BOOK REVIEW

THE MORALITY OF CONSENT. By Alexander M. Bickel. Yale University Press, New Haven, Conn., and London, England, 1975. Pp. 156. $10.00.

Alex Bickel was one of the most prolific and provocative writers on legal-political affairs of our time. Tragically, he died in 1974 at the age of 49, and though he had published several books and countless articles in journals ranging from the *Harvard Law Review* to the *New Republic* and *Commentary*,[1] it was clear that he was only in midstream when he was stricken. In fact, he was working on a volume of the important Oliver Wendell Holmes Devise History of the Supreme Court of the United States, to be entitled *The Judiciary and Responsible Government 1910-1921*. His death deprived us of one of the most articulate spokesmen for a profoundly conservative view of the role of the Supreme Court in a democratic society.[2]

The small volume here under review contains five essays based on Bickel's 1973 DeVane lectures at Yale; these essays present in essence his public philosophy and its application to several issues of recent national concern. He discusses constitutionalism and the political process, citizenship, free speech and free press, civil disobedience, and the moral authority of the intellectual. The discussions are challenging, urbane, and constitute a strong philosophical support for the Supreme Court's current retreat from the civil libertarianism of the Warren years. Bickel's arguments are powerful and his manner beguiling. However, his thesis may be internally inconsistent and fundamentally at odds with the American constitutional and political scheme.

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1. A bibliography appears in the book under review at page 143. Another is found in Black, *Alexander Mordecai Bickel*, 84 YALE L.J. 199, 201 (1974).

2. Bickel's philosophy closely resembled that of his mentor, Justice Felix Frankfurter, for whom he served as law clerk in 1952. In fact, Bickel's career tracked the Justice's in remarkable fashion. Both were born in Europe and came to New York City as youngsters. Both went to the City College of New York and the Harvard Law School. After government service, each went into law teaching—Bickel at Yale rather than Harvard—and each wrote widely on public affairs.

In this brief review, I shall attempt to do no more than point out the instances in which I believe Bickel erred.

I

Bickel placed himself in the classic conservative tradition, with Edmund Burke as his model.[3] In his view, political society must be pragmatic, relativistic, and skeptical. It must eschew moral imperatives because they are barriers to the accommodations, the adjustments, the compromises that are the essential nature of the political process. Such a society is not without basic values, but these values are not derived from some higher authority; rather, they evolve from the sentiments and judgments of the people. In a scale of importance the highest rank is assigned to the value of process, that set of institutional arrangements that makes it possible for the society to work out its accommodations and to hammer out its basic substantive values.[4] Accommodations are reached by agreement, not coercion, and therefore stable government in a Burkean society rests on consent.[5] The majority of the moment must act in such a way that the minority, knowing that its own interests have been taken fully into account, is willing to accept the majority's decision. On the other hand, the majority must stay its hand if a minority expresses intense and unyielding opposition. If there is any moral imperative inherent in this theory of politics it is, as Bickel puts it, the "morality of consent." This is the core of Bickel's public philosophy—that the highest moral imperative is a consent achieved by application of the computing principle, a constant working out of adjustments and compromises. Under this view society relies heavily on accommodations achieved in the past, and progress occurs only as rapidly or as slowly as the felt needs of the entire polity will permit.[6]

In contrast to this Burkean philosophy, Bickel holds up the "contractarian" model of a society made up of individuals possessing inalienable rights derived from nature and a "natural, if imagined, contract."[7] This theory derives from Locke and comes down to us through Rousseau and the Jefferson who drafted the Declaration of Independence. Such a society is described as "moral, principled, legalistic, ultimately authoritarian. It is weak on pragmatism, strong on theory."[8]

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3. A. BICKEL, THE MORALITY OF CONSENT 3 (1975).
4. *Id.* at 5.
5. *Id.* at 15.
6. "Political reason is a computing principle: adding, subtracting, multiplying, and dividing morally and not metaphysically, or mathematically, true moral denominations. The visions of good and evil, the denominations to be computed—these a society draws from its past and without them it dies." *Id.* at 24.
7. *Id.* at 4.
8. *Id.* at 5.

While Bickel regards the Burkean model as truly liberal in the classic sense, he concedes that the liberal label had been captured in this century by those he calls the "contractarians."[9] There is much simplistic labelling in these days of "conservatives" and "liberals," "strict constructionists" and "judicial activists." With due regard for the complexities of such things, Bickel describes a constant competition between those such as Felix Frankfurter, who gave predominant emphasis to Burkean restraint—the conservatives if you will—and those—preeminently Hugo Black and William O. Douglas—who felt more strongly the Court's obligation to protect individual rights.

Starting from Edmund Burke's perspective, it is easy to understand Bickel's view of the proper role of the Supreme Court in American society. For him, the Court is a democratically irresponsible institution whose members are not accountable to the people for their judgments.[10] It therefore must avoid using the Constitution as a vehicle for imposing upon society the judiciary's moral imperatives, whether economic, social, or political. The role of the Court is neatly summed up by Bickel:

> The Court's first obligation is to move cautiously, straining for decisions in small compass, more hesitant to deny principles held by some segments of the society than ready to affirm comprehensive ones for all, mindful of the dominant role the political institutions are allowed, and always anxious first to invent compromises and accommodations before declaring firm and unambiguous principles.[11]

Bickel views the Warren Court as having egregiously violated this principle of restraint. He lays the fault upon justices such as Hugo Black, whom he regards as "the representative figure of the liberal in American constitutionalism."[12] According to Bickel, justices in this tradition—Taney of *Dred Scott*,[13] for example—view the Constitution as embodying a series of absolute principles, the enforcement of which is the job of the Supreme Court where a legislature has violated them. Bickel saw the Warren Court, "Hugo Black writ large" he called it, as the latest bit of contractarian mischief.

II

In his discussion of constitutionalism and the political process,

9. *Id.* at 5-6.
10. This view is elaborated at length in Bickel's *The Least Dangerous Branch*, published in 1962. See particularly his discussion at pages 16-23 thereof.
11. A. BICKEL, *supra* note 3, at 26.
12. *Id.* at 10.
13. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

Bickel criticizes the Court's abortion decisions as a return to the discredited doctrine of *Lochner*,[14] and a clear example of the Court's imposing its own notions of wise social policy on a very sensitive issue which deeply divides the nation.[15] I suggest, however, that Bickel's own discussion is a strained and ultimately unconvincing attempt to use a very controversial case as support for his general thesis.

In Bickel's view, Justice Blackmun's opinion in *Roe v. Wade*[16] substitutes the Court's moral imperative, the right of privacy, for the decision of the legislature to protect human life from the moment of conception. In elevating the right to abortion to the level of a constitutional principle, he argues, the Court makes it difficult—perhaps impossible—for the people to reverse the decision even should they regard it as fundamentally wrong. Worse, the Court was guilty of acting like a legislature—achieving a result by fiat without advancing any supporting reasons.[17]

Doubtless there is much in the abortion opinion to criticize. Nonetheless, Bickel's analysis of it seems unsatisfactory. In the first place it must be recognized that the statutes themselves imposed a moral imperative, the sanctity of life from the moment of conception, on a very large number of people who seriously opposed that precept on philosophical and religious grounds. Moreover, a very large number of women expressed their opposition by resorting to illegal abortion when, for good reasons or ill, they felt the necessity strongly enough. To treat the case as simply an instance of the Court's imposing its own moral imperative is therefore an imperfect analysis of the controversy. It is also important to remember that these were criminal statutes and that the Court has a particularly important duty to protect the individual from the state when governmental intrusion of this coercive nature is challenged.

Indeed, it seems valid to argue that the Court in the abortion cases did apply the computing principle so central to Burkean theory, achieving an accommodation that prevented draconian application of the imperative embodied in the anti-abortion criminal laws. The Court identified and weighed the interests of the pregnant woman, and determined the point at which the state's interest in maternal health and the potential life of the fetus outweighs the woman's right of privacy.[18] Viewed in this way, the decision appears more supportable than Bickel would allow, even under his own principles.

14. Lochner v. New York, 198 U.S. 45 (1905).
15. A. BICKEL, *supra* note 3, at 27.
16. 410 U.S. 113 (1973). *See also* Doe v. Bolton, 410 U.S. 179 (1973).
17. A. BICKEL, *supra* note 3, at 28.
18. 410 U.S. at 164-65.

A comparison of this interpretation with that advanced by Bickel also suggests that his analysis attaches far too little importance to the Court's obligation to protect individual rights. In this respect it seems that Bickel's approach is incompatible with the American political system as it has evolved over two centuries. The Bill of Rights has come to be the primary basis on which to rest protection of the individual from excessive intrusion by government. In the nature of things, that protection is effective only if the Court enforces it. As society has become more complex and pluralistic, therefore, the Court has responded by extending the protection of the Bill of Rights to new and different forms of governmental intrusion. Bickel's theory would radically stifle this part of the Court's function.

Of course, the Court must take care that its decisions extending individual protections are firmly grounded in basic values found in the Constitution. On this score, the abortion decisions and their principal antecedent, *Griswold v. Connecticut*,[19] may well be vulnerable. In *Griswold* Justice Douglas found support for a right of marital privacy in the penumbras of several provisions of the Bill of Rights.[20] Justice Goldberg suggested the even more unspecific ninth amendment as a source of constitutional privacy.[21] For Justice Black this was too much. He was willing, even eager Bickel would say, to enforce fundamental rights, but only if he could find them in the language of the Constitution. He could not find anywhere in the Constitution the right of privacy claimed in *Griswold*, and that meant to him that the Court had transgressed the limits of its authority and was engaged in judicial legislation.[22]

Later, when the abortion decisions were handed down, it became clear that *Griswold's* right of privacy had become something quite different. Now the thrust of the reasoning was not the need to protect against unseemly searches of the marital bedroom but, as Justice Rehnquist pointed out with considerable logic, the felt need to protect women's right to make basic decisions about childbearing. If those decisions are aspects of privacy, they are privacy in a very special sense, and it could well be argued that the Court stretched beyond the breaking point any nexus between the right to have an abortion and the constitutional right of privacy. Hugo Black would have agreed with

19. 381 U.S. 479 (1965).
20. *Id.* at 483-85.
21. *Id.* at 486-93 (concurring opinion). Justice Harlan concurred in the judgment but argued that the proper constitutional inquiry was whether the Connecticut statute infringed the due process clause of the fourteenth amendment because it violated basic values "implicit in the concept of ordered liberty." *Id.* at 500 (concurring opinion).
22. *Id.* at 507-27 (dissenting opinion).

Bickel that the Court was wrong, but he would have done so on a ground that would have left the Court free to perform its vital role of protecting those individual rights that can fairly be drawn from the text of the Constitution.

This is not the place to appraise the abortion decisions in detail. The Court dealt with statutes that made virtually all abortions criminal, without regard to the circumstances or the wishes of the pregnant woman, or to the consequences of forcing her to carry the fetus to live birth. Socially, the existence of those laws imposed severe restrictions on medical practice and drove thousands of desperate women into the hands of illegal abortionists, at a huge cost in suffering and death. It is hard to accept the proposition that it is no part of the Court's business to determine whether such an intrusion violates the Constitution. The abortion decisions may be wrong; but if they are, it is for the reason Hugo Black would have urged, not, as Bickel argued, because the Court presumed to impose its own concept of fundamental values.

III

When Bickel carries his theory into issues of free speech and free press,[23] the focus of his discussion necessarily shifts somewhat. The first amendment, while awkward in language, clearly does embody explicit fundamental principles. Bickel's discussion of the importance of free speech is interesting and insightful. Consistent with his view that the Burkean society necessarily tolerates some degree of civil disobedience,[24] Bickel reasons that the first amendment creates a kind of domesticated civil disobedience. This is particularly true to the extent that it protects speech that counsels peaceable violation of law as a way of expressing conscientious objection to injustice. He thus underscores the importance of communication to our politics.

Despite his recognition of the critical role of speech and press in the politics of accommodation, Bickel's adherence to the computing principle has a subtle but powerful influence on his treatment of first amendment issues. He makes the familiar argument that there are no absolutes, not even in the first amendment, Justice Black's repeated assertions to the contrary notwithstanding. Whatever the rhetoric of some of the Justices, Bickel contends that the Court has solved speech and press issues just as it has others—by weighing and balancing the interests involved. The clear-and-present-danger test was an accommodation of the interest of individuals in freedom of speech and the interest of

23. A. BICKEL, *supra* note 3, at 57.
24. *See id.* at 91-123; text accompanying notes 36-43 *infra*.

the state in protecting itself from serious harm.[25] In the Pentagon Papers case[26] the Court rejected an absolute bar to injunctions against newspaper publication in favor of a less rigid rebuttable presumption against such prior restraint. These cases and others establish for Bickel that "freedom of speech, with us is a compromise, an accommodation. There is nothing else it could be."[27]

It would be hard to deny Bickel's assertion that issues of freedom of speech and of the press are resolved through a delicate process of adjustment, involving a careful identification of interests and an assigning of relative weights—in short, through application of the computing principle. But one reads Bickel with the uneasy feeling that he was inclined to give the game away before it started. There are no absolutes in the first amendment, he says, and therefore it is a waste of breath for anyone to assert any such claims. But to be faithful to the first amendment, the computing principle cannot be applied mechanically without loading the scales in favor of the interests of speech and press. The point of Mr. Justice Black's so-called absolutism was simply that unless predominant weight was assigned a priori to the interests of speech and press, they would inevitably be overwhelmed in the balancing process by the social interest in tranquility and by the exaggerated claims of public safety.[28] Bickel's formulation assigns no such weight to first amendment interests, with demonstrable effect. For example, he is able to speak approvingly of *Beauharnais v. Illinois*[29] in which the Court upheld application of the Illinois group libel law to a speaker who delivered a racist, antisemitic speech under circumstances posing no threat to the public peace.[30] He also could suggest that even so restrained a judge as John Harlan was probably wrong to reverse in *Cohen v. California*[31] the conviction of one who publicly criticized the draft law using a word that most would regard as offensive.[32]

At the center of Bickel's views on the first amendment lies his basic disagreement with the theory that all ideas, no matter how noxious, must have their chance in the marketplace. It is not true, he says that bad ideas will automatically be rejected; therefore, ideas that are sufficiently repellent and dangerous should be suppressed. He offers a belief

25. A. BICKEL, *supra* note 3, at 64.
26. New York Times Co. v. United States, 403 U.S. 713 (1971). Mr. Bickel argued this case in the Supreme Court for the *New York Times*.
27. A. BICKEL, *supra* note 3, at 78.
28. *See* Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (Black, J., dissenting).
29. 343 U.S. 250 (1952).
30. A. BICKEL, *supra* note 3, at 70-71.
31. 403 U.S. 15 (1971).
32. A. BICKEL, *supra* note 3, at 72-73.

in genocide as one example of such a repugnant idea.[33] Obscenity is another; because public availability of obscene materials has an effect on the values and moral tone of a community, he is willing to have the states, though not the federal government, suppress it.[34] Bickel thus rejects the marketplace theory shared by the "First Amendment voluptuaries," as he calls them.[35] In his scheme speech and press issues, like all others, are subject to the computing principle. This is clearly the line that separates Bickel from the civil libertarians who believe that only the marketplace can be trusted to pass on the worth of ideas and that there are other ways than censorship to protect society from palpable harm.

IV

Probably the most provocative argument in the book occurs in the discussion of civil disobedience, revolution and the legal order.[36] It is complex, sobering, and yet ultimately unsatisfying. Summarized, it reads like this: the contractarian model of society cannot tolerate civil disobedience because any refusal to obey the moral imperatives embodied in its law is an attack on the legal order itself and that is revolution, not civil disobedience.[37] The Burkean philosophy, on the other hand, eschews moral imperatives and pragmatically enforces social arrangements only to the extent that substantially all the people consent. This system must allow some room for conscientious objectors to express their deeply felt opposition, even to the length of civil disobedience. But the civil disobedience tolerable under the computing principle has limits. It must not only be open and nonviolent, but must take place within, not against, the system. In other words, it must be engaged in for the purpose of correcting error, not to destroy the system itself.[38]

The civil disobedience we have experienced in the last 20 years, starting with the civil rights movement and running through the anti-war movement of the sixties and seventies ultimately became so extreme, in Bickel's view, as to exceed these limits and to become in fact revolutionary. Its practitioners opposed the system not as "flawed and perfectible but as evil and abominable."[39] Their assaults were made in the name of moral imperatives such as freedom from racial discrimination and the immorality of the Vietnam war. Threatened

33. *Id.* at 72.
34. *Id.* at 73. This view finds expression in decisions of the Court in recent obscenity cases. *See, e.g.*, Paris Adult Theatre v. Slayton, 413 U.S. 49, 59 (1973).
35. A. BICKEL, *supra* note 3, at 69.
36. *Id.* at 91-123.
37. *Id.* at 99-100.
38. *Id.* at 119-20.
39. *Id.* at 118.

by the specter of revolution and anarchy, the system responded with its own moral imperatives of law and order, patriotism, and internal security. The result? Ultimately, the Watergate episode, according to Bickel the unwitting product of the forces of liberalism which spawned or at least tolerated the revolutionary left.[40] To add one further count to the indictment, Bickel tied his argument directly to the Warren Court as the intellectual fountainhead of contractarian or liberal ideology. Even more ingeniously, he attributes, at least in major part, the rise of the imperial presidency—thought by many to be responsible for Vietnam and Watergate—to the "populist fixation" of the Supreme Court embodied in the one-man, one-vote doctrine of the apportionment cases.[41] The Court is thus made responsible for helping to cause the centralization of and the imbalance in the governmental machinery which ultimately caused the nation to slide toward tyranny.

It is very hard to get a grip on Bickel's charge that the Supreme Court is somehow responsible for the excesses of those who took to the streets in social protest. No doubt it is true that *Brown v. Board of Education*[42] raised expectations among blacks that, when unfulfilled, led to greater and greater militancy and finally violence. Does that mean that *Brown* should have upheld racial segregation? Does it mean that when the violence came it was the fault of the Court rather than the political institutions that failed to move against racism? With respect to the war in Vietnam, the cause of so much protest and violence, where was the connection with something the Court had said or done? The Court, as Bickel points out,[43] assiduously avoided hearing any cases in which the legality of the war was at issue.

The charge then is a general one. The Court too vigorously enforced the Bill of Rights and this helped to create a climate of intense dissatisfaction with injustice. When that dissatisfaction was not met by corrective action, people took to the streets. There is implicit in this argument a kind of revisionist suggestion that everything would have been all right if the Court had not acted like the ubiquitous outside agitator—that the social problems of racism, poverty, and war were not so serious as to cause all that unrest had not Earl Warren and Hugo Black stirred the people up with moralistic rhetoric. This seems a patently dangerous idea. The problems were and are serious and we should not forget this fact in our rush to rightly condemn those who turned to violence.

40. *Id.* at 122.
41. *Id.* at 121.
42. 347 U.S. 483 (1954).
43. A. BICKEL, *supra* note 3, at 95.

But what of a different proposition, one that Bickel ignores? That proposition is that the computing principle must work—perceptibly, albeit slowly—if violence is to be avoided. It need not accede to all the demands of the minority but it must satisfy that minority that it has been fairly dealt with. If it does not, it seems that responsibility for the violence that may ultimately result should reasonably be assigned at least in part to the unresponsiveness of the majority. To appreciate this point, one need only to recall Burke's futile attempts to persuade the King and Parliament to reach an accommodation with the American colonies, and the belief by most Americans that the war was the fault of George III.

V

The Morality of Consent is a summary of the theoretical basis for Bickel's view of the limited role the Supreme Court should play in the nation's political life. As suggested, that view seems unsatisfactory on several counts. In the first place, it ignores the balance of power created by the Constitution, the balance between the legislative, judicial, and executive branches. The hallowed system of checks and balances simply will not work if one element of the system essentially removes itself from the decisional process. There are recurring episodes in recent history when the Court effectively has done that. During the cold war of the forties and fifties, for example, the Court avoided confrontations with Congress over the conduct of congressional investigations. After the national fever had cooled, the Warren Court moved somewhat indirectly to impose procedural limitations on such investigations and other attempts to control allegedly subversive activities.[44] Unfortunately, these modifications come too late to undo the damage caused by the excesses of the McCarthy era.

While judicial self-restraint is necessary, carried to Bickel's lengths it seems fundamentally out of harmony with the history of American government. Bickel saw and approved the pulling and tugging that characterize the legislative and administrative process; such activity is, after all, the computing principle in action. But he did not recognize that under the Constitution the Court is necessarily a participant in that governmental process. Such was the meaning of Marshall's opinion establishing judicial review in *Marbury v. Madison*.[45] Of course, there is a risk that the Court, being the final authority on constitutional questions, will abuse its power, as it no doubt did in repeatedly striking

44. *See, e.g.*, Watkins v. United States, 354 U.S. 178 (1957).
45. 5 U.S. (1 Cranch) 137 (1803).

down New Deal legislation. But the political system provides a corrective for such abuses. Franklin Roosevelt responded to the Court's New Deal excesses with the court-packing plan, and although that particular counterattack was unsuccessful, there is no doubt that the mounting pressures had their effect on the Court. Close votes began to favor upholding rather than striking down legislation and several senior justices retired shortly thereafter, making way for an almost complete reconstruction of the Court in the space of about 4 years. It seems clear that we are well into another period of adjustment on the Court at the present time. This is not a tidy or doctrinally pure system of correcting judicial excesses, but its adversarial character may be the genius of the American system.

There is a second way in which Bickel's restrictive view of the Supreme Court's role seems wrong. His is, as Edmond Cahn put it, the imperial as distinguished from the consumer perspective of the Court and the Constitution.[46] For Bickel the highest sense of the Constitution is what he calls "the manifest constitution"; "the constitution of structure and process"; "the constitution of the mechanics of institutional arrangements and of the political process, power allocation and the division of powers, and the historically defined hard core of procedural provisions, found chiefly in the Bill of Rights."[47] The Constitution as thus defined is to Bickel the principal, and very nearly the only, province of the Supreme Court. "[P]rocess and form, which is the embodiment of process, are the essence of the theory and practice of constitutionalism."[48] This strict adherence to process makes possible the achievement of the imperfect justice which is all we are entitled to expect from human institutions.

Bickel's faith in process, as elegant as it is, even as important as it undoubtedly is, suggests that so long as the institutional machinery is kept in good working order everything will come out all right in the end. Almost totally omitted from this reckoning of constitutional functioning, however, is the Bill of Rights, which creates substantive rights in individuals, rights which the Court must observe and protect quite as assiduously as it preserves the institutional arrangements created elsewhere in the Constitution. Indeed, those rights are at the heart of the most hotly contested Supreme Court decisions. In this omission is the fundamental error of Bickel's constitutional theory and his criticism of judicial contractarianism. His criticism of the Warren Court is

46. Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 9 (1963).
47. A. BICKEL, *supra* note 3, at 29.
48. *Id.* at 30.

that it was result oriented. He saw it as too ready to expand, even create, constitutional rights and thereby to deprive the political process of the opportunity to work out those accommodations that are the stuff of government. But the cost of adhering to Burkean restraint is paid by those individuals whose rights are infringed while the law waits for the political forces of the nation to work their will. Bickel is willing to let those individuals pay that price because he thinks it necessary to the higher good. Those whose rights are being violated, however, are likely to be less sanguine about awaiting deliverance from a ponderous—and occasionally nonmoving—political system.

From another perspective, Bickel's view seems not only unmindful of the significance of the Bill of Rights, but politically unrealistic as well. His theoretical structure assumes that given enough time and patience the elected political forces will eventually achieve substantial justice—imperfect perhaps, but generally tolerable. The problem is that too often the assumption is simply not true. The political process alone was not and is not now adequate to the task of eradicating racial segregation. *Brown v. Board of Education* was a necessity as a goad even if it was not a complete solution. And who would really argue that the scandalously unjust criminal justice system would have seen many recent improvements without the pressure exerted by Supreme Court decisions such as *Gideon v. Wainwright*,[49] *Miranda v. Arizona*,[50] and *Mapp v. Ohio*?[51] The political calculus does not assign much weight to the claims of powerless minorities. Classic proof of this rests in the record of state legislatures in malapportioning themselves. The Court thus plays a vital role in responding to the claims of minorities, subject always to its obligation to ground its decisions in some fairly explicit constitutional provision. Far from denying the essentials of constitutionalism, therefore, those who insist that the Court is a part of the political process in the highest sense would seem more faithful to the American constitutional scheme than those who regard the Warren years as aberrational.[52]

There is much wisdom and stimulation in *The Morality of Consent*. Alex Bickel had an elegant and sparkling style that makes reading him

49. 372 U.S. 335 (1963).
50. 384 U.S. 436 (1966).
51. 367 U.S. 643 (1961).
52. Bickel's view, not surprisingly in view of its footing in the politics of Edmund Burke, seems most compatible with the English system of parliamentary rather than judicial dominance. Interestingly, there is evidence that as English society becomes less homogenous and more pluralistic, there is some sentiment for more vigorous judicial protection of civil liberties, perhaps based on a written bill of rights. See Lewis, *Civil Liberties in England*, Arizona Daily Star, Aug. 12, 1976, § A, at 13, col. 1.

a joy even for those who, while sharing many of his views, disagree profoundly with his notion of the proper role of the Supreme Court. We are much the poorer that, except for one as yet unpublished volume, this was his last book.

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