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Towards a Subjective Theory of Law: Some Legal Implications of Existentialism

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TOWARDS A SUBJECTIVE THEORY OF LAW: SOME LEGAL IMPLICATIONS OF EXISTENTIALISM

> *This is not meant for any pulpit, not for men to chant or tell their children. Not beautiful enough.*
>
> *But perhaps this can suggest a passion. Perhaps this passion could be brought to clarify, make more radiant, the standing Law.*
>
> Leonard Cohen*

Whenever any important thinker or school gives us a new conception of man or society, it is the duty of the legal community to consider it. Freud, Darwin, Marx and Durkheim have all had an impact upon the law—for better or worse—and have been assimilated in some way into the body of law. Whether the new theory is accepted or not is unimportant; but if we ignore it completely we isolate the law from reality and place it in danger of becoming desiccated and dogmatic. The stream of thought that Roscoe Pound introduced into American law must be kept alive, not as a monument to his memory, but as an obligation to ourselves—as long as "justice" remains the ideal. In a rare article[1] entitled *The Importance of Being: Some Reflections on Existentialism in Relation to Law*,[2] Anthony Blackshield has written:

> In continental philosophy, existentialism is of course by far the most pervasive contemporary influence; it is almost the matrix of modern continental philosophic thought, in a far more basic and radical sense than, for instance, linguistic philosophy in England. Even for those contemporary continental philosophers who are not existentialists (and of course there are many), existentialism is part of the philosophic air they breathe. There can be no adequate understanding of modern continental philosophy without a thorough understanding of existentialism. This extends to the work of continental legal philosophers as well; and in this respect as in many others, the important legal-philosophical work now being done in Latin-American countries shares the continental character.[3]

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* From *Lines from my Grandfather's Journal*, in THE SPICE-BOX OF EARTH 79 (paper ed. 1971).

1. Writings dealing with existentialism and the law are less rare outside of the Anglo-American community. Anthony Blackshield cites Werner Maihofer, Erich Fechner, Ulrich Hommes and Georg Cohn among others as having made use of existentialism in their legal writings. The only work translated into English and accessible to this author was G. COHN, EXISTENTIALISM AND LEGAL SCIENCE (1967).

2. 10 NATURAL L.F. 67 (1965).

3. *Id.* at 69.

Since existentialism has also made an impression upon various areas of American life, such as literature, education and psychiatry, the fact that it has not been written about by legal scholars in this country seems paradoxical. If existentialism has been left on the shelf in our (super) market of ideas, one may assume that either the product is faulty or the market is sluggish.

INTRODUCTION

Existentialism, like marriage, has made some strange (and eventually unwilling) bedfellows. A collection of existentialist writings, such as Walter Kaufmann's,[4] may include highly religious Protestants, Catholics, atheists (and anti-religionists) as well as former Nazis and Communists. If placed in a single room for eternity their conversation would probably resemble a scene from *No Exit;* in any case they would not get along. However, when listened to in their most individual voices (often in the finest literary styles) they lead us on a frequently agonizing search into the nature of man's being in order to reawaken us to "authentic" existence. Concerning the development of this philosophy Karl Jaspers has written:

> Quietly, something enormous has happened in the reality of Western man: a destruction of all authority, a radical disillusionment in an over-confident reason, and a dissolution of bonds have made anything, absolutely anything, seem possible. . . . Philosophizing to be authentic must grow out of our new reality, and there take its stand.[5]

In their struggle to make us strip away all illusions and self-deception, to accept our freedom and responsibility and drive us out of all the havens of weakness provided by deterministic theories, they raise questions of importance to each of us as individuals, and most especially, as lawyers and judges. This paper represents an attempt, not to reconcile the views of these philosophers, but merely to glean a few ideas from various existentialist thinkers and consider their application to the American legal system. If "the structural framework of their philosophy is such that it positively demands to be filled with a content drawn from the personal idiosyncrasies and outlook of each thinker who employs it,"[6] then this paper may be thought of as the excusable "idio-

4. W. KAUFMANN, EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE (1956).
5. K. JASPERS, REASON AND EXISTENZ 23 (1955).
6. Blackshield, *supra* note 2, at 72.

syncrasy" of one who is neither a lawyer nor philosopher, but is merely trying to fill a vacuum.

I. The Shudder Before Judgment

Any discussion of existentialism should begin with Soren Kierkegaard, who in seeking to revitalize Christianity created a "new total intellectual attitude for men"[7] which has profoundly influenced even those who have no interest or sympathy for any religion. In the first half of the nineteenth century he saw technology creating too many physical comforts and the individual complacently allowing himself to be swallowed up by the "crowd." Therefore, he ironically stated that his task was "to create difficulties everywhere."[8] In his attack upon science he was not lamenting the idyllic village that industrialism had left deserted, but was seeking to warn us that there are limits to rational thought, that human existence cannot be reduced to a simple scientific formula or a closed Hegelian system. His "subjectivity" is sometimes misunderstood as a collapse into irrationalism,[9] but is more correctly placed into perspective in this analysis by John Wild:

> [Kierkegaard's] method of dealing with these data [phenomena of inner existence] is eminently objective and rational. He is simply trying to describe them without distortion, precisely as they are given. . . . He is a great phenomenologist, analyzing confused regions of personal existence with penetrating clarity, and revealing their necessary connections with one another. Far from being a lapse into subjective bias and irrationalism, his philosophical work is a triumph of rational description and analysis, an original penetration of reason into deeps of experience long languishing in the dark obscurity of the obvious.[10]

Although Friedrich Nietzsche was a scathing opponent of the Christianity which was Kierkegaard's sole obsession, the two thinkers are often treated together, as in Jaspers' famous lecture where he stated

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7. K. Jaspers, *supra* note 5, at 25.

8. Kierkegaard, *On His Mission,* in W. Kaufmann, *supra* note 4, at 85.

9.

> Instead of asking whether Descartes' fine ideal that our reasoning should be clear and distinct, reinforced since by the tremendous progress of the sciences, might not eventually lead philosophers to concentrate on logic and trivialities to the neglect of large and certainly important areas, Kierkegaard renounced clear and distinct thinking altogether.

W. Kaufmann, *supra* note 4, at 18.

10. Wild, *Kierkegaard and Contemporary Existentialist Philosophy,* in A Kierkegaard Critique [hereinafter cited as Critique] 25 (H. Johnson & N. Thulstrup eds. 1962).

that "[b]oth are irreplaceable, as having dared to be shipwrecked."[11] Kierkegaard would probably have agreed with Nietzsche's contention that "men are inclined to laziness," that "[t]hey hide behind customs and opinions . . . and what they fear most is the trouble with which any unconditional honesty and nudity will burden them."[12] The Danish thinker feared that this laziness would cause people to allow the "crowd" or the state to make their ethical decisions for them, and his mission was to make people aware of their freedom and the necesssity of making their own choices. At times one is almost led to believe that his condemnation of the "crowd" betrays a touch of the misanthrope. However, by attributing the greatness of Socrates to the fact that when standing accused before the assembled citizens of Athens the great philosopher "did not see masses, but only individuals,"[13] Kierkegaard reveals that his main concern is for each individual in the "crowd."

Kierkegaard's attacks upon speculative philosophy in general, and Hegel in particular, are especially applicable to legal theory. Hegel's system, he writes, is bound to fail because it tries to introduce movement into logic—"a sheer confusion of logical science."[14] Since an individual is always in the process of "existing" or "becoming," he cannot find answers to ethical (or we may add, legal) questions in any closed system which develops out of logic or history. History provides no dependable answers to our problems because our understanding of the past can never be complete. Even if a value were correct at one point in time, it may no longer be correct in face of the unique situation confronting us. Custom and tradition—"the inertia of history"—hold no value for Kierkegaard since an individual's decision in similar circumstances the day before may no longer be correct for him. The subjective individual is always aware of the ethical because neither history nor science can govern his decision. A philosophy is

11. K. JASPERS, *supra* note 5, at 38.

12. Nietzsche, *The Challenge of Every Great Philosophy,* in W. KAUFMANN, *supra* note 4, at 101.

13. CRITIQUE, *supra* note 10, at 72. While Kierkegaard attacked the "crowd," he was not highly enthusiastic about the aristocracy either.

> "The masses": that is really the aim of my polemic; and I learned that from Socrates. I wish to make people aware, so that they do not squander and dissipate their lives. The aristocrats assume that there is always a mass of lost men. But they hide the fact, they live withdrawn and behave as though these many, many men did not exist. That is what is godless in the superiority of the aristocrats; in order to have things their own way they do not even make people aware.

Quoted in CRITIQUE, *supra* note 10, at 57.

14. S. KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT 99 (1941).

only valuable to Kierkegaard to the extent that it is lived. He even recommends that the scientist "acquire an ethical understanding of himself before he devotes himself to scholarship, and that he should continue to understand himself ethically while immersed in his labors; because the ethical is the very breath of the eternal, and constitutes even in solitude the reconciling fellowship with all men."[15] This strikes a highly responsive chord at a time when scientists and universities are being forced to consider the morality of their endeavors. If the idea of "pure" research can no longer excuse the chemist developing new weapons for the government, can a judge applying an oppressive statute escape responsibility beneath a "pure theory of law"? This question will be discussed at a later point of this paper.

In *Existentialism and Legal Science*[16] Georg Cohn tries to incorporate many of Kierkegaard's basic ideas into legal analysis. He stresses the unpredictability of reality and the fact that general principles cannot decide a concrete, singular case. Following Kierkegaard's distrust of history and logic to provide a solution to our problems, he rejects stare decisis, which views the present conflict as having been solved by an earlier decision. First, we are faced with the possibility that the earlier decision was wrong; even if correct, it merely states what the law was at that time and place. Since the precedent is of no greater value than the decision being made now, it is only of historical interest and deserves no binding force. While the traditional view sees the case as decided before the conflict even arises, the existential approach considers the instant case as something that is alive and concrete and worthy of fresh consideration.

> When one considers how often the laws of our times have their origin in entirely unjust political power relations so that in many cases their application amounts to a flagrant interference with the justified interests of the citizen, one can well understand how senseless and purposeless an effect the propping up of time-worn political power structures has on modern legal relations.[17]

Thus, we may paraphrase Edmund Burke's famous remark to say that Anglo-American law represents the outgrowth of that process which allows the dead of the past to gain a stranglehold upon genera-

15. *Id.* at 135-36.
16. G. COHN, *supra* note 1.
17. *Id.* at 30.

tions yet unborn.[18] In this respect the existential view is very similar to the homegrown rule of pragmatism that each precedent should be subjected to a scientific test with every new case and eliminated when it is no longer of value. The difference between pragmatism and existentialism on this point is that the former views science as holding the solution to all problems, including ethical.[19] As the title of one of Kierkegaard's great works, *Concluding Unscientific Postscript,* indicates, the Danish philosopher was clearly disenchanted with scientific revelations.

The existential approach can also be distinguished from that of Karl Llewellyn's school of legal realism, which draws a dichotomy between the treatment of "good" and "bad" precedents.[20] The precedents that the judge thinks are legitimate or honorable are maintained with full force, while those that the judge frowns upon are interpreted strictly and are whittled away. The major quarrel an existentialist may take with this position is that it is dishonest; it pretends to follow authorities while in practice the courts are really deciding each case anew. Karl Friedrich's statement concerning legal fictions that " 'life is but a dream,' and even fictions have their place in the economy of the mind, especially the legal mind"[21] violates the necessity for openness and honesty, which is so basic to many of the existentialist thinkers. Even if it is true that judges receive more criticism for openly rejecting bad precedents than for pretending to follow them, it is better to suffer that instant of pain—as when an open wound is cleansed —than to allow it to fester beneath the surface of a secretive legal methodology.

The thought of Karl Jaspers, the existential philosopher of com-

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18. Edmund Burke was the "English orator and traditionalist to whom all was sacred that bore the imprint of time, even the poorhouse and rotten borough." Friedrich, *Introduction to* The Philosophy of Kant: Immanuel Kant's Moral and Political Writings vii (C. Friedrich ed. 1949).

19. John Dewey reverses Kierkegaard's advice that the scientist study ethics and recommends that the ethicist study science:

> Inquiry, discovery take the same place in morals that they have come to occupy in sciences of nature. Validation, demonstration become experimental, a matter of consequences. Reason, always an honorific term in ethics, becomes actualized in the methods by which the needs and conditions, the obstacles and resources, of situations are scrutinized in detail, and intelligent plans of improvement are worked out.

J. DEWEY, RECONSTRUCTION IN PHILOSOPHY 174 (paper ed. 1963).

20. C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 271 (paper ed. 1958).

21. *Id.* at 260.

munication, might also lead us to reject stare decisis, but for quite different reasons. His concept of tragedy is of particular relevance to legal theory. The atmosphere of humaneness he finds in great tragedy results from the personal involvement of the members of the audience, who experience catharsis by moving inside the characters of the drama and experiencing their fate.[22] In this way, "we transcend misery and terror and so move toward essential reality."[23] However, the force of the tragedy is lost if we allow ourselves to feel mere sympathy for the characters and remain remote from them as if we had escaped from danger. To follow this view is to accept the world as we find it and anesthetize the impulse to existential activity. A good example of this is the Kitty Genovese case[24] in New York City, where 38 persons watched a woman being slowly murdered in front of their houses; none of them tried to help or even call a policeman. This tendency to accept tragedy is probably heightened by the fact that we are continually exposed to wars, riots, floods and famine accompanied by the moderate tones of television commentators who offer unimpassioned political analysis or cold statistics. There is less of a sense of tragedy in the treatment of these disasters than in the coverage of a championship boxing bout. If we translate Jaspers' view of tragedy to the living drama of the courtroom,[25] we see that for the judge to look back to the past for a decision allows him to become remote from the conflict before him and to renounce a unique opportunity for communication.

While the sociological school of jurisprudence would also avoid blind obedience to precedent, their orientation would not be any more satisfying to Jaspers because they view the individual as a "social

22. K. JASPERS, TRAGEDY IS NOT ENOUGH 75 (1953).

23. *Id.* at 80.

24. *See* A. ROSENTHAL, THIRTY-EIGHT WITNESSES (1964).

25. In a symposium on the Chicago conspiracy trial and trial disruption, Leonard B. Boudin stated:

> I want to recognize one human element that can not be disregarded, when defense counsel are involved in a case: as I see it, not only are they emotionally involved, but there is an interaction among defense counsel. One of them necessarily feels that he wants to hold the stage, which all trial lawyers do, I hear, and in holding the stage he must do something that his colleague—other defense counsel, has not done. And then the judge moves in; then the colleague moves in. So generally speaking, there is this emotional reaction in which the judge is playing a part, and the only consideration I would suggest here is: why suddenly decide that this is a political case problem. Why not decide it is a human problem which affects every lawyer in the trial of every case.

Symposium—*Disruption, Discipline and Due Process,* 1 HUMAN RIGHTS 139 (July 1971).

fact"[26] and thus are not really more open to communication with him. They tend to view man from the outside as the product of various social forces. The existentialist, on the other hand, agrees that man can be the subject of different kinds of research but realizes that we can never completely understand him. Sociological jurists tend to lose sight of the unique, concrete case before them as the individual shrinks into a mere speck in their social plan. The judge cannot retain his humanity unless he allows himself (as well as the rest of us) to communicate with the accused in the fullest sense. As Jaspers writes, "only in community with others can I be revealed in the act of mutual discovery. My own freedom can only exist if the other is also free."[27] When a judge condemns the conduct of political trials on grounds of decorum or orders a defendant bound and gagged, then he converts the halls of justice into a mausoleum. Closed courts, like closed philosophical systems, represent a dangerous escape from reality—and from honesty.

Jean-Paul Sartre offers the most activistic philosophy of all the existentialists and his theories are even more controversial for law than for philosophy. He views man as being totally free; his actions cannot be determined by environment, God, society, heredity or any other factors. In his famous lecture *Existentialism is a Humanism,*[28] Sartre proclaims the first principle of his philosophy: man's existence precedes his essence—"that man first of all exists, encounters himself, surges up in the world—and defines himself afterwards."[29] Man is constantly making ethical decisions and thus creating himself at each moment of his existence. Only our actions can determine what we are. A person's potentiality means nothing unless it is realized in some endeavor, such as a work of art or a judicial decision. We cannot say that John Marshall would decide the Pentagon Papers case in a certain way; all we can give him credit (or blame) for are the decisions he did

26. *See* E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD (1895).

27. Jaspers, *On My Philosophy,* in KAUFMANN, *supra* note 4, at 147.

28. KAUFMANN, *supra* note 4, at 287.

29. *Id.* at 290. Although this is generally thought to be the basic tenet of existentialism, Martin Heidegger has taken issue with it in his Letter "On Humanism":

> Sartre formulates the basic principle of existentialism in these words: existence precedes essence. Here he uses the terms *existentia* and *essentia* in the old sense of metaphysics which says since Plato: the *essentia* precedes the *existentia.* Sartre reverses this sentence. But the reversal of a metaphysical sentence remains a metaphysical sentence. Being such a sentence, it remains, like all metaphysics, in the oblivion of the truth of Being.

KAUFMANN, *supra* note 4, at 37.

make. "In life, a man commits himself, draws his own portrait and there is nothing but that portrait."[30] For Sartre there can be no progress (at least in an ethical sense) because man will always exist in a constantly changing situation and will always be faced with a project, which necessitates a choice. No values can force us to decide in a certain way; we must first choose to accept our values. While we always have the freedom to choose, we do not have the freedom of not choosing. "Not to choose is, in fact, to choose not to choose."[31]

Sartre not only makes the individual responsible for himself, but extends this responsibility to include all of mankind. When every decision one makes becomes a piece of legislation for the whole of humanity, the person experiences anguish, "the fear and trembling" that Abraham felt when commanded to kill his son. The fact that there is no God in Sartre's universe leads to a feeling of abandonment, that we must consider the consequences of God's absence until the end of our existence. This philosophy is the antithesis of quietism, since it requires each man to act upon his values even if he faces insurmountable obstacles. No one can create the utopian society he envisions, but he can act towards that goal, without any illusions of success or expectations of help from others.

II. Portrait of the Strict Constructionist

Since existentialism may be viewed as a revolt against traditional philosophy, it is only appropriate that we utilize its basic approach to attack traditional legal ideas. In this section we shall analyze the views of Senator Sam Ervin, a self-avowed strict constructionist, not because he is a particularly important thinker or powerful political figure, but because his misconceptions are very commonly held and, as we shall show, have their roots in several more respectable legal theorists. Thus, this section is essentially an act of unmasking—that is, unmasking in order to change[32]—and will make special use of the philosophy of Sartre, who is most adept at tearing the veil off self-deception.[33] In attempting to develop an existential theory of constitutional law, we have to modify Sartre's assertion that the individual is the creator of all his values to include an acceptance of the Constitu-

30. Sartre, *Existentialism is a Humanism,* in W. Kaufmann, *supra* note 4, at 300.
31. J.P. Sartre, Being and Nothingness 481 (Philosophical Lib. ed. 1956).
32. *See* M. Burnier, Choice of Action: The French Existentialists on the Political Line (1968).
33. *See* J.P. Sartre, *supra* note 31, at 47-70.

tion and its principles. This is not necessarily inconsistent with that philosophy since its values are not so much concerned with the content of our decisions as with the manner in which they are reached; and if Sartre can mix Marx with his existentialism, we may justifiably mix Madison with ours.

In *Role of the Supreme Court: Policymaker or Adjudicator?*[34] Senator Ervin espouses a philosophy of strict constructionism, which he uses to attack the Warren Court. He begins his argument by explaining that the Founding Fathers did not want the Supreme Court to be an advisory body with the power to veto acts it deemed unwise. This policymaking power was delegated to the federal and state legislatures, but was usurped by the Warren Court. "Liberty," he writes, "cannot exist except under a government of laws . . . ."[35] He quotes Woodrow Wilson as warning of the dangers of concentrating too much power in the federal government, since this leads to the destruction of civil liberties. The local authorities in the states are much closer to the needs of the people than the federal government and their vital reserved powers have been destroyed by the Warren Court. The Founding Fathers were aware of the need for change and made provision for this by the amendment process. He urges judges to exercise self-restraint to stay within the judicial power; the extent of this power is to ascertain the meaning of the Constitution, not to rewrite it. Where the language of the Constitution is ambiguous, he argues, the Court must place itself in the position of the framers and ratifiers and interpret these provisions according to their language and history. Until the Warren Court began stretching the legislative powers of Congress beyond constitutional limits, the Supreme Court had been faithful to the dream of the Founding Fathers. Ervin's analysis is interspersed with quotations from Washington, Webster, Brandeis, Madison and other important figures of the past. Though he is critical of many decisions of the Warren Court, his tone is always moderate and hopeful for the future:

> It is obvious to those who love the Constitution and are willing to face naked reality that the Warren Court took giant strides down the road of usurpation, and that if the course set by it is not reversed, the dream of the Founding Fathers will vanish and the most precious lib-

34. S. ERVIN & R. CLARK, ROLE OF THE SUPREME COURT: POLICYMAKER OR ADJUDICATOR? (1970) [hereinafter cited as ERVIN].

35. *Id.* at 2.

> erty of the people—the right to constitutional government—will perish.[36]

Strict construction, he asserts, requires fidelity to the Constitution. The Court is required to apply the Constitution and laws according to their "true meaning,"[37] regardless of whether the individual judges approve of them. He also warns of the danger of losing the states as "laboratories for experiments in government."[38]

The beginning of Ervin's argument is sound historically: the framers of the Constitution did not want the Supreme Court to act as a council of revision to advise the legislature as to which acts were acceptable to them.[39] However, from this he jumps to the conclusion that the Warren Court has usurped the policymaking power that belongs to the legislature. This shows an inadequate understanding of the proper role of the judiciary in this country. In 1835 Alexis de Tocqueville, our most perceptive visitor, wrote concerning this question:

> [The stranger to this country] hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that, in the United States, the judges are important political functionaries: nevertheless, when he examines the nature of the tribunals, they offer at the first glance nothing which is contrary to the usual habits and privileges of these bodies; and the magistrates seem to him to interfere in public affairs only by chance, but by a chance which recurs every day. . . .[40]

Thus, while Ervin is correct in stating that the courts cannot advise Congress as to the constitutionality of an uncontested law, once a proper case is brought, the Court must pronounce judgment upon the law as applied to that case. Tocqueville realized that American judges have great political power because they have the right to base their decisions upon the Constitution rather than statutory enactments and are in fact "not permitted . . . to apply such laws *as may appear to them* unconstitutional."[41] This judicial power, though significant, is still essentially passive in nature because a judge cannot initiate a proceeding on his own but must wait for the case to be brought before him. When

36. *Id.* at 14. The title of this section is "Saving the Constitution."
37. *Id.* at 73.
38. *Id.* at 84.
39. *Id.* at 1.
40. A. TOCQUEVILLE, DEMOCRACY IN AMERICA 73 (R. Heffner ed. 1956).
41. *Id.* at 74 (emphasis added).

the policies of a state or federal government conflict with an individual's constitutional rights, the court is obligated to hear the case, consider the interests involved and decide one way or the other.

Ervin spends much time arguing that liberty only exists under a government of laws and that judges are forbidden to consider their personal ideas about what is right and wrong in making their decisions. Following this line of reasoning, he writes:

> The power to make policy is discretionary in nature. It involves *the making of choices* on the basis of expediency or prudence among alternative ways of acting.
>
> The power to make policy in a government of laws resides with those who are authorized to participate in the lawmaking process [the legislature].[42]

The first weakness of this analysis is that it views the Constitution as something that is "knowable in itself," as if the language of the Constitution is unambiguous and provides ready answers for all possible cases. While it is clear, for example, that each state is entitled to two senators, what about the due process clause? or the equal protection clause? Is their meaning clear? Which rights are protected by the ninth amendment? Can there be one "true meaning" for each of these questions that those "who love the Constitution" can offer us? Ervin views the judge as a computer that is bound by its program or a bird in a Skinnerian cage that must press the right levers to receive its reward. For him the law is like Sartre's example of the paper knife[43] whose essence is predetermined by the artisan who creates it. If it had been the intention of the Founding Fathers to constrict the judiciary with such unrealistic ideas, the American legal system would probably have died stillborn. However, the framers of the Constitution possessed more foresight than Ervin realizes (or wishes to admit). The leaders of the Revolutionary War were influenced by the theories of John Locke and of the French Enlightenment and as a result believed in natural law. Even the austere John Adams could refer in 1765 in a *Dissertation on the Canon and the Feudal Law* to rights that were "antecedent to all earthly government,—*Rights,* that cannot be repealed or restrained by human laws—*Rights,* derived from the great Legislator of the universe."[44]

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42. ERVIN, *supra* note 34, at 5 (emphasis added).
43. Sartre, *Existentialism is a Humanism,* in W. KAUFMANN, *supra* note 4, at 289-90.
44. ESSENTIAL WORKS OF THE FOUNDING FATHERS 7 (paper ed. 1964).

During the early years of the Republic, courts frequently made references to these natural rights. In the 1798 case of *Calder v. Bull,* Justice Chase wrote:

> An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact,* cannot be considered a *rightful exercise* of *legislative* authority.[45]

This idea was also expressed before ratification by Alexander Hamilton in *The Federalist Papers* where he argued against the necessity of including a bill of rights in the Constitution, not because these rights were unimportant, but because their enumeration was unnecessary and even dangerous.

> They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?[46]

James Madison tried to provide a protection from the dangers of "strict constructionism" by the introduction of the ninth amendment. In presenting this amendment he said:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the . . . [ninth amendment].[47]

It is clear then that these basic rights that legislatures cannot infringe are not clearly stated and are, in fact, kept intentionally ambiguous in the text of the Constitution. These rights have no preconceived essence; they are not an a priori whole that can be reduced to scientific formulas and deduced rationally. They must be "brought to consciousness [by the judge] out of a basis which is now experienced and out of a content still unclearly willed."[48] In providing us with certain

45. 3 U.S. (3 Dall.) 386, 388 (1798).
46. THE FEDERALIST No. 89, at 579 (J. Cooke ed. 1961) (A. Hamilton).
47. I ANNALS OF CONGRESS 456 (J. Gales & W. Seaton eds. 1834).
48. K. JASPERS, *supra* note 5, at 48.

minimum liberties, the Bill of Rights does not stop at any determinate point but creates an open-ended system. Since the very nature of the American Revolution is still not completely understood, it is impossible to state definitively which rights the ninth amendment refers to.[49] Are they rights of common law or of nature? If the latter, are they natural rights with a fixed or variable content? Kierkegaard's statement concerning the "true meaning" of history is appropriate:

> The historical material is infinite, and the imposition of a limit must therefore in one way or another be arbitrary. Although the historical material belongs to the past, it is as subject for cognition not complete; it is constantly coming into being through new observations and inquiries, new discoveries are constantly brought to light, compelling not only additions but also revisions.[50]

This is not a justification for judicial arbitrariness or irrationality but only means that when the judge chooses from the "seething cauldron of possibilities"[51] he does so with the knowledge that history cannot in itself motivate his choice and that he is required to decide with "good faith."

The thrust of Ervin's argument becomes clear when he warns of the dangers of concentrating too much power in the federal government. The danger of this tendency, he tells us, is that it leads to the destruction of civil liberties. The local authorities are closer to us and better aware of our needs. "What the Warren Court has done to the powers allotted or reserved to the states by the Constitution," he writes, "beggars description."[52] The image of orthodoxy is carefully constructed by citing many important statesmen of the American past. He speaks of protecting rights as if he were a civil libertarian—a defender of the democratic faith. It is only when he attacks specific decisions that the mask is pierced and his meaning becomes unmistakable. The "revolutionary" decisions he complains of are: (1) *Keyishian v. Board of Regents*[53] (disallowing the state from denying Communists the right to employment as teachers in state educational

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49. *See* Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach,* 40 TUL. L. REV. 487 (1966), for an excellent article rejecting existentialism for a civil law approach.

50. S. KIERKEGAARD, *supra* note 14, at 134.

51. K. JASPERS, *supra* note 5, at 49.

52. ERVIN, *supra* note 34, at 11.

53. 385 U.S. 589 (1967).

institutions); (2) *United States v. Robel*[54] (disallowing Congress the power to deny Communists the right to employment in defense industries); (3) *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*[55] (defending the right of union members to picket on the employer's property); (4) *Miranda v. Arizona*[56] (protecting the right of self-incrimination of the accused while in custody by the police); (5) *Escobedo v. Illinois*[57] (protecting a criminal suspect's right to counsel); and (6) *Jones v. Mayer Co.*,[58] (prohibiting discrimination against blacks in the sale or rental of property). In all these cases the Court was merely protecting constitutional rights of free speech, right to counsel, privilege against self-incrimination, etc. Thus, it is not the *danger* to civil liberties that Ervin is concerned with, but the Supreme Court's *protection* of these rights from infringement by the states. His argument then becomes one of *mauvaise foi* or "bad faith" because it involves a careful attempt to escape from the truth at every turn. The roots of Ervin's arguments are not in Madison or Marshall as he claims, but in John Calhoun and the theorists of nullification. It is an attempt not to "save the Constitution" but to return to state's rights; to resurrect the "unjust political power relations" of the past in order to prevent blacks from acquiring property or to prevent Communists from teaching in public schools. Ervin would have us read the Constitution as beginning with "we the states" rather than "we the people." In this way federalism becomes not a means to divide powers between the federal and state governments, but a tool for the oppression of minorities.

While there may be a tendency to dismiss Senator Ervin's argument as insignificant political rhetoric, many of the ideas he utilizes have been placed at his disposal by the academically respectable opinions of Justice Frankfurter. The late Justice's theory of abstention can can be seen in *Railroad Commission v. Pullman Co.*,[59] which involved the constitutionality of an order of the Texas Railroad Commission requiring all sleeping cars to be in charge of Pullman conductors, who were all white. Pullman porters, who were all black, filed suit in the federal court claiming that the order discriminated against them in

54. 389 U.S. 258 (1967).
55. 391 U.S. 308 (1968).
56. 384 U.S. 436 (1966).
57. 378 U.S. 478 (1964).
58. 392 U.S. 409 (1968).
59. 312 U.S. 496 (1941).

violation of their fourteenth amendment right of equal protection. Justice Frankfurter declared that the doctrine of abstention required the case to be brought up first in the state courts of Texas, because if the supreme court of that state decided that the Commission's assumption of authority was unwarranted, the constitutional issue would not arise. Under this doctrine courts " 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."[60] The danger of this theory is that it places federal etiquette toward the state courts before the rights of the individual who may be crushed beneath this judicial torpor. As Justice Douglas pointed out in his concurring opinion in *England v. Louisiana State Board*:[61]

> [I]nstances where Negroes assert their rights in judicial proceedings . . . will be civil ones and most always instituted in the Federal District Courts, since those courts have a special competence in the field and a record of independence protective of the rights of unpopular minorities . . . . Under the *Pullman* doctrine a Negro who starts in the federal court soon finds himself in the state court and his journey there may be not only weary and expensive but also long and drawn out. . . . *The whole weight of the status quo will be on the side of delay and procrastination.*[62]

Justice Frankfurter's doctrine of abstention accommodates itself well to Ervin's purposes, as the latter's advocation of the slow amendment process as the only proper means of making any change in the meaning of a constitutional provision makes clear.

Justice Frankfurter's attitude of judicial "self-restraint" also furthers the cause of Senator Ervin. *Dennis v. United States*[63] involved a conviction for violation of the conspiracy provisions of the Smith Act because the defendants had organized to teach themselves and others Marxist-Leninist doctrines. In his concurring opinion affirming the conviction, Justice Frankfurter wrote:

> History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
>
> . . . .

60. *Id.* at 501.
61. 375 U.S. 411 (1964).
62. *Id.* at 434-35 (emphasis added).
63. 341 U.S. 494 (1951).

> It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours.[64]

This view of the judicial function is not consistent with existentialism or with the views of Hamilton and Madison in the *Federalist Papers*. It is an attempt to abdicate the adjudicatory role in a proper case because an unpopular minority is being persecuted during a period of national hysteria. The paradox of the judge who does not want to judge is—like Kierkegaard's example of the man who wills to be a bird—ridiculous.[65] As Sartre has pointed out, one cannot choose not to choose. When Justice Frankfurter refuses to judge the case, he does not make the judiciary independent of the hysteria but chooses to join the witchhunt by sanctioning the law. As Tocqueville made clear:

> [The judge] only judges the law because he is obliged to judge a case. The political question which he is called upon to resolve is connected with the interests of the parties, and *he cannot refuse to decide it without a denial of justice*. . . . Within these limits, the power vested in the American courts of justice, of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies.[66]

The justification for this judicial abdication is often made on the grounds that it is " 'abdication' in favor of 'the exhilarating adventure of a free people determining its own destiny.' "[67] However, the meaning of the Bill of Rights is that there are certain limitations upon the types of experiments that the states or the federal government can make. For example, the government is denied the power to experiment with the establishment of a religion or the elimination of free speech. Although Justice Frankfurter was highly literate and humane, the aloofness of his legal philosophy led him to repeatedly condone violations of basic civil liberties. If, as Sartre says, a man's actions determine his own portrait, then the self-portrait that Justice Frankfurter has painted contains some unseemly blemishes.

While describing those thinkers who influenced him, Karl Jaspers wrote: "[I]n his basic philosophic attitude, although not in his con-

64. *Id.* at 525.
65. S. KIERKEGAARD, *supra* note 14, at 109.
66. A. TOCQUEVILLE, *supra* note 40, at 76 (emphasis added).
67. Mendelson, *Introduction* to FELIX FRANKFURTER, A TRIBUTE at 4 (1964).

crete positions, Plato is as alive today as ever . . . ."[68] For Oliver Wendell Holmes the reverse seems true; the concrete positions he took were often far superior to his philosophic attitude—and Justice Frankfurter seems to have been influenced by the wrong part. In *Lochner v. New York*,[69] the Supreme Court struck down a New York statute which prohibited employment in a bakery for more than sixty hours in one week or ten hours in one day. Justice Peckham, who delivered the majority opinion, made the unforgettable statement that

> [t]here is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker.[70]

Justice Holmes dissented, reaching the proper conclusion that the law should have been upheld, but justified his decision by stating that "[a] reasonable man might think it a proper measure on the score of health."[71] Following this approach, Justice Frankfurter accepted almost any legislation that seemed reasonable without actively weighing the evidence to balance the conflicting interests of the individual and the state. For example, in *West Virginia State Board of Education v. Barnette*,[72] he dissented on the grounds that the action of a state board of education requiring public school pupils to salute the flag of the United States in violation of their religious beliefs should have been held constitutional. The fact that there was no strong public purpose, such as existed in cases involving vaccination, did not seem to matter to Justice Frankfurter. He wrote, "We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies?"[73] The proper answer to this question is revealed by a study of Justice Harlan's opinion in *Lochner*. Justice Harlan's opinion manifests a respect for the prerogative of the legislature that stops considerably short of Justice Frankfurter's reverence. He does not accept the law as reasonable merely upon its face as Justice Holmes did, but cites evidence from a treatise on diseases that afflict workers to show the special health hazards to bakers. Then after finding "weighty, substan-

68. Jaspers, *On My Philosophy*, in W. KAUFMANN, *supra* note 4, at 137.
69. 198 U.S. 45 (1905).
70. *Id.* at 58.
71. *Id.* at 76.
72. 319 U.S. 624 (1943).
73. *Id.* at 665.

tial" reasons for supporting the statute, he decides that it is a constitutional exercise of the legislative authority. This approach is consistent with existential theory because the judge is considering all the unique factors in the case with care and honesty and without depending upon the weight of precedent or any inflexible formulas.

The basic view that Senator Ervin has elicited from Frankfurter, Holmes and others is that where the legislature has acted or where there is a settled line of precedent, the judge should exercise self-restraint and eliminate his own feelings from the decision. As Justice Frankfurter stated in *Barnette,* "It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench."[74] But can the judge separate himself from the results of his decision? Is there a justification for "scientific" legal method that results in decisions the judge considers immoral? Hans Kelsen, the theorist of the Pure Theory of Law, would answer in the affirmative. In *The General Theory of Law and State*[75] he wrote, "Judgments of justice cannot be tested objectively. Therefore a science of law has no room for them."[76] This positivistic theory attempts to "purify" the law by separating the philosophy of justice, as well as sociology, from legal theory: "As a theory, its sole purpose is to know its subject. It answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is science."[77] Anthony Blackshield is of the opinion that Kierkegaard's attack upon the Hegelian system can be easily applied to the Kelsenite system, since the latter also seeks to be universally valid and to incorporate the possibility of movement within its structure.[78] Kelsen's theory, in not differentiating between political systems, whether English, Nazi, etc., leaves itself open to criticism on moral grounds. Since the Nuremberg Trials are the specter that haunts this generation and the American system of "justice" is currently under fierce attack,[79] it is relevant to consider the meaning of those trials in the light of our analysis. Since the Trials held individuals responsible for acts which were not crimes under German law when committed, the judgments were criticized as operating ex

74. *Id.* at 647.
75. H. KELSEN, THE GENERAL THEORY OF LAW AND STATE (1945).
76. *Id.* at 49.
77. H. KELSEN, WHAT IS JUSTICE? 266 (1957).
78. Blackshield, *supra* note 2, at 101.
79. *See* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS (R. Lefcourt ed. 1971).

post facto and as manifesting nothing but "a show of crude, irresponsible force"[80] by the victors. The legal positivists claimed that the defenses of "act of state" and "order of superior" should have been sufficient to create legal immunity.[81] One view of the dangers resulting from the Nuremberg decisions was that

> [these] principles if generally accepted may reduce the unity of the state, increase the difficulties of maintaining domestic order, and deter statesmen from pursuing vigorous foreign policies when necessary in the national interests.[82]

It is just such disruption that is advocated here—to prevent members of the military or the legal system from claiming sanctuary from responsibility in the orders of superiors or the acts of the legislature or past decisions. Before a pilot drops a bomb on a Vietnamese village or a judge upholds a bigoted statute, he must be made aware of his freedom at that moment, to feel a sense of anguish because like Abraham there is an Isaac beneath his blade. As Sartre has written in *Being and Nothingness*:[83]

> The most terrible situations of war, the worst tortures do not create a non-human state of things; there is no non-human state of things; there is no non-human situation. It is only through fear, flight and recourse to magical types of conduct that I shall decide on the non-human, but this decision is human, and I shall carry the entire responsibility for it.[84]

It is the purpose of an existential theory of law to refuse to allow the judge or the lawyer to renounce his humanity; if Nietzsche could say that Christianity destroyed Pascal,[85] we may conclude that the philosophy of judicial self-restraint had a similar effect upon Justice Frankfurter. If the subjectivity of existentialism seems to leave us at the mercy of each judge's moral sense, we must remember the lesson of the legal realists that through the power of "broad" or "narrow" interpretation we are *already* at his mercy. All existentialism can do is remind him that his choice should be made with openness, good faith

80. W. BOSCH, JUDGMENT ON NUREMBERG 45 (1970).
81. *Id.* at 52.
82. Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 45 (1947).
83. J.P. SARTE, *supra* note 31.
84. *Id.* at 554.
85. *See* CRITIQUE, *supra* note 10, at 126.

and an awareness of his freedom. As we have seen in such cases as *Dred Scott,*[86] *Plessy v. Ferguson,*[87] and *Sacco-Vanzetti,*[88] once the moral universe within the judge flickers out the positive law may survive—but for that moment justice is dead.

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86. 60 U.S. (19 How.) 393 (1856).
87. 163 U.S. 537 (1896).
88. 275 U.S. 574 (1927).