Furthermore, the book gives extensive treatment to relatively few decisions. Many decisions are treated in less than a page, the book consistently failing to disclose the Court's voluminous research.

Overall, "aftermath" is a fitting description of the book's approach. When addressing school busing questions, the authors direct the reader to a unique side of lawmaking, the aftermath of judicial legislation;¹⁰ similarly, obscenity questions reflect the aftermath of decreeing *de novo* review.¹¹ Moreover, there are constant references to the Warren Court—specifically, a continual attempt to compare Chief Justice Burger unfavorably with former Chief Justice Warren.¹² Regardless of whether such unfavorable comparison is justified, it is surely overdone. Burger is portrayed as a pompous, "uncontrollable, blustery braggart"¹³ with no redeeming intellect,¹⁴

8. "We have attributed thoughts, feelings, conclusions, predispositions and motivations to each of the Justices." *Id.* at 4.

9. Consider, for example, this excerpt:

[Burger] had to attend a judicial conference in Williamsburg, Virginia. He complained there about some of the attorneys who appeared before the Supreme Court. "The quality is far below what it could be," he told a discussion panel. [Federal Judge David] Bazelon too was on the panel, and he praised the Chief Justice for speaking up about attorney incompetence. Bazelon agreed that it was "the most serious threat to the administration of justice." Privately, Bazelon thought the most serious threat to justice was probably Burger.

Id. at 379.

10. *Cf. Brown v. Board of Educ.*, 349 U.S. 294 (1955) (manner in which school desegregation to be achieved).

11. *Cf. Roth v. United States*, 354 U.S. 476 (1957) (Harlan, J., concurring in part and dissenting in part).

12. *See, e.g., B. WOODWARD & S. ARMSTRONG, supra* note 3, at 57, 64, 126, 197.

13. *Id.* at 173. The description is attributed to Justice Blackmun.

14. Justices Stewart, White, and Brennan reportedly debated whether Burger was "evil or stupid." *Id.* at 323. Drafts written by the Chief Justice were frequently in-

despised by nearly every member of the Court.¹⁵ His overconcern for ceremony is ridiculed.¹⁶ Likewise, his concern for power is exposed by showing he sometimes withheld or changed his votes, apparently to be in the majority and therefore able to assign the cases.¹⁷ This kindles a recurring theme that this Chief Justice does not "lead" the Court. Just how he might do so, or whether we might want him to do so, is not clear; for those who question some of Burger's opinions, the idea that he does not "lead" the Court may be quite satisfying. Justice Stewart reportedly explained to Justice Powell that the "leadership" of the Court consists of the middle votes,¹⁸ and realistically, this is true since a Chief Justice leads only if others choose to follow.¹⁹

The other Justices receive better reviews, but their portraits are surprisingly one-dimensional. Blackmun is weak;²⁰ Marshall is lazy;²¹ Douglas is inflexible.²² Rehnquist is two-dimensional—casual and sneaky.²³ Stewart, Powell, White, and Brennan are stronger characters, but no one—with the possible exception of Stevens²⁴—

ferior: Powell said if an associate in his firm had written the like, the associate would have been fired, *id.* at 284; Stewart said one of Burger's drafts deserved a grade of "D", *id.* at 347. Brennan referred to the Chief Justice as "Dummy." *Id.* at 359. Burger's own clerk apologized for the quality of his employer's work. *Id.* at 250.

15. *Id.* at *passim*.

16. *See, e.g., id.* at 32n., 89, 153, 178, 269-70.

17. Frequently he would assign the cases to himself. This was his prerogative, but he sometimes abused it by assigning to himself although his thinking on the case was not in the mainstream of the majority. *E.g., id.* at 421 (the *Nebraska Press* case). Assignment power could also be used to withhold public stature from a Justice by delegating to him only insignificant decisions. Burger did this to Rehnquist, *id.* at 412, and to Brennan. *Id.* at 419. Apparently the practice did not begin with Burger, for Stewart complained of having received similar treatment from Warren. *Id.* at 105.

18. *Id.* at 256. This presages the conclusion. *See id.* at 444.

19. Warren Burger became the fifteenth Chief Justice of the Court, following several whose names are all but forgotten in history. For more detailed information in an effort at comparison, see L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* (1969). Additional insights are provided in B. SCHWARTZ, *THE LAW IN AMERICA* (1974).

20. *See, e.g., B. WOODWARD & S. ARMSTRONG, supra* note 3, at 106, 121, 176 ("paralyzed by indecisiveness").

21. *See, e.g., id.* at 197, 258, 270, 429. Clerks in other offices regarded Marshall as unfit to sit on the Court. *Id.* at 197.

22. *See, e.g., id.* at 138n., 187, 189, 207, 278. Those who have heard accounts of Douglas' return to the Court after retirement may be interested to read that he based his action on a Supreme Court rule. *See id.* at 397-98.

23. *See, e.g., id.* at 269, 383, 408. *See also* note 42 *infra* and accompanying text.

24. This may be accounted for by the fact that Stevens was appointed in 1975, close to the end of the period covered by the book.

escapes unscathed. With selected anecdotes, the authors endeavor to unmask the naivete,²⁵ bigotry,²⁶ impressionability,²⁷ and interpersonal animosity²⁸ of the Court. The raconteurs succeed in proving that Supreme Court appointment does not divest an individual of his humanity.²⁹

The everyday interaction of these human-flawed jurists is touted as the decision-making process. Compromises are given a great deal of attention, apparently as if the Court should be able to "find the law" without internal disagreement. Predictably, the compromises are most evident in the school busing cases, and with good reason: the Court considered it necessary to hand down unanimous busing decisions in order to avoid the appearance of disagreement on the issue of desegregation itself.³⁰ In one such case,³¹ Justice Black

25. In one hilarious episode during a period of several obscenity decisions, the Justices were shown a *National Lampoon* cartoon in which each was caricatured in some deviate sexual act. Two of them, Blackmun and Brennan, did not understand their roles. Brennan boasted to his clerks that he was the only one depicted favorably, as he was spreading open his robe to protect children in front of him from witnessing the others' acts. The clerks had to explain "flashing." *Id.* at 279-80.

26. For Burger's views on blacks, women, and Jews see *id.* at 283-84. Marshall considered Burger a racist, *id.* at 178, but Marshall seemed to find racist implications in various types of cases. He viewed capital punishment as the ultimate form of racial discrimination, *id.* at 205, and sought flexibility in the abortion decision to give black women more time to have pregnancy diagnosed. *Id.* at 232. Powell overcame his prior prejudices against domestic radicals. *Id.* at 223.

27. See, e.g., *id.* at 185, 284. The appellant's brief in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), was written by a former Stewart clerk and aimed specifically at garnering Stewart's vote. *Id.* at 371. Stewart was ultimately the writer of the opinion.

28. *Id.* at *passim*.

29. Cf. *Doe v. Commonwealth's Atty. for City of Richmond*, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting). "(W)hat we know as men is not forgotten as judges." *Id.* See generally B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). Justice Cardozo said:

Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. . . . There has been a certain lack of candor . . . as if judges must lose respect and confidence by the reminder that they are subject to human limitations. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by. We like to figure to ourselves the processes of justice as coldly objective and impersonal. . . . That is an ideal of objective truth toward which every system of jurisprudence tends. It is an ideal of which great publicists and judges have spoken as of something possible to attain. [Quotations omitted.] It has a lofty sound . . . but it can never be more than partly true.

Id. at 167-69.

30. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 97.

31. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

manipulated the Court into altering its views, by threatening to dissent.³² A similar threat from White in the *Nixon* case³³ resulted in an objected-to draft's finally being amended.³⁴ Douglas, in like manner, threatened a dissent exposing disagreement on a procedural matter concerning the abortion cases.³⁵ Douglas eventually relented.³⁶ Nearly every case seems to have elements of compromise, but such compromises do not discredit the process. The process is ever one of balancing, and the value of unanimity, and certainly of majority, is a factor to be balanced. If group compromise through individual pressure is inevitable, it is far better that it come from within the Court, rather than from another branch of government.³⁷

In a court composed of nine jurists, group compromise would seem to be a *sine qua non* in a democracy.³⁸ Obviously, were each

32. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 95-112. A federal judge observed that the decision looked like two opinions laid side-by-side. *Id.* at 112.

33. *Id.* at 332. White disagreed with the Chief Justice on the application of Rule 17(C), and said he would write a separate dissent if the Chief Justice's draft became law.

34. Burger amended his draft, actually substituting segments written by other members of the Court; White's 17(C) opinion was incorporated almost verbatim. *Id.* at 334.

35. After a visit from Burger, Blackmun "withdrew" his circulated abortion case draft, saying it needed more work. That would put it over to the next term. Viewing this as a political tactic in an election year, Douglas determined to publish an immediate individual opinion lambasting this strategy. *Id.* at 187-88.

36. Douglas did not publish his dissent, believing it would prejudice the resolution of upcoming abortion decisions. *Id.* at 189.

37. Of course, the most infamous blackmail of the Supreme Court was President Franklin Roosevelt's "Court-packing plan" of 1937. This resulted in the upholding of the National Labor Relations Act as constitutional in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). For more details, see Stern, *The Commerce Clause and the National Economy, 1933-46*, 59 HARV. L. REV. 645, 677 (1946). For an account suggesting the Act would have been upheld notwithstanding the President's threat, see B. SCHWARTZ, *THE LAW IN AMERICA* 159-60 (1974).

38. In an address to the Section of Judicial Administration of the American Bar Association, Justice Douglas explained:

Certainty and unanimity in the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable; for complete subservience to the political regime is a *sine qua non* to judicial survival under either system. One cannot imagine the courts of Hitler engaged in a public debate over the principles of Der Fuehrer, with a minority of one or four deploring or denouncing the principles themselves. One cannot imagine a judge of a Communist court dissenting against the decrees of the Kremlin.

Disagreement among judges is as true to the character of democracy as freedom of speech itself. The dissenting opinion is as genuinely American as Otis' denunciation of the general warrants, as Thomas

judge to write his own thoughts there would be nine opinions. Due process requires a certain expediency, and it is doubtful that any judge has ever agreed totally with the opinions in which he simply "joins." Rather, he balances the magnitude of his objection against a swift decision, as well as against the possibility of alienating his colleagues, and the future ramifications that would entail. Compromise is an inherent part of agreement.

Apart from compromise, the book also evidences retrogression. The changed Court membership brought with it a backward-looking shift in philosophy and consequently the problem of dealing with former decisions now considered incorrect³⁹ by the later majority. The subject surfaces throughout the book, both Black⁴⁰ and Harlan⁴¹ having voiced their sentiments. One way to resolve the problem jurisprudentially is to distinguish earlier cases on their facts.⁴² Taken to its extreme, this avenue would provide no legal system at all: nearly every case reaching an appellate court has distinguish-

Paine's, Thomas Jefferson's, or James Madison's briefs for civil liberties.

Democracy, like religion, is full of sects and schisms. Every political campaign demonstrates it. Every session of a legislature proves it. No man or group of men has a monopoly on truth, wisdom or virtue. An idea, once advanced for public acceptance, divides like an ameoba. The if's and but's and however's each claim a part; and what was once a whole is soon carved into many separate pieces, some of which are larger than the original itself.

Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUD. SOC'Y 104 (1948).

39. "Incorrect" may be an inadequate description; apart from evaluating the law, the jurists also are able to take into account the changes their decisions have wrought on the system and on society as a whole. In reconsidering the effect of *Maryland v. Wirtz*, 392 U.S. 183 (1968), the court heeded financial problems of urban areas. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 406-08.

40. Although he disagreed with *Mapp v. Ohio*, 367 U.S. 643 (1961), Black did not want to overrule it; he preferred to create a checklist of "reasonable" and "unreasonable" searches. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 116.

41. Harlan advocated cutting back on the rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), but he did not want to begin overruling cases simply because the Court's majority had changed its membership. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 113.

42. Rehnquist was a master at this. See *id.* at 403-05 for his undulating separation of *Paul v. Davis*, 424 U.S. 693 (1976) from the earlier *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

Justice Cardozo pointed out that our system stands indicted for "uncertainty" when, among other things, attempted distinctions are made on facts which present no distinction in applicable legal principles. See B. CARDOZO, *THE GROWTH OF THE LAW* 3 (1924). "Judgments themselves have importance . . . as they permit a reasonable prediction that like judgments will be rendered if like situations are repeated. . . . When the uniformities are sufficiently constant to be the subject of prediction with reasonable certainty, we say that law exists." *Id.* at 37-38.

able facts. Each new majority is thus faced with an institutional policy decision having far-reaching significance for the entire system.⁴³

When Stevens replaced Douglas, the newest majority emerged full-strength. *National League of Cities v. Usery*⁴⁴ highlights the swinging of the judicial pendulum. The deciding of *Usery*, overruling *Maryland v. Wirtz*⁴⁵ and making a marked incursion into Congressional exercise of Commerce Clause power, provides insight into the reluctance of some to shift from a prior stance. In a remarkable confrontation, Justice White convinced Justice Stewart to join the opinion, despite Stewart's disinclination.⁴⁶ The import of this conversation will be lost on the reader untrained in law. To those who understand the legal process, however, it clearly signifies the weighing of *stare decisis* against the perceived need for change.⁴⁷ In a real sense, it shows the system works as it should, regardless of one's opinion of the result.

Admittedly, that conclusion requires reading between lines; the text seems calculated to inspire cynicism. For example, circulated drafts of proposed opinions are criticized by Justices and clerks as inept, unprofessional attempts, sometimes embodying misleading citations or hidden traps.⁴⁸ In a few instances, Justices indicated they did not even realize what they had written.⁴⁹ Burger's approach

43. A sterling example is the death of the *Lochner v. New York*, 189 U.S. 45 (1905), line of cases, overruled in *Bunting v. Oregon*, 243 U.S. 426 (1917).

44. 426 U.S. 833 (1976).

45. 392 U.S. 183 (1968) (sustained application of the Fair Labor Standards Act to include hospitals, nursing homes, and educational institutions, whether public or private).

46. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 407. White reasoned that the unflinching position kept the "jurisprudence of the Court tied up for reasons that are not on the public record." *Id.*

47. For an excellent discussion of the principle of *stare decisis* and a discourse of how it is frequently misunderstood, see Radin, *Case Law and Stare Decisis*, 33 COLUM. L. REV. 199 (1933).

48. *See, e.g.*, B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 383, 408. From a law clerk's perspective, it should be pointed out that the misuse of citations is not *per se* a deliberate, insidious fraud one judge attempts to perpetrate on the others. The misuse of citation is frequently the mark of *negligence*, as the writer of the opinion has unwittingly relied upon the brief of (usually) the appellant to present accurate representations of case law. Ethical Consideration 7-23 and Disciplinary Rule 7-102(A)(5) are apparently not sufficient to prevent this.

49. *E.g., id.* at 153-54 (Burger on *Charlotte-Mecklenburg*); *id.* at 198 (Marshall on *Stanley v. Georgia*, 394 U.S. 557 (1969)). This may indicate the extent to which the Justices rely on their clerks. With respect to Marshall, at least, this is revealed in the text. *See id.* at 258.

to the Nixon tapes case⁵⁰ is far from laudable, as is Blackmun's handling of *Roe v. Wade*.⁵¹ Brennan's treatment of *Moore v. Illinois*,⁵² though he did not write it, can only be described as unconscionable.⁵³ The book's tendency to discourage confidence in the system cannot be denied.

There is nevertheless a positive view. First, while the drafts were decried as horrible, they did not become law until they were altered; or, if they did become law, dissents were filed. Second, we should note the substantive reasons some drafts were objectionable. In one case,⁵⁴ other Justices had to remind the novice Blackmun that a Supreme Court decision stands as precedent for all similar cases rather than representing a simple resolution for two parties.⁵⁵ Deciding issues not presented, on the other hand, would draw Harlan's opposition.⁵⁶ Stewart's objection to obscenity decisions was his conviction that "local standards" were inconsistent with a singular first amendment.⁵⁷ Brennan feared Powell's vague proposals on the *Nixon* case would undo much of *Marbury v. Madison*,⁵⁸ yet Stewart thought Burger's approach to the same case was judicial legislation.⁵⁹ Moreover, the overriding strictures of the bus-ing and obscenity cases were that the proposed opinions did not make the law exactly clear to lower courts.⁶⁰ It was not that the Court did not understand; it was that the Court had to teach. The fact that such criticisms were made is again a positive reflection;

50. *Id.* at 287-334. See note 34 *supra*.

51. It should come as no surprise, to those familiar with the opinion, that it was apparently written in the library of the Mayo Clinic. See *id.* at 229-30. Justice White reportedly described Blackmun as having appointed himself "an unofficial medical board." *Id.* at 416. Blackmun's overriding concern for physicians' discretion and medical evidence was creating a class of cases akin to "political questions" in which the Court should not interfere. *Id.* White recognized that the opinion had subjected the Court to ridicule. *Id.*

52. 408 U.S. 786 (1972).

53. Despite his belief that the decision was wrong, Brennan joined Blackmun's opinion in an effort to bolster that Justice's independence from Burger. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 225. His clerks were shocked. *Id.*

54. *Wyman v. James*, 400 U.S. 309 (1971).

55. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 121.

56. *Id.* at 206.

57. *Id.* at 249.

58. 5 U.S. (1 Cranch) 137 (1803). See B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 298-99.

59. *Id.* at 338.

60. See, e.g., *id.* at 47, 281. The words "all deliberate speed" from *Brown v. Board of Educ.*, 349 U.S. 294 (1955), had resulted only in delay.

and viewed in this light, the first drafts matter little. What matters is the judicial process itself—an idea sadly missing in this book.

Indeed, the book's entire premise—that we need this information to evaluate the quality of the Court's decision-making⁶¹—is misconceived. The judicial branch is not a compeer of the other branches of government, and its performance cannot be identically evaluated. Woodward and Armstrong, like skeptical legal positivists,⁶² ask us to disregard the difference. The distinction, however, is critical: courts must give *reasoned opinions* for their decisions.⁶³ The three functions of the judicial system—law declaration, fact identification, and law application—are all exhibited in the written decision, and can be evaluated *there*.⁶⁴ The genesis of the decision as focalized by these authors has no meaning for the system. A lawyer cannot appear before a court and cite *The Brethren* as authority. All that has meaning in our system is the decision itself. Language is the exponent of intention;⁶⁵ the Court is to be taken at its word. What the Court writes, it must honor, as must those who receive its directives.

61. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 1-4.

62. See generally L. FULLER, *ANATOMY OF THE LAW* 112 (1968).

63. See generally Llewellyn, *Impressions of the Conference*, 14 U. CIN. L. REV. 343 (1940).

64. With one caveat: the Court must identify the facts accurately, in order for the application of the law to be a logical synthesis. The book suggests this was not always done. See B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 118, 225. In each case, a different, more correct view of the facts was noted but not disclosed to the rest of the Court. In both cases, it was Justice Brennan who declined to disclose the information. Justice Rehnquist in one opinion misstated the legislative history of a law. *Id.* at 222. There is perhaps little protection against this abuse beyond a petition for rehearing (for the prejudiced party) or a comparison with lower court decisions and public legislative records (for attorneys).

It should be noted, however, as in note 48 *supra*, that such a misrepresentation could be made by one or both parties on appeal (or on writ of certiorari). The Supreme Court of Indiana recently reprimanded an appellant for doing so. See *Ashbaugh v. State*, ___ Ind. ___, 400 N.E. 2d 767, 772 (1980). Except in the unusual circumstances of *de novo* review, a court at the appellate level is not required to read a transcript to ascertain the facts. The Supreme Court is not, after all, a trial court. In both instances referred to above, it was by reading the transcripts and re-weighing the evidence that the distortions were discovered by clerks. See B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 118, 224. For a discussion of the Court's power to review the facts and its self-restraint in that regard, see Note, *Supreme Court Review of State Court Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328 (1962).

65. This maxim, *Index amini sermo*, is generally applied to written instruments such as contracts and wills; however, it has also been cited with reference to the interpretation of statutes, and the point is the same regarding interpretation of a written decision.

Accordingly, nothing divulged alters the way law is to be practiced, nor should it change the way an attorney reacts intellectually to Supreme Court decisions. There have been badly written, badly reasoned opinions; that was already clear. There have been unpublished disagreements; that is to be expected. There has been retrogression; that is part of the system. Yet the simplistic treatment of the subject matter leaves the public unaware that a great heritage of centuries of judge-made law stands behind every decision, that the decisions signify more than outcomes of personal squabbles. The revelations of *The Brethren* may unavoidably disquiet the public, but they need not discomfort its legal community.

If anything should disturb the legal profession, it is the fact of revelation itself. Various accounts demonstrate that confidentiality was part of the law clerks' employment obligation,⁶⁶ yet the book bespeaks an arrant violation of that trust. In analyzing the ethics of such disclosure, we should not be misled, either by a notion that these persons were exempt from the standard to which other lawyers are held, or that their disclosures are somehow justified as fostering better government. Neither apologetic makes sense. Whether they are regarded as lawyers under the Code of Professional Responsibility or as court personnel under the Code of Judicial Conduct, the standard has been abrogated.

Judicial clerks are not addressed directly by either Code, but the American Bar Association states, "(T)he Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."⁶⁷ This statement is broad enough to encompass law clerks, and such persons have been recognized in ABA Informal Opinions.⁶⁸ One of these edicts appears to perceive the special relationship existing between a law clerk and his employer.⁶⁹ Unlike other lawyers,⁷⁰ the law clerk holds *ex parte* con-

66. *Id.* at 150, 237, 288, 298, 356. For a somewhat unusual treatment of this problem, see Abramson, *Should a Clerk Ever Reveal Confidential Information?*, 63 JUDICATURE 361 (1980).

67. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY 1 (1978).

68. *E.g.*, ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINION, No. 1346 (1975); ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINION, No. 1333 (1975). The latter recognizes that a law clerk might be a person not admitted to the Bar.

69. Informal Opinion 1346, *supra* note 68, deals with the question of a judge's "farming-out" research questions to a center for legal research. This was deemed improper, absent notice to all parties; notice was not required for his talks with court personnel.

70. Other lawyers would be barred by Disciplinary Rule 7-110(B).

versations with the judge. To some degree, he becomes the alter ego of the judge.⁷¹ Thus, the judge is not the clerk's client; rather, the clerk is the judge's working, thinking tool. His technical status as a lawyer⁷² is not so important as his status as an arm of the Court. Canon Three of the Judicial Code directs a judge to require those who serve him to observe "the standards of fidelity and diligence which apply to him."⁷³ Foremost among these is upholding the integrity and independence of the judiciary.⁷⁴ For this reason, confidentiality is expected and essential.

This is not to suggest that the clerk is a mechanical employee untouched by personal ethics. On more than one recounted occasion, clerks in *The Brethren* refused to follow Justices' directions, believing them unethical.⁷⁵ Despite the duty to reveal knowledge of misconduct by a judge,⁷⁶ apparently no clerk took this directive seriously enough to expose the violation,⁷⁷ if one existed. Similarly, there is a duty to make certain that judges are fit for the offices they hold,⁷⁸ but there is a corresponding duty to "*avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.*"⁷⁹ Criticisms motivated by any reason other than *improvement* of the system are not justified.⁸⁰ The concern for improvement of the system also permits disclosure of factual material for publication if it would "supply a tool by which the legal profession and others concerned . . . may better serve their clients."⁸¹ The revelations proffered for publication in *The Brethren* fall far short of these ideals. Instead, they represent myopic recitations of educated disagreement, under the guise of educating the public about its highest institution's "decision-making."

71. Justice Powell specifically requested that his law clerks present the liberal view to him as a challenge to his ordinarily conservative thinking. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 354-55. An "alter ego" is also a confidante, a trusted companion.

72. See note 68 *supra*. It is not clear whether the fact of nonadmittance to a specific Bar would classify the clerk as other than an attorney.

73. ABA CODE OF JUDICIAL CONDUCT, Canon 3(B)(2) (1978).

74. ABA CODE OF JUDICIAL CONDUCT, Canon 1 (1978).

75. B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 138, 278. See also *id.* at 222 (clerk apologizes).

76. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-103 (1978).

77. U.S. CONST. art. III, § 1, states that the Justices "shall hold their Offices during good Behaviour."

78. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 8, EC 8-6 (1978).

79. *Id.* (emphasis added).

80. *Id.* (emphasis added).

81. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL DECISION C-762 (1964) (giving information on jury verdicts).

A jurist expects "public scrutiny";⁸² absent professional misconduct, he should not have to anticipate private betrayal in a best-seller. If a conclusion springs from this book, it is that written decisions, more than Justices, need scrutiny; that lawyers, not laymen, should do the scrutinizing; and that irresponsible disclosures by law clerks are as inimical to our system as are attorneys' breaches of confidentiality.

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82. ABA CODE OF JUDICIAL CONDUCT, Canon 2, Commentary (1978).

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