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EXCEPTIONS TO THE RULE OF LAW

Michael Browning

Abe Fortas describes himself as a man of the law, saying that "each of us owes a duty of obedience to law," claiming that it is "a moral as well as a legal imperative."[1] Fortas has great reverence for the United States' system of government and law and its constitutional framework, but admits that if he had been a "Negro" in the Deep South, he would have disobeyed the state segregation laws.[2] In his essay on Civil Disobedience, he groups "trespassing on private and official premises" with "assaults upon recruiters for munitions firms and for the armed services; breaking windows in the Pentagon and in private stores and homes; and occupying academic offices."[3] He dismisses excuses for this kind of conduct as "nonsense." Fortas reconciles his belief in the rule of law and his belief in disobeying unjust laws by insisting that only unjust and unconstitutional laws be disobeyed. Furthermore, he believes that law breakers must accept their punishment, in what he describes as the "great tradition" of civil disobedience.[4] But when Dr. Martin Luther King ignored an injunction by the state and led a protest in Birmingham that the Supreme Court later upheld as illegal, Fortas was one of the dissenters, saying that he had "no moral criticism to make of Dr. King's action in this incident, even though it turned out to be legally unjustified."[5] How can one insist that a law breaker is morally justified and at the same time believe that there is a moral imperative that the law breaker owes a duty of obedience to the law?

Howard Zinn asserts that even Fortas himself cannot reconcile the two. Zinn claims that Fortas' overall argument is inconsistent because "more and more, Fortas' definition of what is moral coincides almost exactly with what is constitutional, and what is constitutional is what the Supreme Court decides".[6] Thus Zinn argues that Fortas' belief reduces morality to law, which leaves little room for the sometimes extraordinary exceptions in which civil disobedience is needed to change unjust laws and situations. Arguing in line with Henry David Thoreau and other famed civil dissenters, Zinn says that "if political science does not include a moral philosophy and the idea of civil disobedience, it becomes merely a register of whatever regulations the politicians of the time have ordered."[7] Referring back to Fortas' example of Dr. Martin Luther King, Zinn asks "why was it right for Dr. King to accept an unjust verdict corroborating an unjust injunction, resulting in an unjust jail sentence?"[8] Zinn regards these acts as oppressive, and insists that a law breaker should not be willing to admit wrongness and fault just because the Supreme Court or any other court decided the other way. He writes that "when unjust decisions are accepted, injustice is sanctioned and perpetuated."[9]

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[1] Fortas, Abe. 1968. *Concerning Dissent and Civil Disobedience.* New York: Signet, 18.
[2] Ibid.
[3] Ibid., 34.
[4] Ibid.
[5] Ibid., 35.
[6] Zinn, Howard. 2002. *Disobedience and Democracy: Nine Fallacies on Law and Order.* Cambridge: South End Press, 32.
[7] Ibid., 34.
[8] Ibid., 29.
[9] Ibid.

Fortas vehemently disagrees, contending that an individual cannot "pick and choose" which laws to obey and accept the consequences. His regard for the rule of law falls under the fair play theory, in which he says that "a citizen cannot demand of his government or of other people obedience to the law, and at the same time claim a right in himself to break it by lawless conduct, free of punishment or penalty."[10] Fortas also goes on to condemn the use of violence in protest, claiming that there are plenty of forums for civil discourse that allow dissenters to persuade their government peacefully. Fortas notes that it is a city's duty to provide these forums, and that "an enormous degree of self-control and discipline are required on both sides".[11] If this fair play theory works as Fortas asserts it does, then civil dissenters have a duty to follow laws or accept punishment for the laws they break in protest.

Unfortunately for Fortas, fair play is a theory and not a real world application. The example that he cites with Dr. King in Birmingham reveals his inconsistencies. The government does not always provide adequate forums for discourse, and specifically denied the venue for Dr. King. Zinn notes that "if we check Fortas' language carefully, we note that the government being bound by law is an expectation, while the citizen's being bound by law is a fact."[12] Fortas admits that "it is a deplorable truth that because [police] are officers of the state they frequently escape the penalty for their lawlessness."[13] Zinn further insists that Fortas' reliance on the Supreme Court has not only failed in specific circumstances (like that of Dr. King and Dred Scott), but is also inherently unfair because "the Court is still a branch of government…and in the never-ending contest between authority and liberty that goes on in every society, the agencies of government, at their best, are still on the side of authority."[14] Additionally, the government does pick and choose which laws it enforces, so the idea that a citizen cannot pick and choose as a form of discourse contradicts the notion of fair play.

A system of government that allows for effective political discourse in all situations would have no need for civil disobedience, but it is fallacious to assume that such a government exists in the United States. History has proven that civil disobedience is sometimes a last resort option to effect change in policies. Should the protest of unjust laws, whether in speech or in action, be punished because of the theoretical implications of fair play? Violence and other harmful actions certainly deserve stricter scrutiny than other forms of protest, but the idea that Dr. King and Dred Scott were wrong because the Supreme Court declared it so is inconceivable, yet that is what Fortas' logic requires. The laws in question for Dred Scott and Dr. Martin Luther King violated the notion of what it means to be human, and there are no theories of law that can justify the punishment afflicted on them. Moreover, there is no validity in arguing that the justice system has eventually worked out these past atrocities. The individuals affected by unjust laws will not be comforted by the assurance that it will all work out in the end. Thus, the only theories of law that can account for true and effective civil discourse are those that provide exceptions for one of the most valuable forms of speech in our nation's history, civil disobedience.

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[10] Fortas 1968, 33.
[11] Ibid., 36.
[12] Zinn 2002, 23.
[13] Fortas 1968, 33.
[14] Zinn 2002, 8.