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# The authentic judge: French existentialism and the judicial role

Jonathan Crowe\*

*This article draws on the writings of the French existentialist philosopher Jean-Paul Sartre to offer some insights about the judicial role. It begins by exploring the existentially burdensome character of judging, making reference to Sartre's discussions of anguish and the moment of decision. The article then examines why different judges approach the demands of their role in contrasting ways, drawing on Sartre's analysis of various forms of bad faith [mauvaise foi]. The article concludes by sketching an ideal model of the authentic judge, based on Sartre's discussion of authentic love (or 'love in the world'). The authentic judge accepts responsibility for her decisions, without disclaiming her authority or denying the contingent nature of her position. She recognises her inherent fallibility, while nonetheless saying: 'this is what I have chosen'.*

Judges have a difficult and important job to do on behalf of the community. Much ink has been spilt on how the judiciary should best approach its role.<sup>1</sup> Fortunately, however, we need look no further for guidance on this question than the writings of the French existentialist philosopher Jean-Paul Sartre. Sartre offers us a compelling explanation of, first, what makes the judicial role so difficult; second, why different judges approach the demands of the role in contrasting ways; and, third, how the job should ideally be done. That, at any rate, is what I propose to argue.

## The moment of decision

The first lesson we can draw from Sartre's writings concerns the existentially challenging nature of the judge's role. The judge is regularly called upon to make choices that can fundamentally affect people's lives. The stakes are often high: people may end up in jail or be bankrupted at the judge's say so. The judge is the one who is directly responsible for these outcomes. The parties' actions may have landed them in court, but once they get there their fates are in the judge's hands.

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\* Professor of Law, Bond University. This article was originally presented as a lecture to the *French Australian Lawyers Society* at Parliament House, Brisbane on 12 June 2018. I am grateful to Dan Morgan for inviting me and to all those who participated in the discussion. The article draws on material previously published in Jonathan Crowe, 'The Loneliness of the Referee' in Ted Richards (ed), *Soccer and Philosophy: Beautiful Thoughts on the Beautiful Game* (Open Court, 2010) 347 and Jonathan Crowe, 'The Authentic Referee' (2010) 35 *Alternative Law Journal* 174.

<sup>1</sup> Some of it by me. See, eg, Jonathan Crowe, 'The Role of Contextual Meaning in Judicial Interpretation' (2013) 41 *Federal Law Review* 417; Jonathan Crowe, 'Functions, Context and Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 61; Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*' (2019) 42 *University of New South Wales Law Journal* (forthcoming).

The judge is free to choose what decision to make. Now, of course, the judge is constrained by the law. She cannot just do whatever she likes. And yet there are, strictly speaking, two components to any judicial decision.<sup>2</sup> First, the judge must ascertain the content of the relevant law. And, second, she must apply it to the case at hand and give a decision. The first step can be difficult if the law is vague or ambiguous. However, even where the law is clear, the second stage still exists. The judge must take the law and use it to render judgment between the parties. This is the moment of decision, when the parties' fate rests squarely on the judge's shoulders.

The moment of decision plays a central role in Sartre's philosophy. Indeed, he presents it as the defining feature of human experience. In *Being and Nothingness*, Sartre draws a distinction between two basic modes of existence: being-in-itself [*l'être-en-soi*] and being-for-itself [*l'être-pour-soi*].<sup>3</sup> The being-in-itself is a non-conscious object, which can be encapsulated by a predetermined essence or function. Inanimate objects, such as books and wine glasses, fall into this category.

The being-for-itself, by contrast, is a conscious agent or person able to perceive and reflect upon the world around her. Sartre suggests that, far from possessing a pre-determined essence, the being-for-itself is permanently haunted by the possibility of 'nothingness' or negation.<sup>4</sup> In other words, the being-for-itself is forced to confront the possibility that things might be otherwise than they are.

### Freedom and responsibility

In our everyday lives, Sartre contends, we are constantly engaged in enquiries about the world around us: questions ranging from whether there is a God to where we put the car keys all place aspects of our existence into question.<sup>5</sup> However, since any question we might pose raises the possibility of a negative response, it becomes apparent that our place in the world is not necessary, but contingent. This is the interplay between being and nothingness that gives his book its title.

According to Sartre, contingency pervades the human experience of choice. However sure we may be that a particular decision was correct, we are nonetheless aware that other courses of action were possible. Since every course we follow is pregnant with alternative paths we might have taken, it seems that we cannot avoid ultimate responsibility for our decisions. Sartre argues that this sense of inescapable responsibility tends to give rise to anguish.<sup>6</sup>

Imagine that you are walking along a narrow trail on the edge of a mountain. You are constantly aware of the importance of treading carefully, so

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2 For similar themes, see M J Detmold, 'Law as Practical Reason' (1989) 48 *Cambridge Law Journal* 436; Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3.

3 Jean-Paul Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology* (Hazel E Barnes trans, Methuen, 1958) lxiii [trans of *L'Être et le Néant* (first published 1943)].

4 *Ibid* 11, 16.

5 *Ibid* 6–12.

6 *Ibid* 17, 29–45.

as not to lose your footing. At the same time, however, you are also aware that you could just as easily throw yourself over the precipice.<sup>7</sup> Sartre points out that human existence is full of such potentially life-altering moments. The everyday actions of driving a car or having a conversation could be altered irrevocably by one decision: in the space of a moment, you could easily steer your car into incoming traffic or make a callous comment that would alienate a loved one forever.

For Sartre, then, human life involves an unavoidable double realisation. In the first place, the alternative possibilities present in my experience of choice reveal to me that I am free. At the same time, however, I am also aware that I am *responsible*, since I am confronted with the apparent absence of constraints on potentially significant exercises of my freedom. Whether I walk calmly along the ledge or throw myself head along into the abyss, the decision rests with me alone.

### The anguish of the judge

Let us return, then, to the role of the judge. We have seen that the process of giving judgment between the parties leads inevitably to the moment of decision. In this moment, the judge is both free and responsible: nobody can tell her what decision to make and responsibility rests with her alone. Of course, as we have already seen, the judge's decision is constrained by the law, but she nonetheless remains responsible for determining the case in a particular way.

Sartre argues that this kind of free and responsible decision-making naturally produces anguish. It is in this sense, then, that the judge's role is a difficult and weighty one. Many is the judge who has lain awake at night after deciding a case, wondering if she made the right decision. And many is the judge who has agonised after the fact, despite having faithfully applied the law. This is because it is not the law that makes the decision, but the judge. The ultimate duty of the judge — to render a decision between the parties — is one from which nobody can absolve her.

Sartre argues that, in order to lead an authentic existence, humans must embrace the freedom and responsibility that lies at the heart of their lives. They must acknowledge that the type of person they become, far from being dictated by external forces, is a function of the life they decide to lead. For the being-for-itself, as Sartre puts it in *Existentialism and Humanism*, 'existence precedes essence'.<sup>8</sup> Our character is not necessary or fixed, but contingent upon our choices.

A person, unlike an object such as a chair or a cheese platter, is not brought into existence with a preordained set of defining features. We are not born honest, cowardly, loyal or untrustworthy. These types of character traits are, and can only be, a function of the way a person chooses to live. An authentic life involves taking responsibility for our character and recognising our ability to change who we have become. It is only when we die that this project of self-creation is over.

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<sup>7</sup> Ibid 30–1.

<sup>8</sup> Jean-Paul Sartre, *Existentialism and Humanism* (Philip Mairet trans, Methuen, 1948) 26 [trans of *L'Existentialisme est un humanisme* (first published 1946)].

The task of living an authentic life is a challenging one. It is tempting to shirk responsibility for our choices, attributing them instead to hardwired aspects of our character or overwhelming external forces. However, Sartre depicts such attitudes as forms of bad faith [*mauvaise foi*].<sup>9</sup> Our existential freedom confronts us in every aspect of our existence. Any attempt to deny our capacity to shape our lives through our choices is therefore a form of self-deception, ‘a lie to oneself’.<sup>10</sup>

### The letter of the law

The weight of existential responsibility that lies on the judge’s shoulders helps explain why different judges approach their role in diverse ways. Some judges, for example, embrace the security provided by the letter of the law. Judicial philosophies such as strict textualism emphasise the extent to which the judge is restrained by the legal materials. These views of judging downplay the freedom and responsibility of the judge by emphasising how the law dictates her choices.

Chief Justice John Roberts of the United States Supreme Court famously claimed at his confirmation hearings in 2005 that the role of the judge is to ‘call balls and strikes’ like a baseball umpire, applying the legal rules rather than shaping them.<sup>11</sup> This view brought a sharp response from the subsequent Supreme Court nominee, Justice Elena Kagan, at her own confirmation hearings a few years later. The problem with the metaphor, according to Justice Kagan, is that it makes law seem like a ‘robotic enterprise’, where no judgment or discretion is required.<sup>12</sup>

Roberts’s statement can be viewed as an example of the strict textualist strategy mentioned above. This approach to judging has its virtues in terms of reminding judges of the limitations of their role. However, it also brings to mind Sartre’s criticisms of conceptions of morality that equate virtuous action with sticking to a rigid moral code. The problem with this type of outlook is that it encourages people to avoid taking personal responsibility for their actions. People rely on the code to tell them what to do, instead of confronting each situation on its merits.

In *Existentialism and Humanism*, Sartre illustrates this problem through the story of a student who approached him for advice.<sup>13</sup> The student was trying to choose between joining the Free French Forces in England and staying in France to care for his aging mother. He found each option morally attractive, but for different reasons. Leaving for England would enable him to defend his country and his ideals, but looking after his mother was important to him on a more personal level.

After considering the student’s situation, Sartre responded with what must have seemed very unhelpful advice: ‘You are free, so choose.’<sup>14</sup> His point was

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<sup>9</sup> Sartre, *Being and Nothingness*, above n 3, 48.

<sup>10</sup> Ibid.

<sup>11</sup> Mark Tushnet, *In the Balance: Law and Politics on the Roberts Court* (W W Norton, 2013) ix.

<sup>12</sup> Ibid x.

<sup>13</sup> Sartre, *Existentialism and Humanism*, above n 8, 35–8.

<sup>14</sup> Ibid 38 (translation modified).

not that there can never be a right answer to a moral question, but rather that the student could not resolve his dilemma by reference to some abstract formula. Rather, he faced a competition between two dearly held ideals. The only honest response was to make a choice and accept responsibility for the outcome.

Sartre observes that when people ask for advice on a difficult moral decision, they have often already made up their minds on what to do. He suspects the student had already made his choice, but wanted to lessen his personal guilt by getting his professor's endorsement. If the student had wanted to stay with his mother, Sartre remarks, he would have sought advice from a conservative priest.<sup>15</sup>

A similar point applies to the strict textualist judge. The fact that this judge strictly applies the letter of the law does not mean she is not responsible for the outcome. For one thing, the laws are often vague: they need someone to interpret and apply them. The strict textualist exercises as much creativity as any other judge in such cases, but may be tempted to disguise it by citing the legal text.

More fundamentally, however, even clear legal rules do not ultimately absolve the judge from making a decision in the case at hand. Strict textualism and similar philosophies make it look like the judge has no control over the final outcome. Sartre, however, would see this refusal to accept responsibility for one's decisions as a form of bad faith. Legal rules may set out guidelines for our actions, but they do not and cannot determine what choices we ultimately make. Only we, as free and responsible agents, can do that. This point applies to judges as much as anyone else.

### Postponing responsibility

The strict textualist at least has the merit of being clear and decisive. There is another kind of judge prone to evoke despair in law students and practitioners alike. This is the judge who cloaks every decision in reams of prolix reasoning, so that anyone who reads to the end is left unclear exactly what has been decided. This judge can also be seen as responding to the pressures of her role. She dresses up her decision in elaborate legal language, thereby deflecting attention and criticism.

The prolix judge effectively defers the moment of decision by stringing out her reasoning for as long as possible. Sartre discusses a similar example in *Being and Nothingness*.<sup>16</sup> The example (which is undoubtedly a bit sexist) concerns a woman on a first date. The woman's date flirts with her all evening, making comments like, 'I find you so attractive!' However, the woman chooses to take these remarks as compliments to her personality, rather than her physical attributes.

Finally, the woman's date places his hand on hers. Surely, this is the moment of decision, where she must decide whether to return his advances. However, the woman does not want to respond, as she would have to either hurt her date's feelings or admit to returning his attraction. So she simply

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<sup>15</sup> Ibid 37–8.

<sup>16</sup> Sartre, *Being and Nothingness*, above n 3, 55–6.

leaves her hand there — like a ‘thing’, as Sartre puts it<sup>17</sup> — while pretending not to notice. Like the prolix judge, the woman has a decision to make, but she is not ready to confront it. Her reaction is therefore to ignore the situation and hope it will resolve itself.

The prolix judge, then, uses effusive reasoning as a way of diffusing the demands of her role. She hopes that if she considers the legal issues from every possible angle, then the outcome will seem inevitable. However, as with the strict textualist, this strategy only serves to obscure the judge’s underlying agency.

### Playing the judicial role

Other judges adopt a similar strategy to the prolix judge by relying on pomp and ceremony. They obscure the moment of decision, not through legal reasoning, but through the legal process. This kind of judge is a traditionalist about procedure and decorum. Every aspect of the courtroom process is observed to the letter, so that the decision seems to flow naturally from what went before.

Sartre would say the traditionalist is playing the role of a judge, rather than simply being one. In *Being and Nothingness*, he gives a famous example of a waiter in a café who tries a little too hard to inhabit his role. As Sartre puts it, ‘his movement is quick and forward, a little too precise, a little too rapid’.<sup>18</sup> He approaches the patrons a little too quickly, bends forward too eagerly and shows a little too much interest in their orders. Finally, he returns to the kitchen, walking with an artificially stiff and formal gait, ‘while carrying his tray with the recklessness of a tightrope walker’.<sup>19</sup>

The waiter in Sartre’s example aspires to carry out his role in such a way that every part of it seems necessary and inevitable. He wishes to *be* a waiter, in the same way as a table is a table or a wine glass is a wine glass. Similarly, the judicial traditionalist wishes to fully inhabit the judicial role. However, the upshot of this is to make it appear that it is the judicial role, not the judge, who renders the decisions. This represents another way of lightening the judge’s existential burden.

It is, of course, not just judges who adopt these kinds of strategies. Lawyers, managers and police officers all often cite the demands of their role as a way of justifying actions that may not sit well with their personal values. A significant portion of the literature on lawyers’ ethics, for example, focuses on why lawyers can legitimately defend their clients’ interests when they personally find them repugnant.

The standard answer to this question emphasises the special nature of the lawyer’s role.<sup>20</sup> The legal process plays an important role in society and lawyers, in turn, play an essential role within that system. This account, however, risks obscuring the personal accountability lawyers hold for their

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<sup>17</sup> Ibid 56.

<sup>18</sup> Ibid 59.

<sup>19</sup> Ibid.

<sup>20</sup> See, eg, Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role* (Ashgate, 2009); W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2010).

professional actions: as if they become different people when they step into the courtroom.

### The champion of sincerity

The traditionalist seeks relief from the burden of judging by embracing the formality of her role. Other judges seem to actively critique or distance themselves from their position. These are the judges who can be found at dinner parties telling cynical stories illustrating the flaws of the legal process. If an earnest friend asks them, ‘What about justice?’, then they may be met with a wry shrug — or perhaps a jaded remark about how the law is not the place to find it.

This judge, like the others discussed above, is trying to cope with the contingency of her role. A similar attitude can be seen in another of Sartre’s examples from *Being and Nothingness*.<sup>21</sup> Suppose a person who has behaved poorly says, ‘Sorry, I can’t help it; I’m just a bad person.’ Is this confession to be applauded? Sartre does not think so. This self-styled ‘champion of sincerity’ appears to be owning up to his shortcomings, but really he is seeking to avoid responsibility.

His comment that he is ‘a bad person’ treats his character as fixed, as though he were born bad and there is nothing he can do about it. At the same time, he seeks to gain merit in the eyes of others by being sincere about his flaws. He effectively turns his depravity into a badge of honour.

Sartre would, I think, take a similar view of the judicial cynic. This judge takes the attitude that she is part of a corrupt system and there is nothing she can do about it. This jaded attitude may almost come to be worn as a badge of honour. Sartre, however, would remind the cynic that, in the end, she is the one who makes the decisions that she later criticises. It may be difficult to change a flawed legal system, but the judge is in a better position than most to do something about it.

### Confronting contingency

Sartre’s analysis of bad faith reveals a number of existential traps relevant to the judicial role. What, then, is the ideal style of judging, which avoids the various pitfalls that Sartre describes? I want to conclude this article by sketching out a model of the authentic judge, who accepts responsibility for her decisions, without disclaiming her authority or denying the contingent nature of her position.

The authentic judge does not simply cite the letter of the law to avoid debate about her role. She does not treat her decision as flowing naturally or inevitably from either her legal reasoning or the courtroom process. Nor does she treat her decisions as determined by factors beyond the courtroom, such as the vicissitudes of a flawed system over which she has no control.

Rather, the authentic judge is confident enough to recognise, first, that the law is often open to interpretation and, second, that the administration of justice is ultimately in her hands. Ultimately, it is her responsibility to decide

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<sup>21</sup> Sartre, *Being and Nothingness*, above n 3, 65–6.

the case — and she does not shrink from this burden. She does so in full awareness of her fallibility as a decision-maker.<sup>22</sup> Her decisions may not always turn out to be correct, but they represent her considered attempt to do justice in the case at hand.

Maybe we can learn something about the authentic judge from an ostensibly unlikely source: what Sartre says about romantic love. Sartre — admittedly not known as a great romantic — notes that lovers often portray their love as necessary, rather than contingent: they talk about being soulmates, ‘meant for each other,’ ‘brought together by fate’ and so on.<sup>23</sup> The reality, as Sartre sees it, is more ambiguous and, in the end, more meaningful: each of us has many potential partners, and if we stay with one person, it is because we *choose* them over the rest.

Sartre describes love that embraces, rather than seeking to overcome, its contingent nature as ‘love in the world’.<sup>24</sup> Confronting the idea of love in the world requires us to take responsibility for our relationships, rather than presenting them as preordained or fated. Similarly, the authentic judge practices ‘judging in the world’, neither shirking accountability, nor pretending to be something she is not.

The authentic judge is decisive, but she does not pretend that her decision is preordained and no other perspectives are possible. Rather, she calls it as she sees it, doing her best to make the correct decision and taking the time to explain her reasons clearly and transparently to those affected. She knows she will not always get it right, and others may take a different view. Nonetheless, she accepts responsibility for the outcome, saying: *this is what I have chosen*.

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22 Compare Jonathan Crowe, ‘Human, All Too Human: Human Fallibility and the Separation of Powers’ in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 37.

23 Sartre, *Being and Nothingness*, above n 3, 370.

24 *Ibid.*