Contemplating difficulties of this kind one is led to question the wisdom of devoting so much space (Chapters 11-13) to drug offences, public order offences and motor traffic offences. These are important topics, particularly to the practitioner, and raise wide and fundamental questions about society. Nevertheless, like the Hart-Devlin controversy, they seem more appropriate to consequential or specialist courses than to the sort of basic criminal law concepts to which the great bulk of the book is devoted. The space used on these matters might better have been devoted to more thorough coverage of such topics as theft and arrest. Moreover, interesting though drugs, public order and automobiles may be in the larger context of the ordering of society, in themselves they throw little or no light upon the general principles of the criminal law as a body of law.

Two small inaccuracies have been noted. On page 241 (paragraph 3.4) there is a brief reference to the defence of infancy and a reference back to paragraph 2.50 (page 129). Unfortunately paragraph 2.50 does not include an adequate account of the defence of infancy either. On page 295 (paragraph 3.38) Jacobs J. is credited ungrammatically with a "dicta" to the effect that foresight of possibility of death is enough for murder. His judgment extracted on page 280 reads as if it rejects that proposition.

Colin Howard*

The Brethren, by B. WOODWARD and S. ARMSTRONG. (Simon and Schuster, New York, 1979), pp. 1-467, with Index. Cloth recommended retail price $26.00 (ISBN: 0 671 24110 9).

> "A Court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to self-indulge itself and the least likely to engage in dispassionate self-analysis . . ." (page 5)

With these introductory words, quoting Chief Justice Warren Burger at a judicial conference whilst a Circuit Court of Appeals judge, Woodward and Armstrong embark on an examination of the United States Supreme Court. The prospect of revealing the inner workings of the Court is fascinating. The result is disappointing.

The book covers the period from 1969 to 1976, the first seven years of the Chief Justiceship of Warren E. Burger. It commences with the events leading up to Burger's appointment and thereafter the chapters deal in chronological order with each annual court term. The resignations of Chief Justice Warren, Justices Black, Harlan and Douglas, and the appointments of Justices Blackmun, Powell, Rehnquist and Stevens as well as Chief Justice Burger occur during this period.

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The approach of the book is two-pronged: a review of the major cases faced by the Court during the period; and an "analysis" of the individual justices as they interact with one another in relation to the various cases. The emphasis, however, is on personalities and the approach is informal and gossipy, although non-lawyers will find the book hard to read. Cases are used as a vehicle to reveal the operation of the Court and the inter-relationship of the justices. There is little legal analysis in the book and this is highlighted by the absence of citations. It consists largely of jumbled up anecdotes which do not progress toward a final picture or assessment of the Court as a whole or of the justices as individuals.

Nevertheless, the cases which are dealt with in any detail are intrinsically interesting and extremely political due to the role of the United States Supreme Court as the guardian of the rights of the individual which are enshrined in the United States Constitution. The Court repeatedly is faced with cases on bussing, obscenity, discrimination generally and police power and these are all dealt with as well as major cases on abortion, the death penalty, the Pentagon Papers and of course, the Nixon tapes. Despite the authors' overlay of political "blackwashing" (whereby political motivations are attributed to every decision) which results in the attention of the reader being constantly drawn to situations of opinion-negotiating between the justices, the background to the well known cases is fascinating. The Nixon tapes case is the best documented, and to read of the multiple drafts and troubled negotiations which preceded the unanimous opinion of the Court is to gain some understanding of the workings of the institution.

The principal fault of the book lies in the over-emphasis by the authors on the political nature of the cases as they seek to portray the justices as men motivated more by a desire to write the majority opinion in a case than by a sense of legal scholarship and integrity. Again and again the authors depict the justices horsetrading in opinions: Burger allegedly changing his opinion in order to be in the majority and thus able to assign a particular justice to write the first draft in a case; Douglas threatening to reveal the manoeuvring in the Court unless an opinion is published and not further delayed; other justices agreeing in one case in return for support in another. It is this all-pervading political "blackwash" which finally destroys any credibility the book might have.

One specific example of this concerns Justice William J. Brennan. It is alleged (at page 225) that Brennan voted against his views on the merits in a case (*Moore* v. *Illinois*)[1] in order to make a fifth vote for the majority opinion written by Justice Blackmun to support Blackmun and preserve his recently acquired confidence. As would appear to be the case throughout the book, the source of this information was a clerk, in this instance explicitly acknowledged. In a review in *The New York Review of Books* A. Lewis examines this allegation in great detail.[2] All

[1] 408 U.S. 786 (1972).
[2] Vol. 27, No. 1, 7 February 1980.

the clerks of the period were contacted by a particularly outraged clerk of Brennan's, and all denied such an incident. Lewis concluded:

> "It [the book] makes a serious charge without serious evidence—almost offhandedly, in two pages. It gets facts wrong. . . . In sum, the treatment of *Moore* v. *Illinois* leaves doubts not only about the authors' understanding but about their scrupulousness."[3]

This is indeed a serious charge, but it underlies the fundamental doubts one has when reading the book. The cases and conversations between justices are related in a seemingly straightforward "facts only" manner. However, sources are usually only "on background" and very few conversations or circulated memoranda are documented. Despite this, the authors do not hesitate to reveal the innermost thoughts of the justices, for example, over a page is devoted to Justice Potter Stewart's own thoughts as to whether he should make himself available for the position of Chief Justice. The reader is constantly informed of all the justices' states of mind and emotions. Even the most gullible reader must sense the heavy hand of imagination in such revelations.

In the introduction to the book Woodward and Armstrong state that they interviewed "more than two hundred people, including several Justices, more than one hundred and seventy former law clerks, and several dozen former employees of the Court" (page 3). Despite the assertion that several justices were "interviewed" it is evident that most of the impressions are those of the clerks. This is made clear by the shift in emphasis as the more liberal "Warren era" clerks are replaced by the more conservative "Burger era" clerks. Justice Brennan, a man of the centre in the 1969 term is portrayed as an extreme liberal in the 1972 term. Of course, this shift would be evident from the more conservative nature of the Court itself in 1972 but one cannot help but feel the impact of the views of the clerks. Similarly, in 1969 Justice Marshall is glowingly described at conference as "relaxed, almost intuitively reaching his common-sense solution" (page 47). Two years later Marshall is stigmatised as "not willing to do his homework" (page 197).

The figure which dominates the book is that of Chief Justice Burger. The exaggerated picture of him which emerges is so disparaging it is more a caricature than a believable portrait. Expressions of his legal incompetence are attributed to many of the other justices: he is described as "grossly inadequate" (page 256); as a "dummy" (page 359); and as meriting a D grade in law school (page 347). His guiding principle in reaching a decision in a case is shown to be the desire to be in the majority in order that he may assign the case and thus to some extent control the final opinion. Before it could take effect, Burger's appointment as Chief Justice had to be confirmed as had all Supreme Court appointments, by the Senate Judiciary Committee. This Committee had before it Burger's performance on the Court of Appeals for the District of Columbia. It is hard to believe that the Committee would have confirmed the appointment of a man of solid achievement if he had

[3] *Id.*, 4.

truly been as legally inept as he is described in the book. Other justices are portrayed more sketchily. Perhaps because he was already very ill in 1969 the famous liberal Justice Black emerges as a shadowy figure. Similarly, the reader is left with unsatisfying, impressionistic pictures of most of the justices apart from Burger and the crusading Douglas.

Despite the heavyhanded and laboured political emphasis throughout the book and the authors' failure to fill out the personalities of the justices they all (apart from Burger) emerge as thoughtful, concerned men attempting to grapple with the difficult decisions which face the Court. Justice Harlan emerges as a very proper, upright lawyer; Justice White is more dynamic and competitive but similarly thoughtful as is Justice Rehnquist. Even Justice Blackmun, who is often blackened by the assertion that he is under the influence of Burger, is hardworking, troubled by the decisions before him, conscientious and responsible.

The authors' constant emphasis on the political manoeuvring within the Court not only slants the picture within the Court but obscures the complex problems with which the justices are forced to deal. The nature of the cases inevitably means that the political and social predilections of the individual justices cannot be ignored. The verdict of the book, if there can be said to be one, which is released through the mouthpiece of one of the justices, is that the Court makes "pragmatic rather than principled decisions—shading the facts, twisting the law, warping logic to reconcile the unreconcilable" (page 442). This judgment is unremittingly harsh.

The authors fail to point out that the drafts and redrafts, discussions and negotiations which take place, often resulting in compromise opinions, are a result not of the individual justice's lack of principle but are demanded by the nature of the case combined with the nature of the institution within which they operate. By tradition the Supreme Court produces only a majority and a minority opinion. Given this premise, the clearly divisive nature of the cases and the natural fact that the justices are ideologically diverse, it is only to be expected that joint views do not quietly materialise but have to be hammered out. Indeed, it is surely desirable that a justice is prepared to change his initial views on a case in response to a new argument or point raised by another justice. Further, it seems only to be efficient organisation that a particular justice in the majority is assigned to write the first opinion and quite understandable that, having worked on a draft, he would be anxious to retain the agreement of the majority. Of course, the power to assign opinions carries with it to some extent the power to affect the final opinion but the underlying integrity of the majority if not all of the justices emerges as sufficient to balance such power.

Indirectly, the book reveals the inside workings of the judgment process: the judicial conference after the hearing of the case at which a preliminary vote is taken; the subsequent assignment of the case to a justice in the majority; the circulation of the draft opinion and subsequent suggestions from other justices; the negotiations leading up to the final opinion. However, apart from these details of the Court machinery, the reader is left with grave doubts as to how many of the incidents discussed

can be believed and to what extent the portraits of the justices suffer from journalistic embellishment.

A number of interesting comparisons can be made between the procedures of the United States Supreme Court and those of the Australian High Court. At present, the High Court does not have an accepted tradition of majority/minority opinions. Indeed, the tradition in the High Court, as in the English House of Lords, is of individual judgments. A particular justice is not usually assigned to write the first opinion in a case. Whoever does produce the first opinion in a case circulates it to the other chambers. The other justices are free to agree with it or to write separate judgments. There is no pressure to arrive at a unified view.

The multiplicity of High Court judgments in a case has been criticised by academics and practitioners anxious for a clear ruling in a case. Certainly in very recent times there has been a marked increase in the number of joint judgments. *The Brethren* reveals problems with majority/minority opinions but the recent adoption of a similar practice by the Privy Council may indicate that the less attractive aspects of the system may be avoided by a court which deals with less politically explosive cases than those with which the Supreme Court deals. It remains to be seen whether High Court joint judgments continue and whether they will extend to important constitutional cases. The deeply entrenched tradition of individuality will be hard to overcome.

Linked to this procedure of joint judgments in the Supreme Court is the judicial conference. This is a conference which takes place after a case is heard but before a draft is written. At the conference justices indicate their views on a case and on the basis of these views the senior justice in the majority may assign the writing of the opinion either to himself or to another justice in the majority. The High Court does not at present have any such formal case conference procedure, although it too has been advocated.

The introduction of a conference after the hearing of a case poses a number of problems under the present High Court procedures. In the United States the Court is presented with full written briefs and counsel are only permitted limited oral argument. This allows the justices to fully study the case before argument, to ask a few pertinent questions and consequently to have considered the case closely before a conference. In the High Court there are no written briefs (although counsel occasionally hand up written summaries of arguments) and there is unlimited oral argument. A justice's detailed study of a case takes place after the hearing. If a post hearing conference procedure were instituted some justices might have fully researched a case and formed final views whilst others might have to commit themselves to a point of view before completing their work on the case. If on further reflection and research a justice then wished to change his mind there might be allegations of improper motives occasioning such a change of mind, as *The Brethren* constantly demonstrates.

Another problem is one of time. The extended oral argument combined with workload pressure results in the justices having very little time to

spend discussing cases. All the time available is filled by sitting in Court, researching and writing judgments. Perhaps one day the practice of written briefs and limited oral argument will be introduced in the High Court and the two problems outlined above will be largely overcome. However, this will involve the introduction of an entirely new set of procedures. The tradition of individual thought and work is so strong in the High Court that such changes could not be introduced in a sudden fashion but would have to be the result of a slow, gradual development. If one day a formal conference procedure were introduced as part of a series of change it would be unrealistic to expect it not to be affected by internal politics and to expect a justice not to attempt to persuade others to his point of view.

The book leaves the exact role of the Supreme Court clerks unclear. From the manner in which the book is written the clerks appear to be the centre of the entire court system. They constantly deride the justices. Given that they are the major source of information for the book this inflated role is understandable, although it further undermines the reader's confidence in the accuracy of the book. It is well known that the clerks do act as general aides to the justices; researchers, proponents of "young" ideas, people to bounce ideas off and with whom to discuss points of law, friends, and above all people conversant with the daily workings of the court system who are trustworthy and loyal to an individual justice. Whether or not the publication of the book will render the justices more reticent about confiding in their clerks remains to be seen.

The role of an associate to an Australian High Court justice is far less determined by the nature of the Court system than is the role of the American Supreme Court clerk. Its scope is dependent on the individual justice. Some associates only do legal research. Others will in addition incorporate their thoughts about a case in the form of a draft judgment. Most associates are privy to communications between justices but as yet the collegiate bond or network which seems to exist between Supreme Court clerks does not exist between High Court associates. The tradition of individual thought imposes its own strict sense of confidentiality. The move to Canberra, with the individual chambers all on the same floor of the one building instead of dispersed between the various states, might change this.

At present each High Court justice has one associate. Most United States Supreme Court justices have four clerks. Much of the time of the clerks is spent reviewing "cert petitions" (petitions to remove cases into the Supreme Court). It has been advocated that the number of High Court associates be increased. If provision is made in the new, proposed High Court rules for special leave applications to be on documentary materials there may be pressure for the number of associates to be increased. This increase could weaken the present bond between justice and associate and lead to the formation of an associate network.

The most fundamental difference between the United States Supreme Court and the Australian High Court revealed by the book concerns the greater political role assumed by the Supreme Court. The High

Court is unlikely to become as involved as the Supreme Court in adjudicating on divisive social and political issues unless lower courts and specialist tribunals are widely invested with public interest jurisdiction or human rights legislation is introduced.

The High Court is featured in the press more often than previously. However, at present a book about the High Court in the style of *The Brethren* would have little public appeal in Australia. The attraction of *The Brethren* lies in the uneasy relationship between the investigative press in the United States, granted full scope after Watergate, and the powerful third branch of the United States government.

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