RECENT BOOKS

Book Reviews

Concerning Dissent and Civil Disobedience. By *Abe Fortas*. New York: The New American Library. 1968. Pp. 128. Paper, 50 cents.

Review II

Not often, but upon occasion, a reviewer must ask: Is this work worthy of serious discussion? This is such an occasion, for Justice Abe Fortas has written a booklet that fails utterly, in the course of its sixty-four pages of rhetoric, to advance any reasoned conclusions other than a few marginally relevant legal points concerning the judicially declared limits on the right to dissent. The book is worthy of consideration, if at all, only as a starting place for remarks upon liberal political thought at its nadir. What, then, can Justice Fortas mean by what he has said concerning the legal and—more important—the "moral" limits on the right to protest? And, what does his meaning tell us of the liberal tradition with which his law practice and, as Associate Justice of the United States Supreme Court, his stewardship of the law has been identified?

Justice Fortas' argument is simple in design and execution. He begins by discussing the judge-made limits upon the right to dissent, arguing for broad freedom to speak, write, distribute information, assemble, and petition in traditional ways. He applauds the extension of first amendment protection to "symbolic speech" (pp. 12-19) such as picketing (p. 18), and reaffirms his view—set forth in *Brown v. Louisiana*[1]—that vigils and sit-ins on public premises during the hours when such facilities are normally open to the public may be protected forms of expression (pp. 14-15). He defines the limits that the present membership of Supreme Court has placed upon the right to demonstrate in public places, and reaffirms the freedom of effective speech and the prohibitions against vagueness and overbreadth in public regulation of speech. This discussion may arouse ire or concern over some points, and one may disagree with Justice Fortas here and there as to the merits of this or that view about the limits of permissible protest, but all of that is of minor concern. Rather, it is the Justice's views on "civil disobedience" which have gained the most notice for this essay; these same views raise the most serious problems for the reader.

The Justice's central proposition seems to be that among the several varieties of disobedience with which we are familiar, direct challenge to the validity of a law through nonviolent and open refusal to obey it by one willing to go to jail if the courts rule against him is the only moral, and also generally a practical, means of civil disobedience. One should attend carefully each of the following five major elements of this summary statement, for each is crucial to understanding Fortas' view.

First, the view that nonviolent disobedience is a *practical* means of challenging illegal and outdated practices by government rests upon two subordinate propositions: (1) that the courts, and especially the Supreme Court, are ready to vindicate claims for justice rooted in constitutional principle, and, concomitantly, that they are "not instruments of the executive or legislative branches of the government" but are "totally independent—subordinate only to the Constitution" (p. 24); (2) that assertions of rights not grounded in the Constitution, statutes, or judicial decisions are not the proper subject of citizen protest.

Second, Justice Fortas argues that disobedience of laws claimed to be invalid is generally the only sort of disobedience which can be tolerated—or regarded as "moral." Moreover, one may disobey only those laws that he believes to be "profoundly immoral or unconstitutional" (p. 63). "Tolerable" and "moral" are interchangeable concepts in the Fortas cosmology. That is, he is seldom willing to concede the right of the disobedient to violate a facially valid law in

1. 383 U.S. 131 (1966).

order to force abandonment of an illegal practice even though all else has failed. This intransigence is seen with special force when the Justice strains to accommodate the result in *Brown v. Louisiana* to his framework by arguing that the library's use of a segregation ordinance was the *direct* object of the protest and underlay the state trespass prosecution. If disobedience of facially valid laws—trespass laws, for example—is ever to be justified, Fortas says, it must be upon the ground that the disobedient do not have access to "facilities and protection for the powerful expression of individual and mass dissent," including the ballot box (p. 63).

Third, conducting one's disobedience nonviolently (without harm to property or persons) is, Fortas states, necessary to preserve some basic values of civilized society and to prevent polarization of views—a result which would ultimately be "counterproductive" (p. 62).

Fourth, Justice Fortas never justifies his insistence upon *open* disobedience, although he did make an argument on this score in *Dennis v. United States.*[2]

Fifth, the a priori willingness of the protestor to abide by a court's judgment of the legality of his acts is, for Fortas, part of the burden of disobedience—a kind of moral datum which serves to divide "dissent" from "rebellion."

It should be obvious from this brief synopsis that Justice Fortas has muddled up a number of factual, legal, and "moral" propositions in a most astounding way. Whence is derived the moral imperative which Fortas so readily perceives as interdicting not only serious violence and grave disorder, but even the misdemeanant's trespass and the petty offender's gambol upon the Pentagon lawn? Although he never says so, we may surmise that his judgment rests in part upon the normative proposition that the authority of the state is not thus to be challenged because the existence of our present society in more or less its present form constitutes a moral imperative finding roots in our revolutionary beginnings and tracing endless paths in the life of our law. To the assertedly "moral" content of this, a *contrat social* drawn by Fortas as able advocate for those who, under it, hold the power to decide the content of all our lives, I shall return presently. Another premise for Justice Fortas' moral imperative is essentially factual: he asserts that the courts are in fact independent and are in truth ready to decide disputes about whether duties have been imposed upon citizens conformably with fundamental law. Similarly, he contends that the decisions which govern the rhythm, tempo, and content of our lives are in every significant way amenable to social control through the ballot box.

But these factual assertions are demonstrably false. As to the

2. 384 U.S. 855 (1966).

independence of the courts, one must wonder about the Justice's claims. For example, while it is certainly true that some Justices of the United States Supreme Court have been courageously and perseveringly unmindful of pressures from the executive and legislative branches, candor compels the observation that other Justices have not.[3] And as for the Court's readiness to decide issues between citizen and government, the "political question" doctrine has of late interceded to prevent judicial action just when the executive's sovereign prerogative has been most stridently asserted, and when an alienated and dispossessed electorate's choice was ousted by the legislative branch. I refer in the former case to the Supreme Court's refusal to hear challenges to the constitutionality of conscripting men to fight and die in an assertedly illegal war,[4] and in the latter to the refusal of a distinguished United States Court of Appeals to hear the contention that a Harlem Representative was vindictively and discriminatorily denied his seat in the ninetieth Congress.[5]

And what of the ballot box? Eighteen-year olds and Puerto Ricans cannot vote, yet they are drafted to fight. Students in our universities are subject to regimes which they do not, in most cases, control to any significant degree. Workers in our factories have no say in the basic economic decisions which govern the content of their lives. It has been proved time and again that the important decisions concerning the safety of coal mines, automobiles, pipelines, foods, and drugs have been made without control by, and against the interest of, those most affected. For Americans who are uneducated, poor, and discriminated against, the content of life is determined almost entirely from without rather than within—by an endless queue of police, landlords, welfare workers, employers, and other minor satraps. This necessarily suggestive recital reflects, I think, the root problem with easygoing assertions about the ballot box: the centers of real power are, for one reason or another and to a varying though always significant extent, unamenable to influence by any in-

3. For example, President Buchanan's cheery inaugural message that the question of slavery was about to be "finally settled" by a decision of the Supreme Court resulted from a letter to him from Justice Grier on February 23, 1857—less than two weeks before Buchanan's inauguration—outlining the Court's view of the *Dred Scott* case. 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 294-300 (rev. ed. 1926).

4. *E.g.*, Mora v. McNamara, 389 U.S. 934 (1967) (Justices Douglas and Stewart, dissenting); Mitchell v. United States, 386 U.S. 972 (1967) (Justice Douglas dissenting from denial of certiorari). I have attempted elsewhere to expose the essential fallacy in such a view of the "political question" doctrine. *Sel. Serv. L. Rep. Practice Manual* ¶¶ 2329-30 (1968).

5. Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968), *cert. granted*, 37 U.S.L.W. 3184 (Nov. 19, 1968). The Supreme Court's agreement to hear the case somewhat diminishes the force of the argument made in the text, although the Court may in the end affirm the court of appeals. Moreover, the ninetieth Congress, in which Powell was denied a seat, is now over.

strument of formal social control exercised in the interest of the affected public. The centers of economic power are largely located in private hands and the decisions concerning the use of that power are made in the interest of private greed. While it may be conceded that at one point in our history greed was the motive force which led, as a by-product, to social and technological progress, it is fairly clear today that greed often hinders technological innovations that would further the interest of consumers and workers, and is in fact the source of a great deal of irresponsible destruction of our physical and social environment. Even in politics' wonted sphere, the devastation of free dissent upon Chicago's streets at the Democratic national convention in August 1968, the beer-hall atmosphere inside the convention hall itself, and the frustration of the popular will that manifested itself in the convention's preordained outcome should lead us not to accept uncritically assertions that our democracy is pretty healthy after all. Finally, the insulation of the decision makers can be demonstrated on a rather more immediate level. Did you ever try to have a police officer prosecuted for killing a citizen without excuse or justification? Did you every try to sue a policeman under such circumstances? Arduous tasks indeed, and the successful exception is proof of the sad-to-relate rule: you really cannot fight city hall.

It has, in short, become painfully clear that those whom C. Wright Mills, in *The Power Elite,* termed "commanders of power unequaled in human history" have tended not to give much of a damn about what the rest of us think, and have customarily permitted their agents, protectors, and surrogates the same freedom. Thus, with the growing realization of the limits upon the efficiency of protest within established channels has come an appreciation that influence upon the decisions affecting one's life must be sought in other ways.

That is, given the inadequacy of traditional political institutions and techniques for the task of affecting decisions that shape men's lives, confronting those institutions with coercive power has become at times the only effective means of compelling them to act responsibly. This coercive power is often extralegal, and its use often results in arrests and convictions. To put this matter in perspective, it should be stated that protest of this kind has been of decisive importance in social struggle upon many occasions in our history; the abolitionists, suffragettes, and early labor strikers come most immediately to mind. I should also say here that I do not urge that judicial, executive, and legislative institutions are "illegitimate" in any sense which makes it reasonable to reject or disregard them outright as vehicles for social change. It should become clear in the course of the argument that follows on the issue of legitimacy that I

regard the use of extra-institutional responses to institutional coercion as essentially a question of practical wisdom—one that can be resolved in particular cases upon the basis of an agreed set of guiding principles. Here, of course, I disagree with Justice Fortas. The argument that he seems to make when he elevates the concept of "rule of law" to a moral principle is that it is wrong—morally wrong —for anyone to engage in deliberate violation of law in order to coerce power-holding institutions and individuals to act in accord with one's demands. And he would, apparently, condemn equally the use of such power by black mothers sitting in at a Harlem welfare office and the Governor of Alabama standing in a schoolhouse door.

The "moral" element of the Justice's argument tells us we cannot concede that facially valid laws may be violated, for by doing so we compromise a basic tenet of social living. Put another way, the Fortas argument contends that one can violate laws that one says are invalid in order to test them, provided one is willing in the end to abide by the judgment of society's judicial institutions as to whether the law is consistent or inconsistent with the society's own fundamental law. This sort of controversy takes place entirely within the system of fundamental rules which our present society has erected; no participant in the process of disobeying and judging can make a decision based upon any concept external to that presently existing, court-interpreted system of rules. The implicit theoretical underpinning of Fortas' point was expressed by Thomas Hobbes:

> [I]f any one, or more of them, pretend a breach of the covenant made by the sovereign at his institution; and others, or one other of the subjects, or himself alone, pretend there was no such breach, there is in this case, no judge to decide the controversy; it returns therefore to the sword again; and every man recovereth the right of protecting himself by his own strength, contrary to the design they had in the institution.[6]

If Fortas' argument leads to the conclusion that we cannot permit the injection of values external to the system and institutions which we now possess into social discussion as justification for apparent law violation, then his "moral" imperative comes rather near to Sir Patrick Devlin's construction of a moral design which binds us all together and to which we owe obeisance as a condition of organized society.[7] And what a rigid view that is. As H. L. A. Hart pointed out in analyzing Devlin's work,[8] the argument that our present structure of dominant social values is a kind of house in which we all live fails utterly to allow for the wide divergence of view on basic social questions and for the kind of thoroughgoing change in values which

6. LEVIATHAN 114 (Oakeshott ed. 1957).
7. P. DEVLIN, THE ENFORCEMENT OF MORALS 1-25 (1965).
8. H. HART, LAW, LIBERTY AND MORALITY 48-52 (1963).

has happened in the past and may be needed again. Put more simply, the metaphor of the house is too rigid; in calling it to mind Devlin fails to distinguish between the man who would pull up a nail in a floor board and the one who wants to pull down the roof, and to discriminate among different reasons for wanting to pull up a nail or pull down the roof.

So with Fortas' view. We should, I suggest, recognize a crucial difference between black welfare mothers in Harlem and the governor in the schoolhouse door. The difference is that the former group is right and the governor is wrong. If we truly believe this to be so and can make a rational argument which supports that view—based in this case upon the progressive character of the welfare mothers' claim for justice and the antebellum, reactionary character of the governor's claim for justice—then we have liberated ourselves from a straitjacket in which Justice Fortas seeks to bind us. When this first question is answered, we can ask what kinds of responses social institutions should make to these two different acts of disobedience. Joseph Sax had made the observation, wise and disarmingly simple, that in fact prosecutorial and judicial institutions have almost untrammeled discretion in deciding whom to prosecute and whom to convict, and that they exercise that discretion daily in the service of resolving value conflicts far less important to our national well-being than the one posed here.[9] But leaving aside the possibly random character of law enforcement decisions, we can make rational arguments that the mothers' conduct should not be punished and the governor's should. The criteria we might use for such a decision would include, perhaps, the following: (1) Was the goal one which basically advances human rights, as defined broadly in the practice and theory of contemporary nation-states? (2) Was the protest tactic chosen reasonable in light of the other available means of reaching the same result? Application of these criteria might lead only to nonprosecution—a "legal," not a "moral" judgment, to a judge's willingness to abort the prosecution on relatively technical grounds, or to acquittal by a jury convinced of the rightness of the defendant's cause.

It may be objected that this analysis insists that police, prosecutors, and judges continue to obey society's rules while permitting demonstrators to ignore these rules upon occasion. It is difficult to conceive of this objection being employed in any service save that of symmetry. We insist that police, prosecutors, and judges obey rules because we have seen—in the South, in the ghetto, and of late in the streets of Chicago—that to depart from this insistence visits the most terrible consequences upon us. But our history also tells us that the extralegal tactics of demonstrators have at times served as

9. Sax, *Civil Disobedience*, SATURDAY REV., Sept. 28, 1968, at 22.

constructive assists toward building a new consensus on important social issues.

For proper consideration of the "moral" consequences of approving law violation that is based upon appeals to values outside the present system of rules and institutions, we must evaluate the moral basis of a central authority such as that supported by Fortas. This question resolves itself into two issues: one of "legitimacy" and one of the content of the rules enforced by the lawgiver, whether his power be considered "legitimate" or not.

I have discussed the factual assertions—an independent judiciary, and the efficacy of voting as a means of affecting important social decisions—which underlie Fortas' claim that the sovereign power is legitimately exercised in the United States today. I suggest also that a man who has spent his life at the bar in service to some of the country's greatest concentrations of economic power, and who has also attended the nation's highest councils when crucial decisions concerning such matters as war and peace and pacification of the cities have been made, cannot be trusted lightly in making unsupported assertions about the effectiveness of the social checks upon the exercise of power by those whom he advises and represents. His strongly worded theory of legitimacy—styled the "rule of law"—is, moreover, particularly suspect when one sees what interests it serves. I have earlier recalled how like Hobbes it all sounds; perhaps it serves the same role as Hobbes' "belief in a power above the conflicting interests of social classes,"[10] a belief which has been described as "inevitable in an age when social conflicts were of all-absorbing interest and were for the first time rationally viewed, and when economic forces were pressing for the establishment of a strong central authority."[11] Certainly, today's deep-rooted social conflicts present striking parallels to those which caused unrest and upheaval when Hobbes wrote. The difference—and it is an important one—is that Fortas speaks today on behalf of old institutions which are struggling to efface their discredit for having involved the United States in a series of counterrevolutionary interventions the world over, and for having permitted the environment to be taken up into private hands and made largely unfit for socially useful purposes. Hobbes, by contrast, spoke for those who sought a strong state to destroy old social institutions which were hampering progress. Moreover, the concept of legitimacy by which claims to sovereignty are customarily tested today is not Hobbes', but rather is derived from notions of popular control over important decisions. Even Fortas concedes this point at places, departing from the concept only when he feels that it is necessary to insist upon the supremacy

10. E. ROLL, A HISTORY OF ECONOMIC THOUGHT 90 (3d ed. 1954).
11. *Id.*

of sovereign power, in this time and land, no matter what. By this means, "legitimacy" becomes not a goal to be reached by a would-be sovereign upon persuasive evidence that government is amenable to control by society, but an *ipse dixit* to justify repression. But even if legitimacy may properly be premised upon some need to control society, that need must, I suggest, at some point be weighed against the need to accommodate new opinions and ways of solving long-pending problems. To be unwilling, as Justice Fortas is, to consider such a weighing, even in marginal and tentative ways when confrontation between decision makers and subjects clearly advances a significant and progressive social interest, is to contribute to the very rigidity which will either bring down the entire system or lead us into total repression. These choices are thrust upon the protestor because that is the price which Fortas and those who agree with him exact. It is not that those engaged in confrontations wish particularly to escalate them, but that rigorous insistence upon obeisance at all times to the formal commands of the system for which the Justice speaks makes the stakes this high.

To approach the same point from a different direction, even if one does not regard the question of legitimacy as answerable solely by reference to the control citizens have over the exercise of the sovereign power, there appears to be no cogent reason for ascribing a moral value to every sovereign command so as automatically to make condemnable, on moral grounds, every departure from every such command. The point here is no more than Cromwell's in a similar situation: to the sovereign (and his advocate) one should be able to say simply, "think that ye may be mistaken."

But, as noted above, the assertedly moral content of decisions "duly" arrived at has a second aspect. The content of the decisions of which the potential disobedient complains cannot in many cases be separated from the competence or legitimacy of the process by which these decisions are reached. No superstructure of decision-making can far outrun the interests, demands, and goal judgments which give rise to it and form its base. This is not to say that one may expect all decisions by all power wielders to reflect "the ruler's will" with precise correspondence; such a view is mechanical indeed and may be given the lie by events shaped by intelligent use of orthodox means of influencing power wielders. But in the larger view and the long run, the correspondence between the goals at the base and the decisions by elements of the superstructure will appear. To the extent, therefore, that present American institutions rest upon premises antithetical to the demands of the poor and the black—to take an insistent example—one cannot expect these groups to agree that there is a moral element in obeisance to established

authority. The demand to go slow and obey all the laws is viewed as a sham, and assertions that marginal but measurable progress is being made are seen as the prelude to a buy-out. Such disaffected groups address the lawgiver in the words of Kahlil Gibran:

> But what of those . . . to whom life is a rock, and the law a chisel with which they would carve it in their own likeness?
> What of the cripple who hates dancers?
> What of the ox who loves his yoke and deems the elk and deer of the forest stray and vagrant things?
> What of the old serpent who cannot shed his skin, and calls all others naked and shameless?
> And of him who comes early to the wedding-feast, and when overfed and tired goes his way saying that all feasts are violation and all feasters lawbreakers?[12]

For the disaffected, the urgent task is to change the basis of our institutions enough to reflect new values that will ensure an adequate rate of progress toward satisfying their demands. By not perceiving —or not admitting—the objective limits on our present institutions' decision-making power, Fortas comes near to making resistance to change a moral datum.

Justice Fortas' booklet does not, one may gather from the discussion above, contribute much to the discussion of disobedience—civil or otherwise. It is remarkable only for its uncritical acceptance of factual and moral propositions which are subject to serious and strident challenge. In a time of strife and pressure for change, those who take to the printed word have a rather more strenuous task than they would have in a time of relative calm. Shelley expressed well the writer's role in an introduction to *Prometheus Unbound*:

> We owe the great writers of the golden age of our literature to that fervid awakening of the public mind which shook to dust the oldest and most oppressive form of the Christian religion. We owe Milton to the progress and development of the same spirit; the sacred Milton was, let it ever be remembered, a republican, and a bold enquirer into morals and religion. The great writers of our own age are, we have reason to suppose, the companions and forerunners of some unimagined change in our social condition or the opinions which cement it. The cloud of mind is discharging its collective lightning, and the equilibrium between institutions and opinions is now restoring, or about to be restored.[13]

So long as institutions and opinions are not in equilibrium, the important task seems to be not affirmation of the sanctity and in-

12. THE PROPHET 44-45 (1923).
13. Quoted in G. THOMSON, AESCHYLUS AND ATHENS 322 (3d ed. 1966).

violability of institutional power, but careful consideration of the reasons for the disparity. Justice Fortas' effort does not make a noticeable contribution to that task.

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